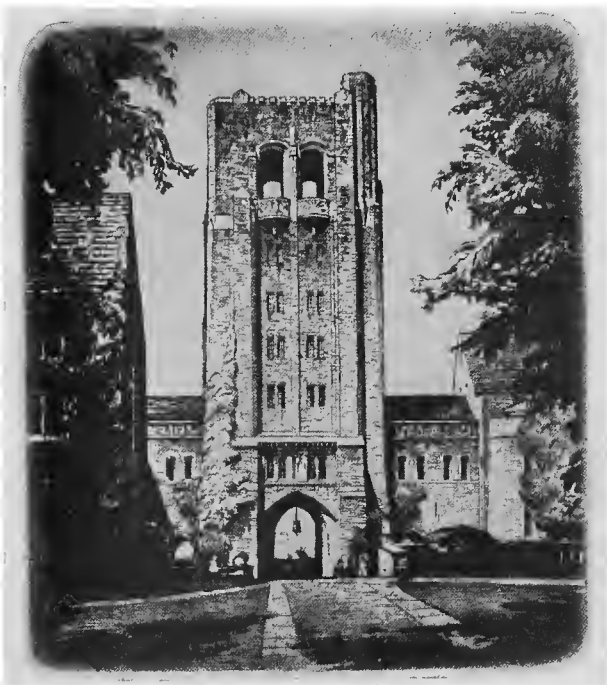

PRACTICE AND PLEADING

IN ACTIONS

IN THE

COURTS OF RECORD IN THE STATE OF NEW YORK,

UNDER

THE CODE OF PROCEDURE,

AND OTHER STATUTES, WHERE APPLICABLE.

WITH

AN APPENDIX OF FORMS.

BY

HENRY WHITTAKER,
COUNSELLOR AT LAW.

THIRD EDITION, IN TWO VOLUMES.

VOL. I.

NEW YORK:
PRINTED FOR THE AUTHOR.
SOLD BY J. S. VOORHIES, NEW YORK, AND ALL THE PRINCIPAL LAW BOOKSELLERS THROUGHOUT THE STATE.
1863.

C. A. ALVORD, STEREOTYPER AND PRINTER.

PREFACE.

THE indulgent appreciation of his former efforts, by the profession and by the public, has induced the author to issue a third and revised edition of his work on Practice and Pleading under the Code; the last, published in 1854, having, for many years, been exhausted.

On resuming his task, now more than four years since, he contemplated, at first, a mere incorporation into the work, as it then stood, of the accumulation of subsequent matter. A careful reconsideration of the subject soon induced him, however, to abandon this intention, to enlarge, to some extent, the general scope of his undertaking, and to subject the whole to a strict and careful revision. The result is, that the work has been substantially rewritten, but little of the original text being retained. Every conclusion formerly drawn has been carefully reconsidered, in connection with recent authorities, and neither time nor trouble has been spared in the endeavor to make the work, as now reissued, accurate and reliable.

The subjects of Jurisdiction and of Pleading are, on the present occasion, treated in greater detail. In the two last editions, those branches of procedure, which, unprovided for by the Code, are still governed by the Revised Statutes and by the former practice, were merely noticed, and the treatises on that practice referred to, instead of their being considered in detail. The author's reasons for that course are fully explained in his introduction to the second edition. It was then a matter of reasonable expectation, that the Legislature, in lieu of shrinking from the complete fulfilment of the task prescribed to it by the Constitution of 1846, would still take measures to embrace within the simplification and abridgment directed by that instrument, the whole and not a part only of the former system of practice and pro-

cedure. The lapse of more than sixteen years, and the failure of more than one attempt made for that purpose by the commissioners to whom the task was delegated, have nullified that expectation, and rendered it, in the author's opinion, inexpedient for him to pursue the same course on the present occasion. He has, therefore, incorporated in the body of the present edition, that residuum of the former practice, statutory or otherwise, which still retains a vitality, concurrent with the procedure directly prescribed by the Code, and by the rules of which, a portion of the measures necessary or available in the progress of a contested suit, is still governed.

The author has, on the other hand, omitted from the present edition his former brief notice of independent special proceedings, and also the concluding chapter as to the retrospective effect of the Code. The latter subject has become practically obsolete; the former is, in fact, foreign to the plan of the work.

That plan remains substantially the same as before. The progress of a suit in the higher courts of the state is traced, from its origin and preliminaries, down to its final determination; practical directions being given for its conduct and management, in each step which may be necessary or advisable during that progress.

The provisions of the Code, of the Revised or General Statutes, and of the Rules of the Courts, which bear upon each particular division of the general subject, are, on the present occasion, cited in the body of the work, instead of being subjoined at its close. An appendix of forms is added, as heretofore, and each volume closes with an index of the subjects considered in it. The first embraces all matters connected, directly or indirectly, with the commencement and progress of a suit, down to the preparation and service of the complaint, inclusive; the second, all subsequent stages of procedure, in that suit, down to its close.

The chapters on Pleading, contained in books VI., VII., and VIII., have been greatly enlarged, adding much to the bulk and complexity of the work. The author trusts they may be found useful to the profession, as containing a synopsis of the recent cases bearing on that important subject.

The citation of authorities is strictly confined to decisions of the Courts of this State, and almost exclusively to such as have been ren-

dered since the adoption of the Code. On subjects provided for by that measure, the bearing of antecedent authorities is rather illustrative than direct; on others, recent decisions will be a sufficient guide as to the present practice, and will, as a general rule, indicate those of earlier date, a reference to which may be expedient. For similar reasons, the author has refrained from any citation of foreign authorities, as tending to increase unnecessarily the complexity of a subject, in itself sufficiently complicated. The list given at the commencement will show that, as it is, more than seven thousand cases are cited in the body of the work.

The author has, throughout, scrupulously abstained from announcing any positive proposition unsupported by positive authority, and, where the decisions on any given point have been conflicting, he has stated those on both sides as impartially as lay within his power, drawing his own conclusions, where necessary.

HENRY WHITTAKER.

11 Wall Street, NEW YORK, *January*, 1863.

CITATIONS.

THE following remarks as to the mode of citation adopted may be convenient.

In quoting the Revised Statutes, the references made are to the marginal, and not to the actual paging. Subsequent acts of the Legislature are cited, by reference to the year of their passage and to the page of the laws of that year.

When a judicial dictum is quoted, or attention is wished to be drawn to any particular passage in the report of a case, that case is cited thus: "2 Seld., 348 (352)." The first figures denote the page at which the report commences; the second, that in which the expression occurs, to which attention is especially directed.

The citations are brought down to the middle of September, 1862, at which time the work first went to press, and include all reported decisions prior to that period.

The authorities cited in the work are as follows:—

COURT OF APPEALS.

Comstock's Reports, 4 vols.
Selden's Reports, 6 vols.
Selden's Notes, cited as such, by date of decision.
Kernan's Reports, 4 vols.
E. P. Smith's Reports, 9 vols.; cited as N. Y., 15 to 23 inclusive.

SUPREME COURT.

Barbour's Reports, 35 vols.

SUPERIOR COURT, N. Y.

Sandford's Reports, 5 vols.
Duer's Reports, 6 vols.
Bosworth's Reports, 6 vols.

N. Y. COMMON PLEAS.

E. D. Smith's Reports, 4 vols.
Hilton's Reports, 2 vols.

GENERAL PRACTICE REPORTS.

Howard's Practice Reports, 22 vols. and part of 23d—cited as How.
Abbott's Practice Reports, 12 vols. and part of 13th.
Code Reporter, 3 vols.; cited as C. R.
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Legal Observer, 12 vols.; cited as L. O.

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INTRODUCTORY CHAPTER

OF THE NEW SYSTEM OF PRACTICE GENERALLY CONSIDERED.

§ 1. *Preliminary Observations.*

Foreshadowed in the Constitution of 1846, and embodied in the original measure of 1848, the system of practice carried out in the Code of Procedure has now, in its more dominant features, assumed the character of an established institution; and, though subjected to continual modification in details, may fairly be considered as, in its essential principles, beyond the reach of retroaction.

The revolution effected by it in the ancient system of procedure, great as that revolution is, and, for extent and boldness, unparalleled in the annals of legal reform, remains in some respects inchoate, or, rather, incomplete in its operation. This peculiar characteristic adds no little to the difficulties incurred by the student, and still more by the illustrator of its provisions. The legislature, whilst taking partial action upon the report of the commissioners, have shrunk apparently from dealing with the subject of civil procedure as a connected whole, as evidently contemplated by the constitution of 1846; and, whilst remodelling portions of an ancient and theretofore consistent system, upon novel principles, have, at the same time, permitted other portions of that same system to stand disconnectedly in their original condition. The effect has been to impart to the result of their labors, when viewed in connection with other branches of the same general subject, a sort of fragmentary character; and to impose upon the student, or the practitioner undertaking the transaction of general business or the conduct of a contested suit, the practical necessity of making himself master, in a great measure, of the details of two distinct systems; the one seemingly, but not actually abolished; the other generally, but not universally dominant.

Another fertile source of embarrassment to the student of the new system is the continued current of amendment and alteration which, in every session since 1848, has, with two exceptions only, been ceaselessly

running. This characteristic has the inevitable effect of introducing into the already formidable array of reported decisions an element of continual fluctuation, involving the constant necessity of looking more closely into cases of apparent general applicability, to see whether that applicability may not in fact be a delusion, as regards the now existent or some intermediate modification of the original measure.

In view of these great, and, in many respects, increasing difficulties in his task, the author, on resuming it, feels bound to solicit a continuance of the indulgence extended to his previous efforts; persuaded by past experience that he will again obtain it, and this not merely from his general readers, but more especially from those who, being more familiar with the details of the new practice, are therefore the more competent to appreciate to the full the difficulties above alluded to.

§ 2. *Origin and Modifications of the Code.*

Before entering on the more practical branches of the subject proposed to be considered in this treatise, a glance at the history of the Code of Procedure itself, and a brief general consideration of the origin and applicability of the new system, will not be out of place.

The germ of the measure itself will be found in the Constitution of 1846, by which (art. VI., § 24) it is thus provided.

§ 24. The legislature at its first session after the adoption of this constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, forms and proceedings of the courts of record in this state, and to report thereon to the legislature, subject to their adoption and modification from time to time.

By the previous provisions of that instrument, the whole of the judiciary system of the state was remodelled. The long established wall of partition between common law and equity jurisdiction was broken down, the ancient chancery system abolished, and the former Supreme Court transformed into a tribunal of general and mixed jurisdiction. See Constitution, art. VI., §§ 3–5; art. XIV., §§ 5–8. The Code is in fact, in its chief characteristic, subordinate and ancillary to this great and radical change.

Pending the labors of the commissioners, the necessary reorganization of the judiciary system was carried into effect by the judiciary act, chapter 280 of Laws of 1847, passed May 12th, 1847, and amended by chapter 470 of the Laws of the same year, passed December 14th, 1847. The provisions of these two measures are for the most part abrogated by the enactments of the Code, but in some respects they are still existent, and where necessary, will be noticed hereafter.

The commissioners appointed as above, made their report to the legislature, and two measures grounded on that report, were also introduced in the session of 1848; both were passed on the 12th of April in that year, and form chapters 379 and 380 of its Session Laws. Chapter 379 is the Code of Procedure properly so called, chapter 380 being a merely supplementary measure, having reference to then existent proceedings. The Code itself was, as provided by section 391, to take effect as from the 1st of July then next (except only as to sections 23 to 27 inclusive, the operation of which was immediate). The supplementary act went into effect at once, except as to section 2, which was made concurrent with the Code.

The original act contained only 391 sections, leaving several important matters of practice partially, and others wholly unprovided for. In the session of 1849 these deficiencies were to a considerable extent supplied, and the whole measure remodelled, not by way of mere amendment, but by the passing of a substantive and substituted statute, containing, instead of 391, 473 sections. This last number has, on all subsequent alterations, been rigidly adhered to. The supplementary law was also re-enacted, with comparatively little alteration. Both were passed on the 11th of April, 1849, and form chapters 438 and 439 of the Laws of that year, pages 613–705.

The supplementary act was to take effect immediately, except as regards section 2, which was made concurrent with the Code. The former, the Code itself, was, by section 473, to take effect on the first day of July, 1848, except that sections 22 to 25 were to take effect immediately, and this section has remained unchanged and unaffected by any of the various amendments down to the present time.

Prima facie, this last provision would seem to impart to those portions of the Code of 1849 not contained in the Code of 1848 a retrospective effect, and, if this construction could be accepted as sound, a similar operation might possibly be claimed for subsequent changes, especially those introduced in the session of 1851, when the whole measure, as then amended, was reprinted in full, by way of appendix to the Session Laws, by express direction of the legislature. On more critical examination, however, it seems impossible to attribute to the section in question any such "*ex post facto*" effect. See *Gamble* vs. *Beattie*, 4 How., 41. In this point of view the general principle laid down in section 12, part I., chapter VII., title IV., of the Revised Statutes, 1 R. S., 157, would attribute the operation of the amendment in question to the 1st of May, 1849, being twenty days from the date of the final passage of the amended statute. Chapter 135 of the laws of 1854, p. 317, would seem, by necessary implication, to favor this construction.

In the same year, 1849, the legislature appointed three commission-

ers further to revise, &c., in the exact phraseology of the Constitution. *Vide* Laws of 1849, ch. 312, p. 453. In 1850, these commissioners reported and submitted the form of a complete Code of Civil Procedure, embracing the whole subject in all its branches, and containing no less than 1885 sections. They were then discharged from their functions, by chapter 281, Laws of 1850, p. 618; but no further action was taken on their report, or otherwise, in the course of that session. In 1853 a bill was introduced, based on the report in question, and containing 1740 sections; but it failed to pass the legislature, and the subject has since remained in abeyance, and the anomaly, before alluded to, unprovided for.

In 1851, the Code, as then existent, was again taken up by the legislature and numerous alterations made. This statute is chapter 479, of the Laws of that year, p. 876, passed 10th July. By section 470, subdivision 2, it was provided that section 13, as amended (fixing the terms of the Court of Appeals), should take effect on the 1st of January next. No provision of this nature was made as to any other portions of the measure, and, therefore, under the general enactment in the Revised Statutes before referred to, the operation of the rest of the amended sections would date from 30th July, 1851. By the same section (470) it was also provided that the secretary of state, in publishing the Session Laws for that year, should publish, by way of appendix, the entire Code, distinguishing the sections then amended by italics, which was done accordingly. See Laws of that year.

The measure was again largely amended by chapter 392 of the Laws of 1852, p. 651, passed April 16th. No time being prescribed, the operation of these amendments would therefore date from the 6th of May, 1852.

In the session of 1853, the general principles of the measure were left untouched. Section 28 was, however, amended so as to comprise the superior local tribunals in New York, by chapter 527 of the Laws of that year, p. 992, passed on the 13th of July, and taking effect immediately.

In 1854, two short measures were passed, making supplementary provisions as to appeals. The former of these measures is chapter 135 of 1854, p. 317, passed on the 3d of April; the latter, chapter 270, of same year, p. 592. Both took effect immediately.

In 1855 two short measures were also passed. The first amends section 153, in relation to reply or demurrer to answer. It forms chapter 44 of 1855, p. 54, passed 3d March. No time being prescribed, its operation would date as of 23d March. The other is a separate and independent measure, extending the provisions of the Code to forfeited recognizances. It forms ch. 202 of the Laws of 1855, p. 305. It was passed on the 9th of April, and, by special provision, took effect immediately.

The short session of 1856 is distinguishable as the only year, except 1850, in which, since its original passage, the Code was left untouched.

By chapter 353 of the Laws of 1857, vol. I., p. 744, passed on the 13th of April, 1857, section 399 is amended, by allowing parties to testify on their own behalf. The operation of this important change was, by special provision, immediate. By chapter 723 of the Laws of the same year, vol. II., p. 551, passed only four days after, *i. e.*, on the 17th of April, numerous amendments of a general nature were made. No specific date being prescribed, the operation of these amendments dates as of the 7th of May, 1857.

By chapter 266 of the same year, p. 552, commissioners were appointed with a view to the general codification of the laws of this state. By chapter 460, of 1862, p. 846, § 38, their term of office is extended to the 1st of April, 1865. They have entered upon their labors, but as yet no report has been submitted by them.

Various general amendments were again made by chapter 306 of the Laws of 1858, p. 491. This measure having been passed without special provision, on the 17th of April, it takes effect as of the 7th of May, 1858.

By chapter 428 of the Laws of 1859, p. 968, the measure is again generally amended. This law took effect as of the 6th of May, 1859, having passed, without special provision, on the 16th of April.

In 1860 two amendments were made. By chapter 131, p. 209, section 53 was enlarged, so as to increase considerably the jurisdiction of justices' courts. No period being specified, this act, passed on the 30th of March, took effect on the 19th of April. By chapter 459, p. 783, several general amendments were made. Under section 14 this measure took effect immediately. By section 13 the commissioners for preparation of a civil code, under the statute of 1857, were directed to prepare and submit to the legislature a book of forms, adapted to the Code of Procedure. This has been done, but no action has as yet been taken upon their labors.

In 1861 section 53 was again amended, by chapter 158 of that year, p. 446, taking effect immediately.

In 1862 sundry amendments were made, by chapter 460 of that year, p. 846. This act, passed on the 23d of April, took effect on the 13th of May, 1862, there being no special provision.

§ 3. *Provisions of the Code, of General Application.*

The following sections of the Code, constituting its commencement and conclusion, and applicable, as will be seen, to the measure itself, or the system thereby established, considered as a whole, irrespective of the details of either, are here inserted, as in their natural division, under the arrangement adopted by the author, as above noticed.

The commencement of the Code, applicable as above, consists of its title, preamble, and of the introductory sections, which run as follows:

CODE OF PROCEDURE.

AN ACT

To amend an act entitled "An Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of this State," passed April 12th, 1848.

Passed April 11th, 1849.

The act entitled "An Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of this State," passed April 12th, 1848, is hereby amended so as to read as follows:

AN ACT

To Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of this State.

Whereas, It is expedient that the present forms of actions and pleadings in cases at common law should be abolished, and that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding, in all cases, should be established;

Therefore, The People of the State of New York, represented in Senate and Assembly, do enact as follows:

GENERAL DEFINITIONS AND DIVISIONS.

§ 1. Remedies in the courts of justice are divided into

1. Actions.
2. Special proceedings.

§ 2. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

In 1848 the phraseology of this section was different. It commenced thus: "An action is a regular judicial proceeding, in which a party prosecutes," &c.

§ 3. Every other remedy is a special proceeding.

§ 4. Actions are of two kinds:

1. Civil;
2. Criminal.

§ 5. A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof.

§ 6. Every other is a civil action.

§ 7. Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

§ 8. This Act is divided into two parts:

The first relates to the courts of justice, and their jurisdiction:

The second relates to civil actions commenced in the courts of this State after the 1st day of July, 1848, except when otherwise provided therein, and is distributed into fifteen titles. The first four relate to actions in all

the courts of this State; and the others to actions in the Supreme Court, in the County Courts, in the Superior Court of the City of New York, in the Court of Common Pleas for the City and County of New York, in the Mayors' Courts of cities, and in the Recorders' Courts of cities; and to appeals to the Court of Appeals, to the Supreme Court, to the County Courts, and to the Superior Court of the City of New York.

In the measures of 1848, this section is slightly different. The Code of that year was distributed into twelve, not fifteen titles, and the Mayors' and Recorders' Courts within its scope, were specified by name, instead of being generally described.

There is a curious mistake in this section, as applicable to the state of things in 1849, and since, which seems to have escaped notice at the time, and has never been amended. By the Code of 1848, the Superior Court was constituted the appellate tribunal for review of the decisions of the Marine and Justices' Courts in New York. By the Code of 1849, this jurisdiction was transferred to the Court of Common Pleas, which has since continued, and now continues the appellate tribunal in these cases; nor has the Superior Court since exercised any revisory jurisdiction whatsoever.

The list of courts affected by the Code is now manifestly incorrect, by the omission of two important tribunals, viz., the City Court of Brooklyn, and the Superior Court of Buffalo, since established.

The second division of the Code of general application, consists of the concluding sections, constituting title XV., of part 2, sections 462 to 473, inclusive.

These provisions run as follows:—

TITLE XV.

General Provisions.

§ 462. (383.) The words "real property," as used in this act, are coextensive with lands, tenements, and hereditaments.

§ 463. (384.) The words "personal property," as used in this act, include money, goods, chattels, things in action, and evidences of debt.

§ 464. (385.) The word "property," as used in this act, includes property, real and personal.

§ 465. (386.) The word "district," as used in this act, signifies judicial district, except when otherwise specified.

§ 466. (387.) The word "clerk," as used in this act, signifies the clerk of the court where the action is pending, and, in the Supreme Court, the clerk of the county mentioned in the title of the complaint, or in another county to which the court may have changed the place of trial, unless otherwise specified.

§ 467. The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this act.

This section was first introduced on the amendment of 1849.

§ 468. (388.) All statutory provisions inconsistent with this act, are repealed; but this repeal shall not revive a statute or law which may have

been repealed or abolished by the provisions hereby repealed. And all rights of action given or secured by existing laws, may be prosecuted in the manner provided by this act. If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice.

§ 469. (389.) The present rules and practice of the courts, in civil actions, inconsistent with this act, are abrogated; but where consistent with this act, they shall continue in force, subject to the power of the respective courts to relax, modify, or alter the same.

These two provisions were in the original Code, and slightly but unimportantly altered, on the amendment of 1849.

§ 470. The judges of the Supreme Court, of the Superior Court of the City of New York, and of the Court of Common Pleas for the City and County of New York, shall meet in general session at the Capitol, in the City of Albany, on the first Wednesday in August, one thousand eight hundred and fifty-two, and every two years thereafter, and, at such sessions, shall revise their general rules, and make such amendments thereto, and such further rules not inconsistent with this Code, as may be necessary to carry it into full effect. The rules so made, shall govern the Supreme Court, the Superior Court of the City of New York, the Court of Common Pleas for the City and County of New York, and the County Courts, so far as the same may be applicable.

Not in the original measure, but first introduced in 1849. The section in that year provided for one revision only, abolishing the existent rules, as from 1st September then next. In 1851 a biennial revision was first provided for. The present phraseology of the section was settled on the amendment of 1852.

Under chapter 484 of 1862, p. 970, section 3, these rules now govern the practice of the Marine and District Courts of the City of New York, so far as they can be made applicable.

§ 471. (390.) Until the legislature shall otherwise provide, the second part of this act shall not affect proceedings upon mandamus or prohibition; nor appeals from surrogates' courts, except that the costs on such appeal shall be regulated and allowed in the manner provided in section three hundred and eighteen of this act; nor any special statutory remedy not heretofore obtained by action; nor any existing statutory provisions relating to actions, not inconsistent with this act, and in substance applicable to the actions hereby provided; nor any proceedings provided for by chapter five of the second part of the Revised Statutes, or by the sixth and eighth titles of chapter five of the third part of those statutes, or by chapter eight of the same part, excluding the second and twelfth titles thereof, or by the first title of chapter nine of the same part; except that when in consequence of any such proceeding a civil action shall be brought, such action shall be conducted in conformity to this act; and except, also, that where any particular provision

of the titles and chapters enumerated in this section shall be plainly inconsistent with this act, such provision shall be deemed repealed.

See the amendments in this provision, from the original clause in 1848, and their effect, as more fully considered in the following section of this work.

§ 472. Nothing in this act contained shall be taken to repeal section twenty-three of article two of title five of chapter six, part third of the Revised Statutes, or to repeal an act to extend the exemption of household furniture and working tools from distress for rent, and sale under execution, passed April 11th, 1842.

This enactment was first introduced on the amendment of 1849.

The section of the Revised Statutes, here reserved, relates to property exempt from execution. It is numbered 23 in the third edition, which is probably here referred to, but in the Revised Statutes, as originally passed, its number is 22.

§ 473. (391.) This act shall take effect on the first day of July, 1848; except that sections twenty-two, twenty-three, twenty-four, and twenty-five, shall take effect immediately.

The applicability of this provision, as regards the different amendments from time to time, has been already considered under section 2 of this work.

§ 4. *Statutory and other Provisions reserved by Section* 471.

In the original Code of 1848, this section was more extensive in its purview. It excluded from the operation of the Code proceedings upon *quo warranto*, information, and *scire facias* to repeal letters patent, as well as those on *mandamus* and prohibition. It likewise included in its reservation of proceedings under the Revised Statutes, proceedings under the 2d, 3d, 4th, and 5th titles of chapter V., part III., of those statutes.

In 1849 these portions of the section were stricken out. The three special remedies on *quo warranto*, information, and *scire facias*, are now provided for in chapter II. of title XIII. of the Code itself, sections 428 to 447 inclusive, first inserted on that occasion. The titles of chapter V. of the Revised Statutes, omitted on that occasion from the list of excepted portions, are as follows: Title II. Proceedings to compel the determination of Claims to Real Property. Title III. Of Partition. Title IV. Writ of Nuisance. Title V. Waste. This omission does not, of course, abolish the remedies themselves; the forms of those remedies were provided for on that amendment, by sections 448 to 454 of the Code itself.

In 1852 the section was again amended, by inserting the "second part of this act" in substitution for "this act," as the clause stood in 1848 and 1849; in other respects the wording of 1849 remained unaltered.

In 1862 its phraseology was settled as it now stands; the provision that the costs of appeals from Surrogates' Courts are to be regulated by the Code, being then first inserted by amendment.

The following is a list of the statutory provisions excepted from the operation of the Code by the section now in question.

Chapter V., part II., of the Revised Statutes, contains the statute law as to insolvency and its incidents, and as to the custody of the estates of persons of unsound mind and drunkards.

The excepted titles of chapter V., part III., of the same statutes are these:

Title VI. Of trespass on lands. N. B. Prescribing the measure of damages in certain cases.

Title VIII. Proceedings to discover the death of *cestuis que vie*, where suspected.

The two titles of chapter VIII. of the Revised Statutes excluded from the operation of the section, and which are accordingly directly affected by the Code, are these:

Title II. Proceedings by or against infants.

Title XII. Of the action of replevin. Proceedings of these natures are therefore essentially governed by the new practice.

The other titles of the same chapter, on which the section directly operates, are these:

Title I. As to suits *in formâ pauperis.*

Title III. Suits by and against executors and administrators, and against heirs, devisees, and legatees.

Title IV. Suits by and against corporations, or public bodies having corporate powers, or the officers representing them (including provisions for their voluntary dissolution).

Title V. Suits against officers on their official bonds.

Title VI. Suits for penalties, and forfeitures, and provisions for the collection and remission of forfeited recognizances, and fines imposed by courts.

N. B. By chapter 202 of the laws of 1855, p. 305, this reservation is partially annulled, and the provisions of the Code extended to forfeited recognizances.

Title VII. Proceedings for the admeasurement of dower.

Title VIII. Proceedings for the collection of demands against ships and vessels.

Title IX. Proceedings for the recovery of rent and of demised premises. (As regards the power of distress, however, these provisions are abolished by chapter 274 of the Laws of 1846.)

Title X. Summary proceedings to recover the possession of land in certain cases.

Title XI. Distress on cattle, &c., damage feasant.

Title XIII. Proceedings to punish contempts.

Title XIV. Arbitrations.

Title XV. Foreclosure of mortgages by advertisement.

Title XVI. Proceedings for the draining of swamps and low lands.

Title XVII. Miscellaneous provisions, relative to suits, and proceedings in general; and,

Title XVIII. Provisions as to the lien of mechanics, &c., on buildings erected by them.

This last title is, however, substantially swept away by subsequent enactments.

The first title of chapter IX. part III. of the Revised Statutes, contains the statute law on the subject of *habeas corpus* and *certiorari*.

N. B. Several of the provisions reserved as above have been since changed by subsequent amendments of the legislature, which changes, where they enter into the scope of this work, will be noticed hereafter.

§ 5. *Rules of the Courts.*

In considering the general applicability of the new system of practice, the rules of the courts, by which the minor details of that practice are governed, demand as of course their share of notice. The authority to make regulations of this kind is in its very nature an essential incident to the constituent powers of any court of general jurisdiction, and has, from time immemorial, been exercised by the higher tribunals referred to in section 470. But, by that section, the exercise of that power is henceforth practically restricted, being now made the subject of special statutory direction.

The general rules directed to be made by the original section of 1849, were published by the judges of the Supreme Court in general session as of the 4th of August, and took effect the 1st of September in that year. The biennial revisions directed by the amendment of 1851, have taken place as follows: The first was had on Wednesday the 5th of August, 1852, being the first occasion on which the judges of the Superior Court and Court of Common Pleas of New York took part in the convocation for that purpose under the section as it now stands. These amendments took effect on the 1st of October, 1852. The next took place as of the 2d of August, 1854; the amendments then made going into effect on the 1st of October following. The year 1856 passed over without any change in the regulations of 1854, it being considered unnecessary by the assembled judiciary. The last actual revision, constituting the present rules of the courts above referred to, was had as of the 4th of August,

and took effect on the 1st day of October, 1858. No action was taken by the judges either in 1860 or 1862.

The same element of uncertainty, before alluded to as involved in the frequent changes made by the legislature, in the text of the Code itself, is in a minor degree attributable to the rules, as thus amended from time to time; nor is this difficulty lessened by the circumstance that, on the different revisions, the numbers by which specific regulations are designated have been continually changed. On the last occasion, in particular, the numerical arrangement was, in a great measure, thoroughly remodelled. The strict attention of the student will be requisite to this peculiarity, especially in consulting the earlier, with reference to later decisions, on those portions of the practice which they regulate. Whenever a rule is cited *in extenso*, the present and the last preceding number will be given; when merely referred to, the former only.

The subject is, moreover, further complicated by the existence of separate rules in relation to the special practice of the Superior Court and Court of Common Pleas of the City of New York, and also by the making, from time to time, of sundry special regulations by the justices of different districts of the Supreme Court, to govern the special practice in those districts. These different regulations, where necessary, will be hereafter noticed *in loco*, and until abrogated, they should, of course, be observed by the practitioners of the districts in question. The power of the justices of any particular district of the Supreme Court to make general rules seems, however, to be taken away, and to be now vested exclusively in the convocation of the judiciary above provided for. This point is expressly decided *in re The Bowery*, 19 Barb., 588. The effect of a rule of court is confined to questions of practice and regularity. They cannot affect the jurisdictional competency of the court. *Althause* vs. *Radde*, 3 Bosw., 410. (434.) Nor do they avail to control or neutralize any positive statutory provision. *Vide Martin* vs. *Kanouse*, 17 How., 146; 9 Abb., 370, note.

The rules of the Court of Appeals are not affected by the provision now under consideration, and the powers of that court in this respect remain without specific restriction. The rules are adverted to hereafter *in loco*. In cases which were not reached by this provision nor those of the Code, it would seem that the former practice of the Court of Errors will still govern. *Hastings* vs. *McKinley*, 8 How., 175.

§ 6. *Former Practice, how far Existent.*

By sections 468 and 469, above cited under subdivision 3, provision is made, first, that in cases in which redress cannot be had by an action under the present system, the ancient practice may be adopted, so far

as may be necessary to prevent a failure of justice; and, secondly, that the practice and rules existent in 1848, though abrogated where inconsistent with the Code, are, where consistent with it, continued in force.

There is in the rules, the following special provision on the subject:

Rule 93. (90.) All actions depending on the first day of July, 1848, may be conducted according to the rules of the Supreme Court, adopted in July, 1847, so far as the same are applicable.

In cases where no provision is made by statute or by these rules, the proceedings shall be according to the customary practice, as it has heretofore existed in the Court of Chancery, and the Supreme Court, in cases not provided for by statute, or by the rules of this Court.

In 1849, the first date stood the 12th of April, instead of the 1st of July.

The letter of the above provisions requires no extended comment. It is clear that, under them, the ancient rules and practice may still be resorted to in those classes of cases, or those branches of the practice in any specific case, as to which the provisions of the Code, or of the present rules, are wholly or partially inefficient to afford relief or direction, but in those only; and equally clear that, in all other instances, the new practice governs, and the old can no longer be resorted to.

Plain as this distinction is in theory, the exact line of demarcation will often be found somewhat difficult to draw in practice, especially in the different proceedings after issue joined; and the instances in which a partial recourse to the principles, and, even in some cases, to the forms of the older system will be requisite, are not infrequent, and this, not merely in special proceedings, but in ordinary actions, regularly commenced and prosecuted under the forms of the Code.

This branch of the subject will be dealt with in detail hereafter, in connection with each specific proceeding.

BOOK I.

OF COURTS OF JUSTICE AND THEIR OFFICERS.

CHAPTER I.

COURTS OF JUSTICE WITHIN THIS STATE.

§ 7. *Statutory Provisions.*

THE following list of the tribunals within this state is given in the Code, part I., title I., section 9.

TITLE I.

Of the Courts in General.

§ 9. The following are the courts of justice of this State:

1. The Court for the trial of impeachments.
2. The Court of Appeals.
3. The Supreme Court.
4. The Circuit Courts.
5. The Courts of Oyer and Terminer.
6. The County Courts.
7. The Courts of Sessions.
8. The Courts of Special Sessions.
9. The Surrogates' Courts.
10. The Courts of justices of the peace.
11. The Superior Court of the city of New York.
12. The Court of Common Pleas for the city and county of New York.
13. The Mayors' Courts of cities.
14. The Recorders' Courts of cities.
15. The Marine Court of the city of New York.
16. The Justices' Courts in the city of New York.
17. The Justices' Courts of cities.
18. The Police Courts.

In 1848, this section was slightly different, No. 7 was styled the Courts of General Sessions of the Peace. In Nos. 13 and 14 the different cities were enumerated. The Justices' Courts

in New York, No. 16, are styled "Assistant" Justices' Courts. No. 17 in 1848 was "the Municipal Court of the City of Brooklyn." This tribunal was abolished, and the "City Court of Brooklyn," established in its stead, by chapter 125 of 1849, page 170. It is most singular that, on the amendment of 1849, this tribunal, established by that very session of the legislature, is omitted in the list. In No. 18 of 1848 (No. 17 of the present section) the Justices' Courts of cities comprised within its scope, are mentioned by name.

§ 10. These courts shall continue to exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by this act.

The list given in section 9, has never been amended since 1849. It is now, in many respects, incorrect. The following specific errors may be noticed. Two important tribunals since established, *i. e.*, the City Court of Brooklyn, and the Superior Court of Buffalo, are omitted from it altogether. The designation of No. 16 has also since been changed from "Justices' Courts," to "District Courts," in the City of New York.

It must not be supposed either that, although mentioned in the Code, all the courts enumerated in the above list are necessarily subject to its provisions. Nos. 1, 5, 7, 8, and 18, are in nowise affected by it. The same may be said of No. 9, a tribunal of special jurisdiction, governed exclusively by the Revised Statutes.

The practice of Nos. 10, 15, 16, and 17, though in part regulated by provisions of the Code, depends in a greater measure upon other and independent statutes. This practice is so essentially different in its main features from that which governs the courts of superior jurisdiction, that its treatment in detail would be incompatible with the scope and objects of the present work. In some few of its features, however, having reference to the limits of the jurisdiction of these tribunals; to the provisions for removing causes involving the title to real estate into a higher court; to the docketing and enforcement of their judgments in certain cases, and to the exercise, by the County Courts and New York Common Pleas, of appellate jurisdiction, with the necessary preliminaries to such exercise, the subject will be hereafter considered.

§ 8. *Federal Courts.*

Before passing on to the consideration of the jurisdiction and powers of the different tribunals whose practice is regulated by the Code, the existence of another class of tribunals, exercising in some instances an exclusive, and in others a concurrent jurisdiction in certain classes of cases, seems proper to be adverted to, though in strictness unconnected with the main purpose of the work.

The jurisdiction in question is exercised by the courts of the United States. Without attempting to give more than the merest sketch of it, it may be defined as threefold.

1. The original and exclusive,
2. The concurrent,
3. The appellate authority possessed by the courts referred to, within the limits of the state sovereignties, and which authorities are exercisa-

ble, the two former by the District and Circuit Courts, and the latter by the Supreme Court of the United States.

I. The original and exclusive jurisdiction of the federal tribunals extends to controversies of the following nature:

1. To cases between two states.

2. To cases where a foreign ambassador, minister, or consul, or the domestics of the two former, are parties defendants.

3. To cases in which a state is defendant, save only as regards controversies between a state and its own citizens.

4. To cases arising under the patent or copyright laws, or the revenue laws of the United States.

5. To cases of admiralty or maritime jurisdiction; and,

6. To criminal cases arising within the limits of the last-named jurisdiction, or cognizable under the authority of the United States.

The personal privilege under the second division, is in strictness capable of being waived by continued non-assertion, though it is available in bar of further proceedings in the local tribunal, at any stage of those proceedings.

II. The concurrent jurisdiction of the federal tribunals may be shortly stated as comprising:

1. All cases in law or equity, arising under the constitution, laws and treaties of the United States; or where an alien sues for tort in violation of the law of nations.

2. Cases wherein foreign ambassadors, consuls, &c., are plaintiffs.

3. Cases wherein the United States are plaintiffs.

4. Controversies in which a state is plaintiff, and individuals are defendants.

5. Controversies between a state, defendant, and its own citizens.

6. Controversies between citizens of different states, or between citizens of the same state, claiming lands under grants of different states.

7. Controversies between a state or the citizens thereof, and a foreign state.

8. Controversies between citizens and aliens.

The jurisdiction under classes 3, 6, and 8, is, however, limited to cases where the value of the thing in controversy exceeds five hundred dollars; the amount of the claim itself, and not of the recovery, being the criterion of value. Where exercisable, the jurisdiction in cases of this description is so far paramount, that they are removable from the state court to the federal tribunal by authority of the latter, by means of a proceeding analogous to *certiorari*, the details of which will be adverted to hereafter.

III. The appellate jurisdiction of the federal tribunals extends to all cases in which any decision shall have been pronounced by the highest

court of any state, repugnant to the constitution, treaties, or statutes of the United States, or drawing in question any commission issued or authority conferred by the general government.

In patent and copyright cases the state courts cannot acquire jurisdiction, even by consent of the parties. *Dudley* vs. *Mayhew*, 3 Comst., 9; *Tomlinson* vs. *Battel*, 4 Abb., 266; *Deming* vs. *Chapman*, 11 How., 382. In *Woolsey* vs. *Judd*, however (4 Duer, 379; 11 How., 49), it was held, by the Superior Court, that this exclusive jurisdiction in copyright cases, does not deprive the state courts of the power to restrain the publication of private letters contrary to the wishes of the writer. But see dissenting opinion of Bosworth, Ch. J., 4 Duer, 596.

And, in cases of tort committed within the limits of property ceded to, and in possession of the United States; the jurisdiction is exclusive, and that of the state courts is precluded. *Armstrong* vs. *Foote*, 19 How., 237; 11 Abb., 384.

Their jurisdiction does not extend, however, to a controversy, as to towage on a navigable river, within the boundaries of the state. *Abbey* vs. *The Steamboat Robert L. Stevens*, 22 How., 78.

The paramount authority of these courts on questions of commercial law is acknowledged by the Superior Court in *Stoddard* vs. *The Long Island Railroad Company*, 5 Sandf., 180.

The implicit obedience which it becomes the state court to render on the reversal of its decision by the Supreme Court of the United States, is as fully admitted by the same tribunal, in *Kanouse* vs. *Martin*, 3 Duer, 664.

When an order has once been made for transfer of a case from the state to the federal courts, under the power above alluded to, it can neither be vacated nor appealed from. *Livermore* vs. *Jenks*, 11 How., 479; *Illius* vs. *The New York & New Haven Railroad Company*, 3 Kern., 597.

And, in all cases where the courts in question have assumed jurisdiction, its acquisition will be presumed, until the contrary be shown by the party seeking to impeach it. *Chemung Canal Bank* vs. *Judson*, 4 Seld., 254; *Rickman* vs. *Cowell*, 1 Comst., 505.

But that presumption does not deprive the state courts of the power, or release them from the duty of inquiring into the question as to whether that jurisdiction was in fact acquired. *Chemung Canal Bank* vs. *Judson*, *supra*.

In cases where, under different suits, the jurisdiction of the federal, and of the state courts has been invoked in substantially the same controversy, the latter can only properly act in subordination to the proceedings of the former, but, where this is compatible, relief of this subordinate nature may be granted. *Thompson* vs. *Van Vechten*, 5 Duer, 618. If incompatible, as where a double arrest had taken place,

the proceeding in the state court will be set aside. *Hernandez* vs. *Carnobeli*, 4 Duer, 642. In *Wing* vs. *Griffin*, 1 E. D. Smith, 162, it was held that the interlocutory action of the federal tribunal was effective, so far as to discharge a lien claimed by the plaintiff in that court, even though his suit was afterward dismissed for want of jurisdiction.

In relation to the possible conflict of jurisdiction of the federal and state courts in matters falling equally within the cognizance of both, see *The People* v. *The Sheriff of Westchester County*, 10 L. O., 298; *in re Kaine*, *ibid.*, 257; *in re Eickhoff*, 11 L. O., 310.

Towle v. *Forney*, 4 Kern., 423, affirming same case, 4 Duer, 164, presents a case of jurisdictional conflict between the federal and state tribunals; the latter asserting their privilege to maintain their own decision as against that of the former, in a question exclusively depending upon the laws of the state, and not falling within any of those classes of controversy in which the question at issue is regulated by a statute of the United States, and in which, therefore, the authority of a federal decision must necessarily control.

CHAPTER II.

OF THE COURT OF APPEALS.

§ 9. *Statutory Provisions and Amendments.*

THE jurisdiction of this, the highest of the state tribunals, is thus defined by section 11 of the Code:

§ 11. The Court of Appeals shall have exclusive jurisdiction to review upon appeal every actual determination hereafter made at a general term by the Supreme Court, or by the Superior Court of the city of New York, or the Court of Common Pleas for the city and county of New York, or the Superior Court of the city of Buffalo, in the following cases, and no other:—

1. In a judgment in an action commenced therein, or brought there from another court; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. In an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, and when such order grants or refuses a new trial; but no appeal to the Court of Appeals, from an order granting a new

trial, shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant, that if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial, if the Court of Appeals shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages or other proceedings to render the judgment effectual, may be there had, in cases where such subsequent proceedings are requisite.

3. In a final order affecting a substantial right made in a special proceeding, or upon a summary application, in an action after judgment. But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in the Marine Court of the city of New York, or in an assistant justice's court of that city, or in a justice's court of any of the cities of this state, unless any such general term shall, by order duly entered, allow such appeal, before the end of the next term after which such judgment was entered. The foregoing prohibition shall not extend to actions discontinued before a justice of the peace, and prosecuted in another court, pursuant to sections sixty and sixty-eight of this code.

This section has undergone considerable alteration by the legislature from time to time.

In 1848 the revisory powers of this tribunal were confined to the judgments of the Supreme Court, Superior Court, and Court of Common Pleas of New York. The prohibition of an appeal from the lower jurisdictions was positive.

In 1849 there was a verbal amendment, but no change of consequence.

On the amendment of 1851 the section was remodelled, and power given to take cognizance of appeals from orders, by the insertion of the first portion of subdivision 2, as it now stands down to and inclusive of the words "an appeal might be taken." A subdivision was added, giving an appeal in an order granting a new trial; and the "Municipal Court of the City of Brooklyn," was stricken out of the prohibitory list.

In 1852, the provision giving an appeal from an order, granting a new trial, was repealed.

Pending its operation, a restricted construction was given to it; it being held that the review granted by it extended to questions of law only and not to questions of fact. *Moore* v. *Westervelt*, 1. C. R. (N. S.), 415.

After its repeal in 1852, the court in question considered that that amendment deprived it of all jurisdiction over appeals of this nature, though brought previous to and pending at the time of that repeal. *Gale* v. *Wells*, 7 How., 191; *Porter* v. *Jones*, *ibid.*, 192.

In those cases, and doubtless in a number of others, appeals so taken were dismissed. Two years after, however, the legislature undertook to provide a remedy, and by chapter 135 of the Laws of 1854, p. 317, enacted that in all cases where such appeals had been taken, before the amendment of 1852 took effect as a law, they should be heard and determined by the Court of Appeals, notwithstanding that amendment.

In 1857, the section was again amended, fixing its phraseology as it now stands, with the single exception, that in subdivision 2, an appeal was not given in terms from an order refusing a new trial. This addition was made on the amendment of 1862.

In addition to the special powers thus conferred by the Code, the Court of Appeals has also jurisdiction of all cases pending in the late Court of Errors, transferred to it as directed by the Constitution, art. VI., section 25, by the judiciary act, ch. 280 of 1847, art. II., § 12.

By chapter 421 of 1853, p. 820, certain powers of the late Court of Chancery, in relation to the enrolment of decrees, are given to the judges of the Court of Appeals, in connection with this branch of their duties; and in *The Farmers' Loan and Trust Company* vs. *Carroll*, 2 Comst., 566; 4 How., 211; 2 C. R., 138, the powers of the court are asserted as extending to causes in the late Court of Chancery, transferred to the Supreme Court, on the abolition of the former jurisdiction.

§ 12. (12.) The Court of Appeals may reverse, affirm, or modify the judgment or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the court below, to be enforced according to law.

Dates from 1849, on which occasion the phraseology of the original section was made fuller and more definite.

§ 13. (13.) There shall be four terms of the Court of Appeals in each year, to be held at the Capitol, in the city of Albany, on the first Tuesday of January, the fourth Tuesday of March, the third Tuesday of June, and the last Tuesday of September, and continued for as long a period as the public interests may require. But the judges of said court may, in their discretion, appoint one of said terms in each year to be held in the city of New York. Additional terms shall be appointed and held at the same place by the court, when the public interest requires it. The court may, by general rules, provide what causes shall have a preference on the calendar. On a second, and each subsequent appeal to the Court of Appeals, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed on the calendar as of the time of filing the first appeal.

Continual changes have been made in this section.

The Code of 1848 provided for six general terms.

In 1849 the number was reduced to five, both by amendment in the section itself, and also previously by chapter 333, of the Laws of that year, p. 434.

During this period, the sittings of the court were migratory, under section 9, art. II., of the judiciary act.

In 1851, this system was changed, the sessions of the court fixed permanently at Albany, and four terms established, as now. The only difference was in the period at which the fourth term was held, which was altered as it now stands, in 1852.

The last clause of the present section was added on the amendment of 1858, and changed in its phraseology in 1862; the power to appoint a session in the city of New York, being first conferred in 1859.

By chapter 167, of 1860, p. 270, a statutory preference is given to appeals in which executors or administrators are sole plaintiffs, or sole defendants, or which prevent the issue of letters testamentary, or of general administration.

§ 14. (14.) The concurrence of five judges is necessary to pronounce a judgment. If five do not concur, the case must be reheard. But no more

than two rehearings shall be had, and if, on the second rehearing, five judges do not concur, the judgment shall be affirmed.

In 1848, a rehearing was absolutely provided for.

In 1849, the judgment or order was to be affirmed, unless a rehearing were ordered. In 1851, the section was fixed as it now stands.

The two following were first inserted in 1849.

§ 15. If, at a term of the Court of Appeals, proper and convenient rooms, both for the consultation of the judges, and the holding of the court, with furniture, attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of its business, be not provided for it, in the place where by law the court may be held; the court may order the sheriff of the county to make such provision, and the expense incurred by him in carrying the order into effect, shall be a county charge.

§ 16. The Court of Appeals may be held in other buildings than those designated by law as places for holding courts, and at a different place in the same city from that at which it is appointed to be held. Any one or more of the judges may adjourn the court, with the like effect as if all were present.

This section originally provided for adjournments of the court from place to place. On the amendment of 1851, this part was stricken out, being no longer necessary.

§ 10. *Jurisdiction and Powers.*

This court is composed of eight judges, four elected by the electors of the state for terms of eight years, so classified as that one shall be elected every second year, and four selected from the class of justices of the Supreme Court having the shortest term to serve. Constitution, art. VI., § 2.

Provision is by the same section directed to be made by law in relation to the carrying out of this organization; and by another section of the same article, different other details in relation to the general powers and duties of the judges of this and of the Supreme Court are regulated, or directed to be regulated by law. For these details see the next chapter.

The clerk of this tribunal is likewise an elective officer, to be chosen by the electors of the state. *Vide* section 19 of the same article.

The justices selected from the Supreme Court are, under section 6, article 1 of the judiciary act, chapter 280 of 1847, to be taken alternately from the 1st, 3d, 5th, and 7th, and the 2d, 4th, 6th, and 8th judicial districts, which arrangement has since been observed.

By the same section it is provided that six judges of the Court of Appeals shall be necessary to constitute a quorum for holding any term of said court.

The constitutionality of this provision was doubted by Bronson and

Jewett, JJ., in *Oakley* vs. *Aspinwall*, 3 Comst., 547, 9 L. O., 45, but the majority decided that the court might be held by less than the eight judges. On failure of a quorum, the attending judges may adjourn from time to time till one shall attend. Ch. 470 of 1847, § 2.

By section 5 of the judiciary act, chapter 280 of 1847, it is provided that the judge elected by the electors of the state who shall have the shortest time to serve, shall be the chief justice of the court.

In case of any vacancy occurring in the office of a judge before the expiration of his term, that vacancy may be filled by appointment by the governor of the state, until supplied at the next general election of judges, when it is to be filled by election for the residue of the unexpired term. Constitution, art. VI., § 13.

By chapter 41 of the Laws of 1850, p. 45, further provision is made that, whenever any of the judges of the Court of Appeals, being a justice of the Supreme Court, shall be absent or cannot attend, the governor may designate another justice of the same class to serve in his stead, until he or some one duly qualified to take his place shall attend

By section 2 of the same statute it is also provided that the last clause of section 2, title 1, chapter 3, of the third part of the Revised Statutes shall not apply to any judge of the Court of Appeals. The clause so excepted runs in the following words, "Nor can any judge decide or take part in the decision of any question which shall have been argued in the court when he was not present, and sitting therein as a judge."

The disqualifications of interest, consanguinity, or affinity to either of the parties, imposed by the prior portion of that section, subsist, however, in full force; nor is the objection capable of waiver even by the consent of the parties. This is so held, but by a majority only of the judges taking part in the decision, in the much discussed case of *Oakley* vs. *Aspinwall*, 3 Comst., 547, 9 L. O., 45. See the subject of general disqualification as concerns judges in general, more fully treated in the next chapter. It has been held by the Court of Appeals that one of its judges who has taken part, as a member of the court below, in a decision sought to be reviewed, is not thereby disqualified, but that it is, on the contrary, his right and his duty to take part in the determination on that decision in the court above. *Pierce* vs. *Delamater*, 1 Comst., 17. This decision wholly ignores section 3, title I., chapter III., part III., of the Revised Statutes, 2 R. S., 275, expressly providing to the contrary, on the ground that, being ancillary to the constitution of 1821, this provision was virtually repealed by its abrogation on the substitution of that of 1846.

The principle here laid down, would seem, at first sight, to be somewhat in conflict with that in *Oakley* vs. *Aspinwall*, 3 Comst., 547, above cited. A distinction is, however, drawn by Hurlbut, J. (p. 551–553),

that the provisions of section 2 of the title in question, being declaratory of universal principles of law, are not within the same category as those of section 3, which are not called for by any inherent reason or fitness; and that, once established, nothing short of an express declaration of the sovereign will ought to be deemed sufficient to abrogate the former. The circumstance that a justice of the Supreme Court is serving, by selection, as a judge of the Court of Appeals, does not disqualify him from performing his ordinary duties as a member of the lower tribunal. *McCarron* vs. *The People*, 3 Kern., 74.

When judgment has been pronounced by this tribunal, in open court, without any public expression of dissent in any of its members, that judgment is conclusive, and cannot be inquired into on any allegation, as what may have taken place among those members, in the conference chamber or out of court. *Mason* vs. *Jones*, 3 Comst., 375; 5 How., 118; 3 C. R., 164; *Oakley* vs. *Aspinwall*, *ibid.*, 547 (556, 557); 9 L. O., 45. Nor can any allegations of that nature be taken into consideration by the inferior tribunal whose decision has been reviewed, when the question comes on afresh under the *remittitur*. *Oakley* vs. *Aspinwall*, 10 L. O., 79; 1 Duer, 1.

Where two or more points are discussed in the opinions delivered, and the determination of either in the manner there indicated would authorize the judgment pronounced; the judges concurring in the judgment must be regarded as concurring in those opinions upon the points discussed; unless some dissent is expressed, or the circumstances necessarily lead to a different conclusion. *James* vs. *Patten*, 2 Seld., 9.

And, on a second appeal, where the question presented was identical with that formerly decided, the court held it would not depart from its former adjudication, though, on the former hearing, the judges then sitting were not unanimous in making that decision, and the reasoning of those who concurred was not in harmony. *Oakley* vs. *Aspinwall*, 3 Kern., 500; following same case, 4 Comst., 513.

Where judgment on demurrer had been reversed, on appeal to this court, the decision was held by the court below to be conclusive on all the grounds of demurrer taken, though only one of those grounds was discussed in the opinion delivered on the reversal. *New York and New Haven Railroad Company* vs. *Schuyler*, 8 Abb., 239, following same case, 17 N. Y., 592; 7 Abb., 41.

In *Green* vs. *Clark*, 13 Barb., 57, it is also laid down that a judgment of affirmance in an appellate court should, in the absence of evidence of dissent, be held an affirmance, not only of the judgment, but of the precise proposition decided by the court below.

In *Nicholson* vs. *Leavitt*, 2 Seld., 521, it seems to be held that, where a positive opinion is pronounced by one of the members of the court,

without dissent by the others, a point discussed in that opinion is to be considered as established, though no actual decision was made by the court, none being necessary for determination of the suit; overruling the views of the court below to the contrary, in 4 Sandf., 252 (294).

The deduction of course follows from the above decision, and its general constitution, that a deliberate adjudication of the court now in question, or of the late Court of Errors, is, as a general rule, conclusive as a precedent. It seems scarcely necessary to cite authorities on this point, but the following may be referred to: *Palmer* vs. *Lawrence*, 1 Seld., 389; *Buell* vs. *The Trustees of Lockport*, 4 Seld., 55; *Towle* vs. *Farney*, 4 Kern., 423; *Oakley* vs. *Aspinwall*, 1 Duer, 1; 10 L. O., 79; *Schufeldt* vs. *Abernethy*, 2 Duer, 533; *Wall* vs. *The East River Company*, 3 Duer, 264; *Beirne* vs. *Dord*, 4 Duer, 69; *New York and New Haven Railroad Company* vs. *Schuyler*, *supra*; *Van Winkle* vs. *Constantine*, 6 Seld., 422; *Martin* vs. *Kanouse*, 17 How., 146; 9 Abb., 370, note.

An affirmance by default, however, settles nothing. *Watson* vs. *Husson*, 1 Duer, 242. A reversal similarly obtained, is, of course, similarly devoid of ulterior authority. The same principle holds good as to an affirmance, for want of the concurrence of five judges, after two rehearings, under section 14. See an instance in *Moss* vs. *Averill*, 6 Seld., 449. Although, as regards that particular case, the judgment must be affirmed, the questions of law raised by it remain open. See *Bridge* vs. *Johnson*, 5 Wend., 372.

To this class the rule of *stare decisis* does not apply, nor, though neces sarily dominant, does that rule seem entirely inflexible as to others. The right and duty of the court to examine into the principles of its previous determination, and, when clearly shown to be erroneous, to overrule them, is distinctly asserted and acted upon by a majority of the judges in *Leavitt* vs. *Blatchford*, 17 N. Y., 521. See also *Curtis* vs. *Leavitt*, 15 N. Y., 9; *Church* vs. *Brown*, 21 N. Y., 315 (334); *Grosvenor* vs. *Atlantic Fire Insurance Company of Brooklyn*, 17 N. Y., 391 (400); *Buffalo Steam-Engine Works* vs. *Sun Mutual Insurance Company*, 17 N. Y., 401. See also conflict of adjudication between *Rumsey* vs. *The People*, 19 N. Y., 41, and *Lanning* vs. *Carpenter*, 20 N. Y., 447. See likewise comments upon this practice, in *Wilson* vs. *Lynt*, 30 Barb., 124 (131). Compare, likewise, *Brewster* vs. *Silence*, 4 Seld., 207, with *Glencove Mutual Insurance Company* vs. *Harrold*, 20 Barb., 298, and *Church* vs. *Brown*, above cited.

It is obvious, however, that this right is one of the most delicate nature, and only to be exercised in extreme cases. In the following, the rule of *stare decisis* is strictly maintained. *Van Winkle* vs. *Constan-*

tine, 6 Seld., 422; *Bell* vs. *McElwain*, 18 How., 150; *White* vs. *Foster*, 18 How., 151.

Where, too, the opinions in any specific case leave it wholly uncertain what particular point or principle of law was decided by the court, or what a majority of the members thought upon any particular question, the decision will be considered as of no authority. *Vide Wells* vs. *The Steam Navigation Company*, 2 Comst., 208; wholly disregarding the decision of the Court of Errors in *Alexander* vs. *Greene*, 7 Hill, 533.

So also, where, on a second trial in the court below, material evidence was given on a new and controlling element in the case, not brought before the appellate tribunal on the previous occasion, its previous reversal was disregarded, and its former judgment reiterated by that court; and, on appeal, that action was affirmed. *Bowen* vs. *Newell*, 2 Duer, 584; affirmed, 3 Kern., 290; disregarding same case, 4 Seld., 190. See same principle asserted in *Wright* vs. *Douglass*, 10 Barb., 97; but that particular decision is a second time reversed upon general considerations, 3 Seld., 564.

And where, by the report of an adjudged case, it appeared that a point essential to the decision rendered, was not taken or inquired into at all by the court above, the court below considered itself at liberty to disregard the decision as authority upon that specific question. *Moloney* vs. *Dows*, 8 Abb., 316. See, likewise, *Requa* vs. *Holmes*, 19 How., 430.

The power of this court, and of the Federal tribunals, to inquire mutually into each other's jurisdiction, though such jurisdiction is, in the absence of proofs to the contrary, to be presumed, is laid down in *The Chemung Canal Bank* vs. *Judson*, 4 Seld., 254; and its rights as the highest court in the state, to be bound by state decisions only, in matters not within the statutory jurisdiction of those tribunals, is maintained in *Towle* vs. *Farney*, 4 Kern., 423, as before noticed.

The prohibition from entertaining appeals in cases commenced in a justice's court, without special leave of the appellate tribunal below, extends to cases removed from a district court in New York, into the Court of Common Pleas of that city, under the special statutory power conferred by chapter 344, of 1857. *Smith* vs. *White*, 23, N. Y., 572.

Since the enactment of chapter 174, of 1859, a judgment in mandamus is reviewable in this court on ordinary appeal. *People* vs. *Church*, 20 N. Y., 529. Prior to that enactment, the review could only be had on a writ of error, which, for that purpose, was held to be still authorized. *Becker* vs. *The People*, 18 N. Y., 487.

CHAPTER III.

OF THE SUPREME COURT.

§ 11. *General Constitution, and Powers of Judges.*

The scope of this tribunal is coextensive with the limits of the state, embracing every species of relief, and every variety of jurisdiction, original and revisory. Its common law authority dates from the original establishment of courts of justice in the former colony of New York; its cognizance of equitable cases, from the Constitution of 1846. The powers exercised by it have never on any occasion been made the subject of constitutional definition, but have devolved upon it without restriction—its jurisdiction at common law being that which heretofore belonged to the Supreme Court of this colony, being identical, or nearly so, with that exercised by the courts of King's Bench, Common Pleas, and Exchequer, in England; and, in equity, that by the Court of Chancery, in the same country; subject, however, in either case, to the exceptions, additions, and limitations, created and imposed by the constitution and laws of this state. *Vide* 2 R. S., 196, § 1; 2 R. S., 173, § 36. See, likewise, definition in *Kanouse* vs. *Martin*, 3 Sandf., 653; and Graham's Practice, p. 23.

The criminal jurisdiction exercised by the justices of this court, when sitting in oyer and terminer, analogous in its nature to that of the common law tribunals, before referred to, falls out of the scope of this work.

By the Constitution of 1846, art. VI., sec. 3, it is simply provided: "There shall be a Supreme Court having general jurisdiction in law and equity;" the former powers of the legislature to regulate the jurisdiction and proceedings in both being reserved by the next section. By other provisions contained in article XIV. of the same measure, the whole of the former system is swept away, and the old Supreme Court and Court of Chancery abolished; the transfer of jurisdiction from the ancient to the substituted judiciary taking place as from the first Monday of July, 1847. *Vide* art. XIV., sec. 5. See, as to the retrospective effect of the provision, *Suydam* v. *Holden*, Seld., notes, Oct. 7th, 1853, p. 16.

The following definition of the jurisdiction, then conferred, is contained in section 16 of the judiciary act:

"The Supreme Court, organized by this act, shall possess the same powers

and exercise the same jurisdiction as is now possessed and exercised by the present Supreme Court and Court of Chancery; and the justices of said court shall possess the powers and exercise the jurisdiction now possessed and exercised by the justices of the present Supreme Court, chancellor, vice-chancellors, and circuit judges, so far as the powers and jurisdiction of said courts and officers shall be consistent with the present constitution and the provisions of this act. And all laws relating to the present Supreme Court and Court of Chancery, or any court held by any vice-chancellor, and the jurisdiction, powers, and duties of said courts, the proceedings therein, and the officers thereof, and their powers and duties, shall be applicable to the Supreme Court organized by this act, the powers and duties thereof, the proceedings therein, and the officers thereof, their powers and duties, so far as the same can be so applied and are consistent with the constitution and the provisions of this act."

See likewise as to transfer of any special powers of vice-chancellors or judges of the old Supreme Court, the further statute ch. 30, of 1849, p. 27; and generally as to the effect of the section above cited, *Mason* vs. *Jones*, 1 C. R. (N. S.), 335; *Garcie* vs. *Sheldon*, 3 Barb., 232; *Wyatt* vs. *Benson*, 23 Barb., 327; and *Griffith* vs. *Merritt*, 19 N. Y., 529.

The two next sections of the judiciary act provide as to revisory jurisdiction of the new court, to be exercised by writ of error or *certiorari* at common law, or appeal in chancery, being the same as that exercised by the older tribunals. The whole system of appeals has since been remodelled by the Code, the ancient forms, by way of writ of error, being abolished. The proceeding by *certiorari* is, in certain cases, still existent. Both subjects will be noticed in detail hereafter.

The revisory jurisdiction thus exercised, is shortly defined by Graham, p. 23, as "a revisory power over every court of common law or statutory jurisdiction in the state, excepting only the court for correction of errors." This definition is still substantially true, save only that the "Court of Appeals" should be substituted in the last branch of the sentence; and that, as regards the New York Superior Court, and Court of Common Pleas, and the Superior Court of Buffalo, this revisory power, so far as it was heretofore exercised by appeal or writ of error to this court, has been abolished.

In addition to the general jurisdiction, original and revisory, above referred to, this court is also invested with the ancient common law powers of restraining or enforcing the exercise of authority on the part of inferior courts or by public officers, by way of *mandamus* or prohibition. It is likewise the jurisdiction, especially charged with the exercise, or with supervision over the exercise by its inferiors, of the numerous statutory authorities, of a *quasi*-judicial nature, exercisable

independent of the ordinary forms of an action by way of special proceeding.

By other sections of article VI., of the Constitution, various further provisions are made, having reference to the justices of the court. Under section 4, the state is to be divided into eight judicial districts, of which the city of New York is to be one, with power to reorganize those districts in certain cases (§ 16). The number of justices to each district is to be four, with power to increase that number in the city of New York, which power has been exercised by the addition of a fifth justice, in that district, by chapter 374 of Laws of 1852, section 8, p. 592; those justices are to be elected for terms of eight years, and to be so classified as that one of the justices of each district shall go out at the end of every two years (§ 4), this classification to be provided for by law (§ 9). Under section 6 provisions may be made by law for designating the justices who are to preside at the general terms in the different districts, and it is also provided that such general terms may be held by three justices or more, of whom the justice so designated is always to be one; general powers of holding all other courts being given to the other justices, exercisable in any county.

Further provisions are made by the same article, having common reference to the justices of this court and the judges of the Court of Appeals. Their compensation is to be established by law; and is not to be increased or diminished during their continuance in office (§ 7). See this rule rigorously applied in *The People* vs. *Haws*, 32 Barb., 207; 20 How., 29; 11 Abb., 261. Such judges are not to hold, and are ineligible for any other office or public trust, nor can they exercise any power of appointment to public office (§ 8). The times of holding their terms are to be provided for by law (§ 9). Both judges and justices are made removable by concurrent resolution of both houses of the legislature (§ 11). Both are to be elected; the judges of the Court of Appeals by the electors of the state, the justices of the Supreme Court by the electors of the several judicial districts, at such times as may be prescribed by law (§ 12). Any vacancy in either office may, from time to time, be filled by appointment by the governor until it shall be supplied at the next general election, when it is to be filled by election for the residue of the unexpired term (§ 13). In relation to the governor's powers in this respect, and the duration of the appointment when made, *vide People* vs. *Cowles*, 3 Kern., 350. None are to receive for their own use any fees or perquisites of office (§ 20), which last prohibition is common to all judicial officers, except justices of the peace.

The provisions of the Constitution above referred to, which required further legislative action, were duly carried out in the ensuing session.

By chapter 240 of the Laws of 1847, the state was, as directed, divided into eight judicial districts, consisting as follows:

The first, of the city and county of New York.

The second, of the counties of Richmond, Suffolk, Queen's, King's, Westchester, Orange, Rockland, Putnam, and Dutchess.

The third, of the counties of Columbia, Sullivan, Ulster, Greene, Albany, Schoharie, and Rensselaer.

The fourth, of the counties of Warren, Saratoga, Washington, Essex, Franklin, St. Lawrence, Clinton, Montgomery, Hamilton, Fulton, and Schenectady. For certain purposes, Fulton and Hamilton are treated as one county. *Vide* Code, § 20. See also, chapter 95, of 1860, p. 168.

The fifth, of the counties of Onondaga, Oneida, Oswego, Herkimer, Jefferson, and Lewis.

The sixth, of the counties of Otsego, Delaware, Madison, Chenango, Broome, Tioga, Chemung, Tompkins, and Cortlandt.

A new county (Schuyler), has been created by the legislature, by chapter 386, of 1854, p. 913, partly out of counties comprised in this, and partly out of others forming portions of the seventh district. On this latter ground, the constitutionality of the law is denied, in *Lanning* vs. *Carpenter*, 20 N. Y., 447. It had been previously recognized, in *Ramsey* vs. *The People*, 19 N. Y., 41.

The seventh, consists of the counties of Livingston, Wayne, Seneca, Yates, Ontario, Steuben, Monroe, and Cayuga.

The eighth, of the counties of Erie, Chatauque, Cattaraugus, Orleans, Niagara, Genesee, Alleghany, and Wyoming.

The election of the different judicial officers is regulated by chapter 276, of the Laws of the same year.

By the judiciary act, chapter 280, of 1847, the classification of the judges and justices is provided for, and detailed directions given with reference to the holding of courts by them; and the designation of the justices to preside at general term, as also directed by the Constitution.

Those portions of that statute which provide as to the holding of terms, &c., are repealed by the Code. The section (§ 15), which regulates the presidency at general terms, was again amended by chapter 170, of the laws of 1848, and, as amended, runs as follows:

§ 15. The justice of the Supreme Court, in each judicial district, having the shortest time to serve, and who is not a judge of the Court of Appeals (nor appointed or elected to fill a vacancy in the first class), shall be a presiding justice in the Supreme Court; and in case of the death, absence, or inability of the presiding justice, appointed to hold any general term of the Supreme Court, any three justices convened to hold such term, may designate one of their number to preside at such general term.

N. B.—That portion of the section which is included between parentheses, is now obsolete. This designation, when once made, extends to the whole term, if deemed expedient, during which the authority of the designated judge will continue, and will not be defeated by the return of the regular presiding justice to the district before its close. *People* vs. *Hicks*, 15 Barb., 153.

By sections 81 and 82, of the same measure, the following general restrictions are imposed upon the exercise of judiciary powers, by, amongst others, the officers in question:

§ 81. No judge of any court shall have a voice in the decision of any cause in which he has been counsel, attorney, or solicitor, or in the subject-matter of which he is interested.

§ 82. No judge of the Court of Appeals, or justice of the Supreme Court, shall practise as an attorney, solicitor, or counsellor, in any court of this State.

To these may be added the following, imposed by the amended judiciary act, chapter 470, of the laws of 1847, section 52:

§ 52. No partner or clerk of any judge, or officer, shall practise before him, as attorney, solicitor, or counsel, in any cause or proceeding whatever, or be employed in any suit or proceeding which shall originate before such judge, or officer; nor shall any judge, or officer, act as attorney, solicitor, or counsellor, in any suit or proceeding which shall have been before him in his official character.

In addition to the above, the justices of the Supreme Court are liable to the general disqualification, imposed by title I., chapter III., of the 3d part of the Revised Statutes, 2 R. S., 275.

These provisions run as follows:

§ 2. No judge of any court can sit as such, in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror, by reason of consanguinity or affinity to either of the parties; nor can any judge decide or take part in the decision of any question which shall have been argued in the court, when he was not present or sitting as judge.

N. B.—The first part of this section is common to all courts. The latter portion does not affect the Court of Appeals. See last chapter. By chapter 15 of 1850, p. 20, a special power is given to remove any cause in which the justices in the district in which it is pending, or any of them, are thus disqualified, into any adjoining district.

The prohibition against a judge taking part in the decision of a question, at the argument of which he was not present, does not disqualify him from sitting with two others who heard it, to constitute a court, when the decision is pronounced; and that decision, he taking no part in it, will be valid. A consultation between the three judges, who actually heard the argument, will be presumed. *Corning* vs. *Slosson*, 16 N. Y., 294.

The disqualification of consanguinity has been noticed in detail in the previous chapter, and the decision of *Oakley* vs. *Aspinwall*, referred to. In *Place* vs. *The Butternuts Woollen and Cotton Manufacturing Company*, 28 Barb., 503, it was even held to extend so far as to incapacitate a justice whose relation was a stockholder in the company there in question. There seems, however, some reason to doubt whether this conclusion is not carried too far. See dissenting opinion of Balcom, J.

§ 3. No judge of any appellate court, or of any court to which a writ of *certiorari* or of error shall be returnable, shall decide or take part in the decision of any cause or matter which shall have been determined by him, when sitting as judge of any other court.

N.B.—See doubts thrown upon the constitutionality of this provision by the Court of Appeals, as noticed in the previous chapter.

§ 4. No judge can practise as solicitor, counsellor, or attorney in the court of which he is a judge, except in those suits in which he shall be a party, or in the subject-matter of which he shall be interested.

§ 5. No judge shall have a partner practising in the court of which he is a judge; nor shall any judge be directly or indirectly interested in the costs of any suit that shall be brought in the court of which he is a judge, except those suits in which he shall be a party or interested as above provided.

By chapter 272, of 1841, section 1, 3 R. S., 3d edition, 372, the following further restriction is added.

No judge shall directly or indirectly take any part in the decision of any cause or question which shall be brought or defended in the court of which he is a judge, by any person acting as an attorney or counsellor, with whom he shall be interested or connected as a partner in any other court.

And lastly, by 2 R. S., 275, section 6, any judge is prohibited from receiving fees or other compensation for advice in matters pending, or which he has reason to believe may be pending before him, or for drafting papers in such cases.

The fact that one of the justices of the court is, for the time being, serving as a judge of the Court of Appeals by selection, does not affect his authority, to perform his ordinary duties, as such justice. *McCarron* vs. *The People*, 3 Kern., 74.

In the Supreme Court, being a court of general jurisdiction, jurisdiction will always be presumed till the contrary appears. *Wright* v. *Douglass*, 10 Barb., 97. See also to the same effect *Bumstead* v. *Read*, 31 Barb., 661, drawing the distinction between courts of general and those of special jurisdiction, as regards the necessity of specific averments in the latter case, and the impossibility of jurisdiction being conferred by mere consent in any.

As between this tribunal and another of co-ordinate jurisdiction, the Court in which the controversy is first raised is that which acquires jurisdiction, and, if a suit be subsequently commenced in another for the same purpose, proceedings should be stayed. *McCarthy* v. *Peake*, 18 How., 138; 9 Abb., 164.

The impropriety of allowing proceedings to be instituted in one judicial district, in relation to a controversy already pending in another, is strongly insisted on, and an application of that nature refused in *Whitney* vs. *Stevens*, 16 How., 369.

The present being a continuation of the former Supreme Court and Court of Chancery, it will in all cases consider the decisions of those tribunals as binding as its own previous adjudications. *Spicer* vs. *Norton*, 13 Barb., 542; *Lovett* vs. *The German Reformed Church*, 12 Barb., 67. Whether it acts through the special or general term, its powers are the same, and the decision is a decision of the Supreme Court. *Mason* vs. *Jones*, 1 C. R. (N. S.), 335; *Tracy* vs. *Talmadge*, 1 Abb., 460; *Ayres* vs. *Covell*, 9 How., 573; *Anon.* vs. *Anon.*, 10 How., 353.

Although possessing all the powers, and exercising all the functions both of the former Supreme Court and also of the Court of Chancery, this tribunal has not acquired, by the blending of both systems, any powers not previously possessed by either of the former tribunals. And in exercising a statutory power, it is confined by the limits of that power as conferred. By changing the form of application from a petition to a complaint, it cannot alter its essential qualities, or enable the submission of controversies or the bringing of parties before the court, on subjects foreign to the proceeding as authorized. *Onderdonk* vs. *Mott*, 34 Barb., 106.

See also as to this last point of the limited powers of the court in that class of cases, and its incompetency to exercise general jurisdiction, *The People* vs. *Porter*, 1 Duer, 709; *The People* vs. *Wilcox*, 22 Barb., 178; *Wyatt* vs. *Benson*, 23 Barb., 327. But, though so incompetent, relief may in certain cases be obtained from it under the same circumstances, through the instrumentality of a petition addressed to the Court in Equity. *People* vs. *Wilcox*, *supra*. And, in proceedings under a statute of a general and public nature, the court acts as one of general jurisdiction, and not as exercising a special statutory power. *Bangs* vs. *Duckinfield*, 18, N. Y., 592. As to its powers and duties, with reference to questions as to the constitutionality or unconstitutionality of any act of the legislature, *vide Clarke* vs. *The City of Rochester*, 5 Abb., 107.

By virtue of their general powers and control over the suitors within their jurisdiction, this court and others of similar authority are competent to entertain a controversy and make a decree affecting lands in another state. *Williams* vs. *Ayrault*, 31 Barb., 364.

But not so in actions by or against a foreign corporation, which are regulated by special statute. In these, the cause or subject of action must have arisen, or some property to be acted upon must be situated within the jurisdiction. *Cumberland Coal and Iron Company* vs. *Hoffman Steam Coal Company*, 20 How., 62. And even the fact that property of such a corporation, defendant, has been attached in such a suit, will not avail, where the plaintiff also is non-resident. *Campbell* vs. *Proprietors of Champlain and St. Lawrence Railroad*, 18 How., 412. See likewise *Whitehead* vs. *Buffalo and Lake Huron Railway Company*, 18 How., 218.

The order of a judicial officer, in a case of which he has jurisdiction, fully protects all parties acting under it, and the judicial officer himself, though, in making it, he may have erred in the exercise of his discretion. *Landt* vs. *Hilts*, 19 Barb., 283.

By the Revised Statutes, 2 R. S., 173, section 37, it was provided as follows:

"The Court of Chancery shall dismiss every suit concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of $100, with costs to the defendant."

By the amendment of 1862, section 39, this section is wholly repealed, a previous provision being made to the same effect by the amendment in section 274, as to proceedings to enforce a judgment against the estate of a *feme covert*.

This puts an end to the previous controversy on the subject. The proposition that this ouster of jurisdiction still continued, was maintained in *Shephard* vs. *Walker*, 7 How., 46; *Marsh* vs. *Benson*, 19 How., 415; 11 Abb., 241; and in the dissenting opinion of Bosworth, J., in *Woolsey* vs. *Judd*, 4 Duer, 596.

The converse, *i. e.*, that under the Code there is no limitation whatever on the jurisdiction of the court, and that this provision of the Revised Statues was obsolete, was maintained in *Woolsey* vs. *Judd*, 4 Duer, 379; 11 How., 49; *Quick* vs. *Keeler*, 2 Sandf., 231; *Mallory* vs. *Norton*, 21 Barb., 424; *Durham* vs. *Willard*, 19 How., 425; and *Cobine* vs. *St. John*, 12 How., 333.

As to the powers of this court to entertain, under its general jurisdiction, an action upon an award, notwithstanding that the submission itself provided for the entry of judgment in the County Court, see *Burnside* vs. *Whitney*, 21 N. Y., 148.

In the first district, this court, and the New York Superior Court, and Court of Common Pleas, have exclusive jurisdiction of all actions brought against the corporation of that city. Ch. 379, of 1860, § 1, p. 645.

In cases in which a judge of the County Court is disqualified from

acting, the Supreme Court assumes jurisdiction. Code, § 30, sub. 13; also, amended judiciary act, ch. 470, of 1847, § 31. And the same is the case, where any two of the justices of the Superior Court of Buffalo, are similarly unable to hear and decide any case before them at general term. Laws of 1857, ch. 361, § 10, vol. I., p. 754. The other powers of transfer into its own, from certain other jurisdictions, of causes there pending, also possessed by this court, will be hereafter considered.

Under the Code, as it now stands, this court has also special jurisdiction of actions commenced in a justice's court, but discontinued, on the ground that the title to real estate is brought in question, under the special provisions contained in title VI., part I., of that measure. This enactment was contained in the original measure of 1848. By the amendment of 1851, this peculiar jurisdiction was transferred to the County Courts. It remained in them till 1858, when, by the amendments of that year, it was retransferred to the Supreme Court.

By chapter 45, of 1862, p. 812, the experiment is made of establishing a tribunal of conciliation in the sixth district, for the disposal of controversies voluntarily submitted by both parties. When possessed of such a controversy, the jurisdiction of this tribunal is substantially the same as that of the Supreme Court, but a resort to it cannot be compelled, and the whole proceeding is rather in the nature of a judicial arbitration than of an ordinary suit. Such being its nature, and the operation of the statute being, moreover, strictly local and not general, the consideration of the subject falls without the scope of the present work.

§ 12. *Provisions of the Code; or, consequent thereon.*

The Code, without defining or attempting to interfere with the powers of this court in jurisdictional matters, provides for the holding of its terms, and other minor matters of detail, as follows:

TITLE III.

Of the Supreme Court, Circuit Courts, and Courts of Oyer and Terminer.

§ 17. (15.) All statutes now in force, providing for the designation of the times and places of holding the general and special terms of the Supreme Court, and the Circuit Courts, and Courts of Oyer and Terminer, and of the judges who shall hold the same, are repealed, from and after the first day of July, one thousand eight hundred and forty-eight; and the order of the Supreme Court, adopted July fourteen, one thousand eight hundred and forty-seven, prescribing the times and places of holding the general and special terms of the court, and the Circuit Courts, and Courts of Oyer and

Terminer, during the residue of the year one thousand eight hundred and forty-seven, and for the years one thousand eight hundred and forty-eight, and one thousand eight hundred and forty-nine; and assigning the business and duties thereof to the several judges of the court, is, from and after the first day of July, one thousand eight hundred and forty-eight, abrogated; and the provisions of this title are substituted in place thereof.

§ 18. (16.) At least four general terms of the Supreme Court shall be held annually in each judicial district, and as many more as the judges in such district shall appoint, at such times and places as a majority of the judges of such district shall appoint.

Amended as it stands in 1849. In 1848, six general terms were to be held in each district.

§ 19. (17.) The concurrence of a majority of the judges holding a general term, shall be necessary to pronounce a judgment. If a majority do not concur, the case shall be reheard.

§ 20. (18.) There shall be at least two terms of the circuit court and court of oyer and terminer held annually in each of the counties of this State, and as many more terms thereof, and as many special terms, as the judges of each judicial district shall appoint therein, but at least one special term shall be held annually in each of said counties. Fulton and Hamilton shall be considered one county for the purposes of this section.

Amended as it stands in 1849. In 1848 the number of terms in each county was specifically prescribed.

§ 21. (19.) Circuit courts, and courts of oyer and terminer, shall be held at the same places, and commenced on the same day.

In 1848, this section commenced with the words "special terms."

The Code of 1848 went on here to make special provisions, by sections 20, 21, and 22, in relation to the continuance of the special term, circuit and court of oyer and terminer, on each occasion. These sections were stricken out in 1849.

§ 22. (23.) The Governor shall, on or before the first day of May, one thousand eight hundred and forty-eight, by appointment in writing, designate the times and places of holding the general and special terms, circuit courts, and courts of oyer and terminer, and the judges by whom they shall be held; which appointment shall take effect on the first day of July thereafter, and shall continue until the thirty-first day of December, one thousand eight hundred and forty-nine. The judges of the Supreme Court of each district shall, in like manner, at least one month before the expiration of that time, appoint the times and places of holding those courts for two years, commencing on the first day of January, one thousand eight hundred and fifty, and so on, for every two succeeding years, in their respective districts.

§ 23. (24.) The Governor may also appoint extraordinary general terms, circuit courts, and courts of oyer and terminer, whenever, in his judgment, the public good shall require it.

§ 24. (25.) The places appointed within the several counties, for holding the general and special terms, circuit courts, and courts of oyer and terminer, shall be those designated by statute for holding county or circuit courts If a room for holding the court in such place, shall not be provided by the supervisors, it may be held in any room provided for that purpose, by the sheriff, as prescribed by section twenty-eight.

General and special terms of the Supreme or county courts and circuit courts, and courts of oyer and terminer, may be adjourned, to be held on any future day, by an entry to be made in the minutes of the court; and juries may be drawn and summoned for an adjourned circuit or county court, or an adjourned court of oyer and terminer, and causes may be noticed for trial, at an adjourned circuit or county court, in the same manner as if such courts were held by original appointment.

And special terms may be adjourned to be held at a future day at the chambers of any justice of said court residing within the district, by an entry in the same manner, and then adjourned from time to time, as the justice holding the same shall order and direct.

The concluding sentence of the last clause was added by amendment in 1862. Otherwise, that clause dates from the amendment of 1851. It is a condensation of the provisions on the same subject contained in the judiciary act, section 19, and the amended judiciary act, section 11. The first dates from 1848, except a mere formal change in 1849.

§ 25. (26.) Every appointment so made, shall be immediately transmitted to the Secretary of State, who shall cause it to be published in the newspaper, printed at Albany, in which legal notices are required to be inserted, at least once in each week, for three weeks before the holding of any court in pursuance thereof. The expense of the publication shall be paid out of the treasury of the State.

The Code of 1848 went on by section 27 to make sundry provisions as to the designation of judges to hold courts in different districts, and as to one judge, at least of those who held a general term, being obliged to sit at that next succeeding. These were omitted in 1849, and are now obsolete.

§ 26. (28.) In case of the inability, for any cause, of a judge assigned for that purpose, to hold a special term or circuit court, or sit at a general term, or preside at a court of oyer and terminer, any other judge may do so.

By section 29 of 1848 the clerk was bound within ten days after the expiration of every term or circuit, to certify to the governor the amount and nature of the business done. This clause was left out on the amendment of 1849.

§ 27. (30.) The judges shall, at all reasonable times when not engaged in holding court, transact such other business as may be done out of court. Every proceeding, commenced before one of the judges in the first judicial district, may be continued before another, with the same effect, as if commenced before him.

The first clause of this section has come down unaltered. The second dates from 1849.

The Code of 1848 was more specific in its directions as to the transaction of chamber business in the first district, specially providing for the attendance of one of the judges from ten to three on every judicial day, and longer if the business required it.

§ 28. (31.) The supervisors of the several counties shall provide the courts appointed to be held therein with room, attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of their business. If the supervisors neglect, the court may order the sheriff to do so; and the expense incurred by him in carrying the order into effect, when certified by the court, shall be a county charge.

To the above provisions may be added the following, inserted for the first time on the revision of 1851, as part of section 459—the prior portion of that section relating to other matters.

Whenever the judges of the Supreme Court in any district find that the court, at any term or circuit, has not been, or will not be able to dispose of all the cases upon the calendar, they may request the governor to assign other judges, and, if necessary, appoint extraordinary terms and circuits, for the purpose of disposing of such cases. The governor may thereupon make such assignment, and the judges assigned must hold the courts accordingly.

By chapter 1 of the laws of 1850, p. 1, it had been previously enacted that—

Whenever from any cause any general or special term of the Supreme Court, or any Circuit Court, or Court of Oyer and Terminer duly appointed, shall be in danger of failing, it shall be the duty of the governor to designate some justice or justices of the Supreme Court who shall hold said courts respectively.

By chapter 374 of the Laws of 1852, p. 591, additional provisions are made for the administration of justice in the first district. Additional sittings for the trial of all issues of fact triable by a jury, are to be held at such times as the chief judge of the Court of Appeals shall appoint (§ 1). By section 2, it is made the duty of such chief judge, whenever applied to by the *presiding justice* in the first district, to appoint such sittings, to assign some justice of the Supreme Court to hold the same, and to designate the class of business which shall be noticed for or triable thereat; and it shall be the duty of the justice so appointed to hold such sitting. All statutes in force, with reference to circuit courts, in the city and county of New York are, under section 3, to be applicable to these sittings. By section 4, it is competent for the said chief judge, whenever applied to for that purpose, by *any one of the justices* of the Supreme Court, elected in the first district, to assign some justice of that court to sit in the general or special terms in said

district. Under section 5, the objection as to different circuits and sittings being held at the same time is obviated, provision being made by sections 6 and 7 for the raising of funds to pay the expenses of such justices, and likewise for additional compensation to the justices resident in the first district. By section 8, the election of an additional justice for that district is, as before noticed, provided for.

The power of the justices of this court to make rules, in concurrence with those of the New York local jurisdictions, conferred by section 470, and the rules from time to time promulgated and revised under that power, have been before noticed and the provision cited under section 3.

Under chapter 167 of 1860, p. 270, cases in which executors or administrators are sole plaintiffs or sole defendants, or which prevent the issuing of letters to either, are entitled to a special preference on the calendars of this court.

§ 13. *General Term.*

The highest form in which jurisdiction is exercised by the justices of this court is by their sittings in general term.

The functions of this branch of the court are, for the most part, strictly appellate, its principal business being the revision on appeal of the judgments of inferior tribunals, or of the decisions or rulings of a single justice of the court itself, at circuit, special term, or chambers, and of the judgments or orders entered in pursuance of such decisions or rulings. The justices exercise, when thus sitting, the same powers as were possessed at common law by the general term of the former Supreme Court, and in equity, by the chancellor sitting on appeal. *Vide Mason* vs. *Jones*, 1 C. R. (N. S.), 335; *Gracie* vs. *Freeland*, 1 Comst., 228. The general term has likewise, by especial provision of the Code, original cognizance of questions submitted for the opinion of the court, without the ordinary forms of an action, under section 372 of that measure. Its powers are however not strictly confined to the exercise of mere appellate jurisdiction, but are of wider scope as regards collateral applications, when it chooses to exercise them. It has accordingly taken cognizance of exceptions to the interlocutory report of a referee set down to be heard before it in the first instance, and refused, on motion, to strike the cause off its calendar. *Tracy* vs. *Tallmadge*, 1 Abb., 460. Of matters affecting its own calendar it of course takes cognizance on motion. See *Peel* vs. *Elliott*, 16 How., 483. In *Anon.* vs. *Anon.*, 10 How., 353; it asserted and acted upon its powers to make an original order for retaxation of costs. In *Duel* vs. *Agan*, 1 C. R., 134, it was considered that a motion in arrest of judgment (if unanswerable at all, which was doubted)

could only be there made. And its powers to entertain a motion for an injunction, or to continue an injunction granted by a reversed judgment, pending an appeal from that judgment, are distinctly asserted in *Drake* vs. *Hudson River Railroad Company*, 2 C. R., 67; and *The Town of Guilford* vs. *Cornell*; 4 Abb., 220.

It take slikewise original coguizance of writs of error in criminal cases, (*vide Tracy* vs. *Tallmadge*, *supra*), and exercises especial jurisdiction in reference to the admission of attorneys and counsel, and to the control of the conduct of those officers when admitted.

The general term has also peculiar cognizance of exceptions directed to be heard there in the first instance, under section 264 of the Code, and likewise of applications for judgment, on a verdict subject to the opinion of the court (§ 265).

The decisions of the general term in one district, on a question of law or practice, ought, as a general rule, and in the absence of special reason to the contrary, to be taken as conclusive by the justices in another. *Andrews* vs. *Wallege*, 8 Abb., 425; 17 How., 263; *Burt* vs. *Powis*, 16 How., 289; *Olcott* vs. *The Tioga Railroad Company*, 26 Barb., 147; *Andrews* vs. *Wallace*, 29 Barb., 350; *Cobb* vs. *Dunkin*, 19 How., 164, (167); *Loring* vs. *United States Vulcanized Gutta Percha Company*, 30 Barb., 644; *Malan* vs. *Simpson*, 20 How., 488; 12 Abb., 225.

This rests, however, much in the discretion of the judges before whom the question is brought, and as to what they may or may not consider as a sufficient special reason for rendering a conflicting decision. When in conflict, the decision of its own general term controls the practice in each district, until one or other branch of the court recedes from its previous position, or the question is settled by the Court of Appeals. Whilst this is the case, that question is, of course, completely open in the other districts.

As to the duty of disregarding a clearly erroneous decision, even of the general term of the same court, see *Romaine* vs. *Kinsheimer*, 2 Hilt., 519.

A motion to dismiss an appeal taken to the general term, is cognizable by the appellate tribunal only. *Barnum* vs. *Seneca County Bank*, 6 How., 82; *Harris* vs. *Clark*, 10 How., 415; *Bradley* vs. *Van Zandt*, 3 C. R., 217. And after its decision has been made, all applications for correction of that decision, in matters of substance, must be made to it, and not to the special term. *Corning* vs. *Powers*, 9 How., 54; *Ayres* vs. *Covill*, 9 How., 573.

But in mere matters of form, or regularity, irrespective of the substance of the decision, the special term has power to entertain a motion, and to correct any error in the entry of the decision of the general term, *De Agreda* vs. *Mantel*, 1 Abb., 130; *Bagley* vs. *Brown*, 3 E. D. Smith, 66; or to open a default irregularly taken, *Ayres* vs. *Covill*, 9 How., 573.

Where error of fact has been committed in the trial below, the general term, on reversing the judgment, has no power, however clear the case may be, to render final judgment in favor of the appellant. All it is authorized to do, is to grant a new trial. *Astor* vs. *L'Amoureux*, 4 Seld., 107; reversing same case, 4 Sandf., 524; *Marquat* vs. *Marquat*, 2 Kern, 340; *Meyer* vs. *The City of Louisville*, 26 Barb., 609; *Cobb* vs. *Cornish*, 15 How., 407; 6 Abb., 129; 16 N. Y., 602.

Nor has the general term any power to award judgment in the first instance, on failure to answer, or in analogous cases; that power belongs to the special term. *Ryan* vs. *McCannell*, 1 Sandf., 709. So, likewise, as to a special statutory application. *In re Walker*, 2 Duer, 655. The rule may be broadly stated, that any hearing or application, as to which the court may subsequently be called upon to exercise its revisory jurisdiction, cannot properly be made to the general term, but should be brought on before a single judge in the first instance. If otherwise, the applicant or party would, of necessity, be deprived of his right to have the original action of the court reversed by the assembled bench, a right of which he cannot be deprived. *Vide Gracie* vs. *Freeland*, *supra*. See also, as to a motion for new trial in a special proceeding, *in re Fort Plain and Cooperstown Railroad Company*, 3 C. R., 148.

§ 14. *Circuit and Special Term.*

These sittings are frequently holden by the same judge, on the same occasion, for which express authority is given by section 20 of the judiciary act. This circumstance leads to the distinction between them being frequently lost sight of. In strictness, however, the cognizance of a judge sitting at circuit or oyer and terminer, is of a comparatively limited nature. His office is primarily to preside at the hearing of issues of fact, triable by a jury; but, under section 255 of the Code, and rule 28 (21 of 1854), issues of fact to be tried by the court may also be tried before him as well as at special term, and this course is not unfrequently adopted in the case of the taking of inquests, or the trial of other causes not involving any important contest upon the facts. He has also power, under rule 24, to entertain an application for judgment on failure to answer.

To the above is superadded, by section 264 of the Code, authority, at his discretion, to entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages, but such motion can only be heard at the same term or circuit at which the trial is had. Section 265 would seem to give a wider scope to the powers of the judge at circuit to hear

motions for a new trial, but in practice this does not seem to have obtained. He, the judge, may likewise order a reference of the case when brought on, but, except to try or refer, hardly any step can be taken by him at circuit. *Mann* vs. *Tyler*, 6 How., 235; 1 C. R. (N. S.), 382.

In *Bedell* vs. *Powell*, 3 C. R., 61, it was considered that, in the country districts, a justice holding circuit and oyer and terminer at a time and place for which no special term was appointed, had no authority to make any order at all in a motion not cognizable by him out of court. He has no authority to hear motions, except at a general or special term.

This doctrine is carried out by rule 40 of the court, which expressly provides that non-enumerated (*i. e.*, original, as distinguished from enumerated, *i. e.*, appellate motions), shall be heard at special term, except when otherwise directed by law; whilst the alterations made in that rule, on the last revision, only refer to motions at a special term, noticed contemporaneously with a circuit, and do not recognize the practice of bringing on motions, at a circuit held independently.

Of course this principle must be understood as applicable only to motions of an interlocutory nature, extraneous to the actual hearing of the cause. There is another class not requiring any notice, but incidental to the hearing itself, such as motions for a nonsuit, for the exclusion of testimony, &c., which are of necessity excluded from its operation.

When once a cause has been tried, it seems immaterial whether the proceedings subsequent to verdict be inserted in the record, as taken at the circuit or special term. It is, at all events, no cause for reversal, and, if the practice be irregular, the remedy is by motion. *Dart* vs. *McAdam*, 27 Barb., 187.

The functions of the special term are thus defined by section 20 of the judiciary act, chapter 280 of 1847: "To hear and determine non-enumerated business in suits and proceedings at law, and to take testimony and hear and determine suits and proceedings in equity; and orders in suits and proceedings at law, and orders and decrees in suits, and proceedings in equity, may be made at such special term."

To this original cognizance of contested motions and hearings in equity, there is superadded by the Code that of causes triable by the court. This class includes all issues of law, and likewise issues of fact, with the exception of those joined in actions for the recovery of money only, or of specific, real, or personal property, or for divorce on the ground of adultery, which are primarily triable by a jury. In all these, however, except the last, a jury trial may be waived, and then the matter falls more peculiarly within the cognizance of the special term, though the circuit has power to try them under section

255 of the Code and rule 28, and occasionally does so, especially on the taking of inquests and the trial of cases in which a jury is waived.

The special term is likewise the proper forum for hearing motions for a new trial in jury cases, and applications for judgment on a special verdict, or case reserved for further argument or consideration; except in the case of exceptions, directed to be heard in the first instance by a general term. Code § 265.

The justice sitting at special term possesses substantially the same powers and exercises the same authority as was heretofore possessed by a vice-chancellor, or a single judge of the old Supreme Court; subject to revision, in all cases, by the general term. *Vide Mason* vs. *Jones*, 1 C. R. (N. S.), 335. *Gracie* vs. *Freeland*, 1 Comst., 228.

An application for judgment on failure to answer, or to reply when necessary, must likewise be made to the judge, at special term, and not at chambers. Rule 24. *Aymar* vs. *Chace*, 12 Barb., 301; 1 C. R. (N. S.), 330. To award judgment, "the court" must be invoked. *Ryan* vs. *McCannel*, 1 Sand., 709. Nor does *Porter* vs. *Lent*, 4 Duer, 671, really conflict with this principle, inasmuch as, under the special regulations of the Superior Court, the judge attending at chambers sits in fact at special term.

In one case, however, *i. e.*, that of an application for judgment on a frivolous pleading, an application for judgment may be made to a judge in or out of court, and is therefore, cognizable at chambers as well as at special term. Code, § 247. *Witherspoon* vs. *Van Dolar*, 15 How., 266; *Fales* vs. *Hicks*, 12 How., 153.

The powers of the special term, with reference to the correction of errors of the general term in matters of form but not extending to matters of substance, have been already noticed, and the cases cited in the preceding section.

A common law *certiorari* cannot be allowed by a justice out of court, but, though *ex parte*, the application must be made at special term. *Gardner* vs. *Commissioners of Highways of Town of Warren*, 10 How., 181.

The powers of the special term extend to the correction or setting aside of the report of a referee, or the entry of judgment thereon, for irregularity, want of sufficient statement, or neglect to pass upon all the issues in the case. *Hulce* vs. *Sherman*, 13 How., 411; *Brush* vs. *Mullany*, 12 Abb., 344. See also *Van Steenburgh* vs. *Hoffman*, 6 How., 492; *Goulard* vs. *Castillon*, 12 Barb., 126; *Church* vs. *Erben*, 4 Sandf., 691; and sundry authorities cited at 13 How., 412. But it has no power, when a referee has passed upon the whole of the issues, to set aside the report upon the ground that his decision is erroneous in law. Errors of that nature are reviewable on appeal only, and not on motion. *Dana*

vs. *Howe*, 3 Kern., 306; *Lakin* vs. *New York and Erie Railroad Company*, 11 How., 412.

An application for an indefinite stay, or for setting aside proceedings pending before another officer, cannot properly be made to a judge at chambers, but should be to the court at special term. *Bank of Genesee* vs. *Spencer*, 15 How., 14; *Bangs* vs. *Selden*, 13 How., 374.

It may be laid down as a general rule that when, by statute, an application for interlocutory or independent relief is directed to be made "to the court," that application is cognizable by the judge only when holding special term, and cannot properly be entertained by him, at chambers or out of court. So held as to a motion for an allowance. *Mann* vs. *Tyler*, 6 How., 235; 1 C. R. (N. S.), 382. See also rule 52, as to an order for appointment of a guardian *ad litem* in partition. *Disbrow* vs. *Folger*, 5 Abb., 53.

But in the first district, the practice is otherwise, and, under the special authority conferred by section 401, subdivision 2, all motions whatsoever, except for a new trial on the merits, are cognizable by a judge or justice out of court. See *Main* vs. *Pope*, 16 How., 271, and *Disbrow* vs. *Folger*, *supra*. This power would seem however to be restricted to motions in a pending suit. In special statutory proceedings brought before the court on petition, the judge sitting at special term is alone competent to act, whether in the first or the other districts. *In re Walker*, 2 Duer, 655; *in re Bookhout*, 21 Barb., 348.

By the same section of the Code (401), the districts within which motions must be made are prescribed, the first district being specially separated from the others. If brought on in the wrong district, the order made on a motion will be null. It is however voidable only, and until set aside should be obeyed. *Harris* vs. *Clark*, 10 How., 415; *Newcomb* vs. *Reed*, 14 How., 100; *Bangs* vs. *Selden*, 13 How., 374 (163); *Canal Bank* vs. *Harris*, 1 Abb., 192.

Although, as a general rule, a judge sitting at special term is competent to entertain motions, of whatever nature, including that class which is also cognizable by a judge out of court; still there is one description of applications on which the latter alone is competent to act, and that is the class of proceedings which by statute are directed to be made to a judge or justice of the court, as, for instance, proceedings supplementary to execution.

It has been held that the court, or a judge of it sitting at special term, has no power to make an order in these cases. *Bitting* vs. *Vandenburgh*, 17 How., 80; *Miller* vs. *Rossman*, 15 How., 10; *Bank of Genesee* vs. *Spencer*, 15 How., 14. See *Davis* vs. *Turner*, 4 How., 190. And, further, that the exclusive jurisdiction of the judge out of court, includes the power to punish for a contempt of his order, *re Smethurst*,

2 Sandf., 724; 3 C. R., 55; *Wicker* vs. *Dresser*, 14 How., 465: and that he has not merely the power, but the exclusive power of doing so, *Shephard* vs. *Dean*, 13 How., 173.

The contrary of the last proposition is, however, maintained, and the power of a judge sitting at special term, to punish for contempt in such a case, asserted in *Dresser* vs. *Van Pelt*, 6 Duer, 687; 15 How., 19; and *Wicker* vs. *Dresser*, 13 How., 331. The mere objection that an order appointing a receiver in a similar proceeding, was entitled at special term, instead of at chambers, has been also disregarded. *In re The Knickerbocker Bank*, 19 Barb., 602.

But, though the judge at chambers has exclusive jurisdiction in proceedings of this nature, his powers are confined to the limits imposed by the statute; he cannot act in them collaterally, by way of granting a stay of proceedings, or instructing a receiver, when appointed. That power rests only with the court. *Bank of Genesee* vs. *Spencer*, 15 How., 14, 412; *In re The Knickerbocker Bank*, 19 Barb., 602.

Although the granting of orders for extensions of time, or stay of proceedings, is, when exercised within the limit of twenty days imposed by section 401, within the cognizance of the judge sitting at chambers; an application for such an extension, or stay, when running over a longer period, can only be made at special term, and is not cognizable by a judge sitting at chambers. *Harris* vs. *Clark*, 10 How., 415; *Haase* vs. *New York Central Railroad Company*, 14 How., 430; *Bangs* vs. *Selden*, 13 How., 374; *Wood* vs. *Kimball*, 18 How., 163; 9 Abb., 419; *Steam Navigation Company* vs. *Weed*, 8 How., 49.

An application under section 174, for relief in respect of an omission or mistake, lies also to the court, and not to the judge. *Sheldon* vs. *Wood*, 6 Duer, 679; 14 How., 18.

And, as a general rule, it may be stated that all orders which affect the disposition of a pending action, in a radical and not an interlocutory manner; as an order for reference, for judgment on default, for a discontinuance, or others of the like nature, should be entitled, and applications made for them at special term, and not at chambers, though such application be made *ex parte*, or even by consent. The granting of a reference is, under section 271, the especial province of "the court."

An application to extend time already expired, falls clearly within the jurisdiction of the special term, and the judge sitting at chambers has no jurisdiction. It is no longer an *ex parte* proceeding; the adverse party, having acquired a positive right, is entitled to be heard upon notice. *Doty* vs. *Brown*, 3 How., 375; 2 C. R., 3.

The special, and not the general term, is the forum before which an appeal from a justice's court, originally taken to the county court, but transferred to this court by reason of the incapacity of the county judge

to hear it, should be brought to a hearing. *Sheldon* vs. *Albro*, 8 How., 305; *Davis* vs. *Stone*, 16 How., 538, and cases mentioned, p. 540; *Wiles* vs. *Peck*, *ibid.*, 541.

Since the recent amendment of section 24, a special term may now be adjourned to be held at a future day, at the chambers of any justice of the court residing within the district.

§ 15. *Judge at Chambers.*

The power of the judge or justice, at chambers or out of court, includes, in all the districts, the large class of *ex parte* orders and orders of course, whether made in the course of a regular action, or on a special statutory proceeding. *Mathis* vs. *Vail*, 10 How., 458. To this is superadded, in the first district alone, the power of hearing contested motions. The court is always open for business of this nature, and the judge, sitting in chambers, exercises, in equity cases, substantially the same powers as were formerly exercised by the chancellor out of term, or by the clerk of the court in the entry of orders of course. *Vide* amended judiciary act, ch. 470 of 1847, § 16; *Clark* vs. *Judson*, 2 Barb., 90; *Garcie* vs. *Sheldon*, 3 Barb., 232.

The functions of the judges at chambers are thus provided for by the Code.

Under section 27, before cited in this chapter, they are directed "at all reasonable times when not engaged in holding court" to "transact such other business as may be done out of court," with the additional clause that "every proceeding commenced before one of the judges in the first judicial district, may be continued before another, with the same effect as if commenced before him."

Under section 401, hereafter more particularly considered on the subject of motions, it is thus specially provided:

By subdivision 2. "Motions may be made in the first judicial district to a judge or justice out of court, except for a new trial on the merits."

By subdivision 3. "Orders made out of court, without notice, may be made by any judge of the court in any part of the state," with further provisions as to their being made by a county judge, noticed in the next section of this work. See also section 403, on the latter subject.

By subdivision 6, the following limitation is imposed: "No order to stay proceedings for a longer time than twenty days shall be granted by a judge out of court, except upon previous notice by the adverse party."

By section 404 it is thus provided: "When notice of a motion is given, or an order to show cause is returnable before a judge out of court, and, at the time fixed for the motion, he is absent or unable to

hear it, the same may be transferred by his order to some other judge, before whom the motion might originally have been made."

N. B. In the first district, all motions noticed for a particular day, and not able to be then brought on, stand over as a matter of course till the next day, unless a different disposition be made. *Mathis* vs. *Vail*, 10 How., 458.

By section 405, it is also provided, that the time within which any proceeding in an action must be had after its commencement, except the time within which an appeal must be taken, may be enlarged on affidavit, showing grounds therefor, by a judge out of court.

The power of making *ex parte* orders is clearly exercisable by any justice, without regard to the district in which he acts. In *Adams* vs. *Sage*, 13 How., 18, this power was asserted to extend to the enlargement of time to make a case, for a period exceeding twenty days, in an action pending in the first district, by order of a justice of the seventh, at chambers, *on contested motion*. This conclusion is based on section 405, but its correctness seems very doubtful. It is in direct conflict with *Bangs* vs. *Selden*, 13 How., 374.

As stated in the last section of this work, the cognizance of special proceedings of a statutory nature, in which jurisdiction is conferred on a judge or justice, as such, and not upon the court, belongs more especially, and indeed exclusively, to that officer, sitting at chambers, so long as he acts directly within the limits of that authority, but not so when his action is not direct but collateral. See that section and cases there cited. He cannot, however, act in the matter of a special statutory proceeding, in which the court acts as such. *In re Hicks's Will*, 4 How., 316, 2 C. R., 128.

It should likewise be observed that, although under sections 401 and 405 the granting of orders for extension of time or stay of proceedings *ex parte*, is especially the function of the judge at chambers, his power in that respect is limited to twenty days; and that an extension or stay for a longer, or for an indefinite period, or an extension of time already expired, is not within his jurisdiction, and can only be obtained by application to the special term. See last section, and authorities there cited.

Nor can he take cognizance of an application in any of that class of special proceedings, which, under the terms of the statutory authority conferring such cognizance, is directed to be made to the court, upon petition or otherwise. See same section, and authorities cited.

But in that class of applications where, on petition, the chancellor had jurisdiction to interfere in vacation, as in an application as to the custody of a minor child, the judge, sitting at chambers, has similar powers, and is competent to act. *Wilcox* vs. *Wilcox*, 4 Kern., 575, affirming *People* vs. *Wilcox*, 22 Barb., 178.

When acting at chambers, under a special statutory authority, he is bound by the limits of that authority, and cannot exercise general equitable jurisdiction. *Vide Wheaton* vs. *Gatss*, 18 N. Y., 395.

As a general rule, contested motions are, in all districts except the first, cognizable by the court at special term, and not by the judge at chambers. *Vide Mann* vs. *Tyler*, 6 How., 235; 1 C. R. (N. S.), 382.

This is clearly provided for by rule 40. That rule admits however of many exceptions. It does not of course apply to that class of proceedings which, by special provision, may be taken before a judge out of court, in which cases any contest which may arise remains cognizable by the judge before whom the proceeding was instituted, or his substitute under section 404. Necessity frequently arises also for applications consequent on the previous action of the judge himself, as motions for settlement or correction of an order or decree, on points of form, or in relation to the preparation, settlement, or resettlement of a case or bill of exceptions, which, though possibly brought on on regular notice, come properly for hearing before the same judge, out of court.

In the first district the above distinctions do not exist, and the fact that, in the different courts, the same judge is in the habit of sitting cotemporaneously at chambers and at special term, lessens still more the chance of any material difficulty, especially if care be taken to entitle any order made by him as made within the proper jurisdiction. *Vide Porter* vs. *Lent*, 4 Duer, 671; *Lowber* vs. *The Mayor of New York*, 5 Abb., 325; *Wood* vs. *Kimball*, 18 How., 163; 9 Abb., 419.

As a general rule, a judge at chambers has, as above noticed, no cognizance of motions tending directly to the regular progress or final disposition of the cause, and not collateral in their nature. *Vide Duel* vs. *Agan*, 1 C. R., 134. There is however one exception, *i. e.*, a motion for judgment on a frivolous pleading. This, by section 247 of the Code, is expressly cognizable by a judge or justice out of court, and, on such a motion, it is competent for him to make precisely the same disposition of the case as if it had come on before him regularly at special term. *Witherspoon* vs. *Van Dolar*, 15 How., 266; *Witherhead* vs. *Allen*, 28 Barb., 661.

It is not competent for one judge sitting at Chambers to vacate the order of another. A motion for that purpose must be made to the court on notice. *Cayuga County Bank* vs. *Warfield*, 13 How., 439; *Bank of Genesee* vs. *Spencer*, 15 How., 14; *Blake* vs. *Locey*, 6 How., 108; *Lindsay* vs. *Sherman*, 1 C. R., N. S., 25; 5 How., 308; *Woodruff* vs. *Fisher*, 17 Barb., 224; *Mills* vs. *Thursby*, 1 C. R., 121. See however *Bruce* vs. *Delaware and Hudson Canal Company*, 8 How., 440. Or the question may be brought up on appeal, when the order has been made on notice. *Follett* vs. *Weed*, 3 How., 360. Nor can a judge at chambers review

the decision of another judge collaterally. *People* vs. *Orser*, 12 How., 550. The judge, however, may vacate his own *ex parte* order, and that *ex parte*, without notice to the adverse party. Code, § 324.

Prior to the last revision of the rules, it was held incompetent for a judge sitting at chambers to make an order to show cause, returnable before another judge, or in court. *Merritt* vs. *Slocum*, 6 How., 350. Since that revision, such an order may be made, if returnable before the judge who grants it, or at a special term appointed to be held in the district in which such judge resides. Rule 39. Nor did the principle ever apply to motions in the first district.

A judge at chambers cannot tax or adjust general costs taxable under the Code. The clerk alone is so authorized. *Van Schaick* vs. *Winne*, 8 How., 5. The decision of the latter is however reviewable by the former so sitting. Nor does this rule affect his former power to adjust costs in proceedings antecedent to the Code, or not subject to its provisions.

A judge of one district cannot take cognizance of or make an order to show cause affecting a motion in a cause triable in another. *Baldwin* vs. *City of Brooklyn*, *unrep.* See also cases as to first district, cited in last section.

§ 16. *Chamber Business. Powers of County Judge, or Supreme Court Commissioners.*

The manifest inconvenience caused by the accumulation of applications, purely formal, and directed to the obtaining of relief, purely *ex parte*, and uncontested in its nature, led to the delegation of that branch of the powers of the justices of the Supreme Court, to a class of inferior officers specially deputed for that purpose. This delegation was originally made by the legislature to a class of officers styled Supreme Court commissioners; to be appointed under a power conferred by the Revised Statutes. This office has been abolished, by section 8, article XIV., of the Constitution; and is now non-existent, as regards any proceedings in a regular suit, and, for the most part, in special proceedings. There is, however, a certain class of applications in which judges of some of the other courts are still entitled to exercise powers which were originally conferred upon them as Supreme Court Commissioners, *ex officio*, and which will be noticed at the end of the present section.

The power heretofore exercised by the commissioners above referred to, is now, by statute, transferred to the county judge. Section 27 of the amended judiciary act made provision on the subject, but the authority at present exercised is conferred by the Code.

By section 401, subdivision 3, it is provided that orders made out of court, without notice, "may be made by a county judge of the county

where the action is triable, or by the county judge for the county in which the attorney for the moving party resides, except to stay proceedings after verdict."

This provision dates from the amendment of 1849. The power was, however, only given in that year, to the county judge of the county where the action is triable. That to the county judge of the county in which the attorney for the moving party resides, was first conferred by the amendment of 1859.

By section 403, the following general power was added by the Code of 1848, and has come down unaltered.

§ 403. (364.) In an action in the Supreme Court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the Supreme Court at chambers, according to the existing practice, except as otherwise provided in this act. And, in all cases where an order is made by a county judge, it may be reviewed, in the same manner as if it had been made by a judge of the Supreme Court.

And, by section 405, the power to extend the time for taking any proceeding, given to a judge of the court, is also conferred (if the action be in the Supreme Court) on a county judge.

Similar authority is likewise conferred on this officer, by other sections of the Code, in regard to *ex parte* orders granting a provisional remedy, which he is empowered to make, as follows: As to arrest, by section 180; as to injunction, by section 218; and, as to attachment, by section 228. See *Bank of Lansingburgh* vs. *McKie*, 7 How., 360; *Conklin* vs. *Dutcher*, 5 How., 386; 1 C. R., (N. S.), 49. In *Seymour* vs. *Mercer*, 13 How., 564, it was laid down that an order of arrest granted by a special surrogate was valid, on the ground that that officer was, by virtue of the statute under which he was appointed, entitled to exercise all the powers of a county judge out of court. In *Eddy* vs. *Howlett*, 2 C. R., 76, it was held that an injunction granted by the county judge of a county, other than that named in the complaint as the place of trial, was a nullity, but this conclusion no longer holds good since the last amendment.

The power of the county judge in these matters, extends, however, only to the granting of initial *ex parte* orders, or to the vacating of such an order, out of court without notice, under section 324. *Bank of Lansingburgh* vs. *McKie*; *Conklin* vs. *Dutcher*, *supra*; *Conway* vs. *Hitchins*, 9 Barb., 378. A motion to vacate or modify the order, when granted, being of necessity a contested motion, can only be made to the court; and even the judge who actually made the order, is not competent to entertain it. *Rogers* vs. *McElhone*, 20 How., 441; 12

Abb., 292. See also, express provision to the same effect in section 225, in relation to injunctions.

The county judge of the county to which an execution has been issued, has, under sections 292 to 302 inclusive of the Code, special jurisdiction in proceedings supplementary to execution. His powers in a proceeding of this nature, when commenced before him, are the same as those of a judge of the court; nor has the court or a judge any authority to interfere with his exercise of those powers, except only by way of appeal, so long as he keeps within the limits of his statutory jurisdiction. *Conway* vs. *Hitchins*, 9 Barb., 378; *Sale* vs. *Lawson*, 4 Sandf., 718.

But, beyond the limits of that jurisdiction, those powers do not extend. He cannot, therefore, make an order staying such proceedings, though pending before him. It is a stay of proceedings after verdict, from which he is restricted by section 401. *Bank of Genesee* vs. *Spencer*, 15 How., 412. See *Otis* vs. *Spencer*, 8 How., 171, as to proceedings after verdict, in which it is laid down that proceedings on judgment, entered on the report of a referee, do not fall within that prohibition. This seems contrary to the spirit, though possibly within the letter of the statute; it is, too, a mere dictum, doubtingly announced.

Nor is it within his competency to grant an arbitrary stay to either party, without reference to some other application to be made. *Chubbuck* vs. *Morrison*, 6 How., 367; *Schenck* vs. *McKie*, 4 How., 246, 3 C. R., 24. Nor can he or a judge at chambers grant a continuing or indefinite stay. *Bank of Genesee* vs. *Spencer*, 15 How., 14; *Bangs* vs. *Selden*, 13 How., 374.

He cannot make an order providing as to the amount of security, to be given upon an appeal; that falls within the cognizance of the court only, *Otis* vs. *Spencer*, 8 How., 171.

In *Peebles* vs. *Rogers*, 5 How., 208, 3 C. R., 213, it was considered that the general power of extending time to answer, conferred on the county judge, by section 29 of the judiciary act, was not affected by the limits imposed by section 401 of the Code; and that the county judge of any county was competent to make such an order. This conclusion is, however, doubted in *Chubbuck* vs. *Morrison*, 6 How., 367; and *Bangs* vs. *Selden*, 13 How., 163.

Under the last amendment of section 401, the power contended for in *Peebles* vs. *Rogers*, is given in express terms. This would seem, by implication, to destroy the authority of that case, and sustain *Chubbuck* vs. *Morrison* as to proceedings previous to that amendment. Before 1859, there was considerable discussion as to the force of the expression, "the county where the action is triable," and as to which was the county within which the county judge had jurisdiction in such

cases. It had, however, been nearly if not entirely settled that the word "triable" meant the county designated by the plaintiff in his complaint, or, after change of the venue, any county to which that venue had been so changed. See *Bangs* vs. *Selden*, 13 How., 163. Same case, 13 How., 374; *Sturgess* vs. *Weed*, 13 How., 130; *Chubbuck* vs. *Morrison*, 6 How., 367; *Eddy* vs. *Howlett*, 2 C. R., 76; *Erwin* vs. *Voorhees*, 26 Barb., 127, conflicting with *Peebles* vs. *Rogers*, 5 How., 208, 3 C. R., 213. In *Askins* vs. *Hearns*, 3 Abb., 184, it was expressly decided that, pending a motion to change the venue, the county judge of the county designated in the complaint, was alone competent to act.

The county judge cannot grant an order to show cause returnable before the court, or before a judge of it. *Askins* vs. *Hearns*, *supra*; *Merritt* vs. *Slocum*, 6 How., 350.

He cannot, under any circumstances, hear a contested motion in an action pending in the Supreme Court. *Merritt* vs. *Slocum*, 3 How., 309; 1 C. R., 68; *Rogers* vs. *McElhone*, 20 How., 441; 12 Abb., 292. Nor has he the power to settle interrogatories in such an action, or to issue a commission. *Erwin* vs. *Voorhies*, 26 Barb., 127. See, however, section 15 of the amended judiciary act, below noticed.

Nor has he any power to entertain proceedings by way of *habeas corpus*, in relation to the custody of a minor child, that power being expressly given to "the court," by statute, 2 R. S., 148, 149, §§ 1, 2; *People* vs. *Humphreys*, 24 Barb., 521.

On the ordinary *habeas corpus* he is, however, empowered to act within the county in which a prisoner is detained. 2 R. S., 363, § 23; or, in certain cases, in another, § 24.

The jurisdiction of the county judge in the above several respects being of a limited nature, nothing can be presumed in its favor, and on a proved state of facts, admitting of a reasonable doubt, will be against it. *People* vs. *Hurlbut*, 5 How., 446; 1 C. R., (N. S.), 75; 9 L. O., 245. But, in the absence of proof, nothing will be so presumed. *Barns* vs. *Harris*, 4 Comst., 374.

It must be borne in mind, that the restrictions on the power of the county judge above noticed, refer only to his action in causes pending in the Supreme Court, in which he acts as a mere deputy for one of the justices of that tribunal. To those commenced in his own court, they do not apply. In this branch of jurisdiction, his action is as unfettered as that of any other judge, either on interlocutory application, or otherwise. Nor is a judge of the Supreme Court at liberty to interfere with that action, and, should he attempt to do so, his order will be vacated. *Blake* vs. *Locy*, 6 How., 108.

Under section 13 of the amended judiciary act, chapter 470, of 1847,

the county judge was empowered to allow writs of *ne exeat* in suits and proceedings in the Supreme Court, and this power would seem to be still existent, in those cases in which that writ may still be held issuable. See hereafter, under the head of arrest.

By section 15 of the same measure, an application for a commission in an action at law, may be made to a county judge at chambers, in the county of his residence, wherever the venue may be laid. This provision would seem to be nearly, if not entirely obsolete; the subject of motions in general, and the powers of the county judge in such cases, being now regulated by the Code. See *Sturgess* vs. *Weed*, 13 How., 130.

The original powers of the office of Supreme Court commissioners, were conferred by article II., title II., chapter III., part III., of the Revised Statutes. 2 R. S., 280, 281. Their powers extended generally to the performance of all duties, and the execution of every act, power, and trust, which a justice of the Supreme Court might perform out of court, according to its rules and practice, or pursuant to any statute (§ 18). By section 32, every recorder of a city, and every judge of a county court, of the degree of counsellor-of-law, were commissioners, *ex officio;* and by section 33, the same authority was conferred on the judges of the Superior Court of the city of New York. The judges of the latter tribunal are also, by section 23 of the act for its establishment, chapter 137, of 1828, "authorized to perform all the duties which the justices of the Supreme Court out of term, are authorized to do and perform, by any statute of this state."

By section 8, article XIV., of the Constitution of 1846, the office of Supreme Court commissioners was abolished from the first Monday of July, 1847. Before the date in question, *i. e.*, on the 12th of May, chapter 255 of the laws of that year was, however, passed, providing for the election of justices of the Superior Court, and Court of Common Pleas; and by section 7 it was enacted, "that the justices of the Superior Court should have and possess the same powers, and perform the same duties, as the justices of that court now possess and perform."

In *Renard* vs. *Hargous*, 2 Duer, 540, the question came up as to whether, under the section last cited, the power of a justice of the Superior Court to exercise *ex officio* the powers of a Supreme Court commissioner was or was not still continued, notwithstanding the formal abolition of the office. It was decided in the affirmative, and this decision has been affirmed by the Court of Appeals. *Renard* vs. *Hargous*, 3 Kern., 259. See, also, *People* vs. *Porter*, 1 Duer, 709, 11; L. O., 228.

By chapter 121 of 1849, section 4, it was provided that the recorder of the city of Troy, or in his absence or inability the mayor of that city, might exercise the powers conferred on county judges, by the provisions of

the code, in relation to supplementary proceedings, and also the powers of a judge of the Supreme Court at chambers. In *Griffin* vs. *Griffith*, 6 How., 428, it was held that this provision was unconstitutional, as tending to revive the office of Supreme Court commissioner; and that an order in a Supreme Court action, granted by the officer in question, was void. This case is, however, overruled, and the constitutionality of the statute in question affirmed by the Court of Appeals, in *Huyner* vs. *James*, 17 N. Y., 316.

By chapter 320 of 1848, the powers of a judge of the Supreme Court at chambers are conferred on the recorder of Hudson; and, by chapter 374 of the same year, on the recorder of Oswego. The city judge of New York and the recorder of New York have also similar powers. See *Avery's Case*, 6 Abb., 144, and Laws of 1847 and 1850 there cited.

By chapter 125 of 1849, section 26, it is provided that the judge of the city court of Brooklyn may "exercise within the county of Kings all the powers of a justice of the Supreme Court at chambers." This officer stands, therefore, on the same footing, as regards the making of *ex parte* orders in the Supreme Court, as those previously mentioned. *Cushman* vs. *Johnson*, 13 How., 495; 4 Abb., 256. The same powers are conferred on the justices of the Superior Court of Buffalo, by chap. 96 of 1854, section 24 and 25; amended by chapter 361 of 1857.

In *Cushman* vs. *Johnson* it was held, however, that, under the statute above referred to, the powers of the city judge of Brooklyn do not extend to the exercise of jurisdiction in supplementary proceedings on a judgment of the Supreme Court. The opinion also maintains that it was incompetent for the legislature to confer upon the officer in question any of the powers of a Supreme Court commissioner; but, so far, the case is undoubtedly overruled by *Hayner* vs. *James*, 17 N. Y., 316, above cited.

In a case of *habeas corpus* for detention, the powers of the city judge of Brooklyn, conferred as above, are limited; and he cannot issue such a writ running into another county, without proof that in such other county there is no officer authorized to grant it, *Vide* 2 R. S., 563, § 23; *Dooley's Case*, 8 Abb., 188. And the decision is couched in general terms, and would seem to include within its scope a county judge or any other officer exercising similar jurisdiction, not residing within the county in which the prisoner is detained.

The powers of a judge or justice, now exercising the powers of a Supreme Court commissioner, are limited, and do not extend to the exercise of general jurisdiction. On the statutory *habeas corpus*, in relation to the custody of an infant child, even a judge of the Supreme Court cannot exercise the equitable powers of the court, unless invoked by

special petition. *People* vs. *Wilcox*, 22 Barb., 178; and an *ex officio* Supreme Court commissioner cannot exercise any powers of that nature, or do more than declare that infant at liberty to go where it pleases. *People* vs. *Porter*, 1 Duer, 709; 11 L. O., 228.

CHAPTER IV.

OF THE COUNTY COURTS.

§ 17. *Jurisdiction and Powers—Statutory Provisions.*

These tribunals exercise throughout the whole of the state, the city and county of New York excepted, a limited but extensive jurisdiction in matters of a local nature, similar in its substantial features to that formerly vested in the courts of Common Pleas and general sessions, for counties. This jurisdiction is of a civil, and also of a criminal nature, but the former alone enters within the plan of this treatise. In the city of New York itself, the powers of the county judge, strictly so called, are merged in and form part of the more extensive authority vested in the local tribunals considered in the next chapter.

The present organization of the county court has its germ in section 14, article VI. of the constitution of 1846, which runs as follows:

§ 14. There shall be elected in each of the counties of the state, except the city and county of New York, one county judge who shall hold his office four years. He shall hold the county court and perform the duties of the office of surrogate. The county court shall have such jurisdiction in cases arising in justices' courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases.

This section then proceeds to the effect following:

Subd. 1. Provides for the holding of courts of general sessions with criminal jurisdiction.

2. Relates to the salary of the county judge, to be fixed by the board of supervisors.

3. Provides for the election of a special officer, to perform the duties of surrogate, in counties having more than 40,000 inhabitants.

4. Runs thus: "The legislature may confer equity jurisdiction in special cases upon the county judge."

And 5. Authorizes the establishment of inferior local courts of civil and criminal jurisdiction in cities.

By article XIV. section 5 of the same instrument, jurisdiction of all suits and proceedings originally commenced and then pending in any court of Common Pleas (except in the city and county of New York), is from the first Monday of July, 1847, vested in the Supreme Court. By this provision, the abolition of the ancient jurisdiction, for which the present county courts are in a great measure the substitute, was consummated.

The election of county judges so directed, was organized by the legislature, in the following session, by chapter 276 of the laws of 1847. By art. 4 of the judiciary act, chapter 280 of 1847, further regulations were made in relation to the court thus established, and the surrogates' courts.

The duties exercised by the county judge in the latter capacity, or by his substitute, in those counties in which a separate officer is elected, and the practice before the judge or officer so acting, do not fall within the cognizance of this present work, but will be found in the separate treatises devoted to this particular subject. That practice is wholly regulated by statute, and the jurisdiction conferred is exercised independent of the forms adopted in an ordinary action or suit.

The jurisdiction of the county court was defined by section 36 of the judiciary act, as being that which was then possessed and exercised by the Courts of Common Pleas of the same county, or the Court of Chancery, so far as should be consistent with the constitution and the provisions of that act; but, inasmuch as the whole of that jurisdiction is remodelled by the Code itself, it seems needless to cite that section *in extenso*.

By the amended judiciary act, chapter 470 of 1847, the following further regulations are made. In section 28 powers are given to these courts to entertain applications for sale of the property of a religious incorporation and the disposition of its proceeds. See Code, § 30, sub. 9.

Section 31, of the same measure, contains a provision for transferring into the Supreme Court any cases in which the judge of the county court is incapable of acting, similar to that contained in subdivision 13 of section 30, as introduced in 1852, and amended and extended in 1860, as below noticed. Prior to the former year, the authority for that purpose was only to be found in the section in question; and the county judge's duty to make a certificate of incapacity was, from 1852 to 1860, prescribed by that provision only, and not by the Code. As to his duty to make such a certificate, pending this period, *vide Sheldon* vs. *Albro*, 8 How., 306. The section may also be considered as still in force, so far as it defines the incapacities to which the provision is applicable. They are as follows:

Whenever a cause or matter shall be pending in any county court, in which the judge of such court shall have been attorney, solicitor, or counsel, or shall be interested, or in which he would be excluded from being a juror, by reason of consanguinity or affinity to either of the parties, or in the decision of which he shall have taken part, when sitting as a judge in any other court, it shall be his duty, &c.

The following special disqualifications are imposed by section 48, of the same measure:

No county judge shall practise or act as an attorney, solicitor, or counsellor, in any court of which he shall be or shall be entitled to act as a member; nor shall any partner or person connected in law business with any such judge, practise or act as an attorney, solicitor, or counsellor, in any court of which such judge shall be or shall be entitled to act as a member, or in any cause or proceeding originating in such court; nor shall any judge practise or act as a counsellor in any cause or proceeding which shall have originated in a court of which he shall be or shall be entitled to act as a member.

In addition to the above, county judges are further subject to the general disqualifications imposed on all judicial officers in common, as noticed in the last chapter.

The jurisdiction of these tribunals is now definitely laid down in title IV., part I., of the Code itself, as follows:

TITLE IV.

Of the County Courts.

§ 29. (32.) All statutes now in force, conferring or defining the jurisdiction of the county courts, so far as they conflict with this act, are repealed; and those courts shall have no other jurisdiction than that provided in the next section. But the repeal contained in this section shall not affect any proceedings now pending in those courts.

§ 30. (33.) The county court has jurisdiction in the following special cases, but has no original civil jurisdiction except in such cases:

1. Civil actions, in which the relief demanded is the recovery of a sum of money, not exceeding five hundred dollars, or the recovery of the possession of personal property, not exceeding in value five hundred dollars, and in which all the defendants are residents of the county in which the action is brought, at the time of its commencement: subject to the right of the Supreme Court, upon special motion for good cause shown, to remove any such action to the Supreme Court before trial.

2. The exclusive power to review, in the first instance, a judgment rendered in a civil action by a justice's court in the county, or by a justices' court in cities, and to affirm, reverse, or modify such judgment.

3. The foreclosure or satisfaction of a mortgage, and the sale of mortgaged

premises situated within the county, and the collection of any deficiency on the mortgage, remaining unpaid, after the sale of the mortgaged premises.

4. The partition of real property situated within the county.

5. The admeasurement of dower in land situated within the county.

6. The sale, mortgage, or other disposition of the real property, situated within the county, of an infant or person of unsound mind.

7. To compel the specific performance, by an infant heir or other person, of a contract, made by a party who shall have died before the performance thereof.

8. The care and custody of the person and estate of a lunatic or person of unsound mind, or an habitual drunkard, residing within the county.

9. The mortgage or sale of the real property, situated within the county, of a religious corporation, and the disposition of the proceeds thereof.

10. To exercise the power and authority heretofore vested in such courts of Common Pleas, over judgments rendered by justices of the peace, transcripts of which have been filed in the offices of the county clerks in such counties.

11. To exercise all the powers and jurisdiction conferred by statute upon the late courts of Common Pleas of the county, or the judges, or any judge thereof, respecting ferries, fisheries, turnpike-roads, wrecks, physicians, habitual drunkards, imprisoned, insolvent, absent, concealed, or non-resident debtors, jail-liberties, the removal of occupants from State lands, the laying out of railroads through Indian lands, and upon appeal from the determination of commissioners of highways, and all other powers and jurisdiction conferred by statute, which has not been repealed, on the late court of Common Pleas of the county, or on the County Court, since the late Courts of Common Pleas were abolished, except in the trial and determination of civil actions; and to prescribe the manner of exercising such jurisdiction, when the provisions of any statute are inconsistent with the organization of the County Court.

12. To remit fines and forfeited recognizances, in the same cases and like manner as such power was given by law to Courts of Common Pleas. But the first subdivision of this section shall not apply to the County Court of the counties of Kings and Erie.

13. To grant new trials, or affirm, modify, or reverse judgments in actions tried in such court, upon exceptions or case made, subject to an appeal to the Supreme Court; but in any action or proceeding pending in the County Court in which the county judge is, for any cause, incapable of acting, it shall be his duty to make a certificate of such fact, and file the same in the office of the clerk of such county court; and thereupon jurisdiction of such action or proceeding shall be vested in the Supreme Court, and such further proceedings shall be had therein, according to the practice of such court, as might have been had in the county court, if such cause or matter had remained therein; but all such matters shall be heard or tried, in the first instance, at a special term or circuit court held in the county where such action or proceeding is situated.

Subdivision 13, as above cited, was passed as it now stands on the amendment of 1860. The rest of the section, and the germ of the above subdivision, dates from 1852.

Prior to that year, many changes were made. In the original Code, the jurisdiction conferred was, in many particulars, less extensive. In 1849, considerable alterations and additions were made. In 1851, the section was remodelled, standing, as to the first eleven sections, precisely, and as to the twelfth and thirteenth sections, substantially as it does now, save only as regards the power of transfer into the Supreme Court in cases of incapacity. That power was added, but in permissive terms only, and with less detail, on the amendment of 1852, in which the present phraseology of subdivision 13 was fixed.

The above enumeration completes the consideration of the statutory powers directly conferred by the title of the Code above considered. By title V., section 33, subdivision 2, the following further source of jurisdiction is opened by a provision analogous to that last above referred to.

"And any action or proceeding pending in any Mayor's or Recorder's Court in which the judge is for any cause incapable of acting, may by such court be transferred to the county court of the county, and thereupon the papers therein on file in the Mayor's or Recorder's Court shall be transmitted to the county court, which shall thenceforth have jurisdiction of such action or proceeding."

By chapter 193 of the laws of 1849, p. 291, amending the Revised Statutes in relation to summary proceedings to recover the possession of land, an appeal is, by subdivision of section 5, given to the county court, in cases where those proceedings have been had before a justice of the peace, similar to the appeal which lies from the judgment of such officers in civil actions, except only that the decision of such county judge shall be an affirmance or reversal of such judgment, and shall be final.

Original jurisdiction in the same class of proceedings was also specially conferred on the judge of the county court by section 1 of the same measure, and by section 28, article II., title X., chapter VIII., part III., of the Revised Statutes thereby amended. 2 R. S., 512, § 28. But this special jurisdiction would seem now to be merged in the more general provisions of the present subdivision 13, of section 30, which attribute to this court the whole of the powers and jurisdiction conferred by statute on the late Courts of Common Pleas for the county, or on the county court, since those courts were abolished.

These courts have also original jurisdiction of actions for the enforcement of mechanics' liens for sums above $50, in all the counties of the state except New York and Erie. See chapter 402 of 1854, section 6, extended in its operation by chapter 204 of 1855, section 1.

In addition to the above, the following items of jurisdiction have also been conferred upon these courts by separate statutes.

As to the liberties of jails, by chapter 21 of 1851, page 22.

By chapter 90 of 1860, p. 151, section 4, 5, 6, they were also empowered to take cognizance of the proceedings thereby authorized in relation to

the sale of the estate of a married woman without her husband's consent. These sections are however wholly repealed by chapter 172 of 1862, p. 343, without any substitute being provided.

§ 31. (34.) The County Court is always open for the transaction of any business for which no notice is required to be given to an opposing party. At least two terms in each county for the trial of issues of law or fact, and as many more as the county judge shall appoint, shall be held in each year, at the places in the counties respectively designated by statute for holding county or circuit courts, on such days as the county judge shall, from time to time, appoint, and may continue as long as the court deem necessary.

Notice of such appointment shall be published in the state paper, at least four weeks before any such term, and also in a newspaper, if any, printed in the county; so many of such terms as the county judge shall designate for that purpose, in such notice, may be held for the trial of issues of law, and hearing and decision of motions and other proceedings at which no jury shall be required to attend.

The section, as it now stands, dates from 1851.

In 1849, the first sentence was omitted altogether, and the rest of the first clause was differently worded.

In 1848, the system of practice, now regulated by this and the next section, was provided for at greater length, and with greater detail, by sections 34 to 38 of that measure, both inclusive.

§ 32. Jurors for the county courts, and courts of sessions, shall be drawn from the jury-box of the county, and summoned in the same manner as for the trial of issues at a circuit court.

First introduced in 1849, in substitution for the provisions of 1848, above referred to.

It will be observed that, by section 24 of the Code, cited in the last chapter, these tribunals possess the same powers as the Supreme Court for adjourning their terms, when held, and making all necessary arrangements for that purpose.

As also noticed in that chapter, they possessed, from 1851 to 1858, cognizance of actions commenced before a justice, but discontinued, on the ground of the title to real estate being brought into question; but, since 1858, that branch of jurisdiction is restored to the Supreme Court.

Before passing on to the general consideration of the jurisdiction of these courts, it may be a convenience to the reader simply to refer to the provisions of the Revised Statutes, in reference to which the special powers of these courts, as above enumerated, are severally exercisable, though of course without entering into any discussion on those subjects.

The statutory directions respecting foreclosure, will be found at 2 R. S., 191–194, in connection with the jurisdiction of the late Court of Chancery. These special provisions are now, in great part, obsolete, being merged in the more recent and general amendments of the Code, but they are alluded to here, as being especially referred to in the case of *Arnold* vs. *Rees*, below commented upon.

The statute law as to partition, obtained by way of petition, and not

by ordinary suit, is contained in title III., chapter V., part III., of those statutes, 2 R. S., 316–333.

That as to the admeasurement of dower, will be found in title VII., of chapter VIII., of the same part, 2 R. S., 488–493.

That as to the sale or other disposition of the real estate of infants, and the specific performance of contracts by infant heirs, at 2 R. S., 194–197.

That as to the care of the person, and the disposition of the estate of persons of unsound mind, at 2 R. S., 52–56.

The general act for the incorporation of religious societies, is that of the 5th of April, 1813. Laws of 1813, ch. 60. Various amendments of that act have since taken place, and various local acts passed by the legislature, which will be found in vol. III. of the third edition of the Revised Statutes, and in the laws of the different years since that edition was published.

The provisions of the Revised Statutes as to the powers of the courts of common pleas over justices' judgments, will be found at 2 R. S., 245–249.

The statute law as to ferries, at 1 R. S., 526–528.

That as to fisheries, at 1 R. S., 687–690. See likewise, numerous local statutes.

As to turnpike roads, 1 R. S., 695–697.

As to wrecks, 1 R. S., 690–695.

As to physicians, 1 R. S., 452–456.

As to habitual drunkards, 2 R. S., 52–56.

That as to imprisoned, insolvent, absent, concealed, or non-resident debtors, at 2 R. S., 1 to 52, *i. e.*, in ch. V., of part II., title I., *passim.* See also act of April 26, 1831, following the provisions above referred to, in the more recent editions.

As to the liberties of jails, 2 R. S., 432–437.

As to the removal of occupants from state lands, 1 R. S., 206, § 52–55.

As to the laying out of railroads through Indian lands, Laws of 1836, ch. 316.

As to appeals from the determination of commissioners of highways, 1 R. S., 518–521, and subsequent amendments by ch. 180, of 1845.

The general jurisdiction of the late courts of common pleas, will be found laid down in title V., ch. I., part III., of the Revised Statutes, 2 R. S., 208–218. See also, sundry local and other statutes, accompanying those provisions in the more recent editions.

The provisions as to the collection and remission of fines and forfeited recognizances, are contained in art. II., title VI., ch. VIII., part III., of the Revised Statutes, 2 R. S., 483–488.

§ 18. *Jurisdiction generally considered.*

The limits of the original civil jurisdiction in ordinary actions, conferred or attempted to be conferred on these tribunals, by the amendment of 1851, as above noticed, have been the subject of considerable discussion, and the question seems still involved in some obscurity, owing to the diversity of opinion as to the precise limits and extent of the term "special cases" employed by the framers of the Constitution of 1846, in section 14 of article VI., above cited. The exercise of their appellate or other authority, in cases arising in justices' courts, is free from that difficulty.

In *Kundolf* vs. *Thalheimer*, 2 Kern., 593, the Court of Appeals decided, *nemine dissentiente*, that, in an action for assault and battery, these courts have no jurisdiction, and that section 30, so far as it professes to confer that jurisdiction, is unconstitutional; and the reasoning of the learned judges who came to that conclusion, is not based upon any peculiarity in the remedy, but embraces within its scope the whole class of common law actions of whatsoever nature. A *dictum* to the same effect will be found in *Griswold* vs. *Sheldon*, 4 Comst., 581. In the previous cases of *Dayharsh* vs. *Eno*, 1 Seld., 531; and *Frees* vs. *Ford*, 2 Seld., 176 (also incorrectly reported 1 C. R. (N. S.), 413); the point did not come up. In the former, it was not raised at all; in the latter, the court expressly declined passing upon it. The views to the contrary entertained in *Beecher* vs. *Allen*, 5 Barb., 169, are necessarily overruled by this decision. *Kundolf* vs. *Thalheimer*, is also supported, as to common law actions, by *Doubleday* vs. *Heath*, 16 N. Y., 80. *Vide* opinion of Denio, J., p. 82.

The principle laid down in the former decision is, however, strongly attacked by Comstock, J., in his opinion in *Arnold* vs. *Rees*, 18 N. Y., 57; 7 Abb., 328; 17 How., 35; and, at first sight, this case, which upholds the jurisdiction of these courts in an ordinary suit for foreclosure, would seem to be in conflict with the above. On a more close examination, however, the remark does not seem to hold good. The views of Judge Comstock are supported by Judges Rosevelt and Pratt only; Judges Johnson and Denio were for reversal, on the ground that foreclosure under our statutes is an exceptional and peculiar case, in which jurisdiction in the County Courts is to be upheld, for the same reasons are assigned in respect to partition in *Doubleday* vs. *Heath*, before referred to; Judge Selden expressed no opinion, whilst Judges Harris and Strong dissented, the former delivering an opinion sustaining the principle of interpretation in *Kundolf* vs. *Thalheimer*. See Report, p. 68.

Arnold vs. *Rees* decides, as above noticed, in favor of the jurisdiction of these courts, in a suit for foreclosure. This decision of necessity overrules that of *Hall* vs. *Nelson*, 23 Barb., 88; 14 How., 32, in which the contrary conclusion is come to, on the authority of *Kundolf* vs. *Thalheimer*.

The jurisdiction in these cases is also supported in *Benson* vs. *Cromwell*, 26 Barb., 218; 6 Abb., 83, in which that case is fully commented on, and a distinction drawn between ordinary actions at law and cases in equity, subdivision 4 of article XIV. of the Constitution being specially alluded to.

In *Doubleday* vs. *Heath*, 16 N. Y., 80, before alluded to, the jurisdiction of these courts is upheld in an action for the partition of land. In one point of view the report seems unsatisfactory. The opinion of Denio, J., proceeds throughout on the assumption that a proceeding for partition being commenced by petition, without suit, is of a summary and special character, for which reason it may be considered a "special case." He also assumes that by section 448 of the Code, the forms of the Revised Statutes are adopted, p. 82, when the section itself runs that the general provisions of those statutes shall apply to actions for partition brought under that act, "*so far as the same can be so applied to the substance and subject matter of the action, without regard to form.*"

He also says, in another place, alluding to the ancient writ out of chancery, *de participatione facienda*, "Suits for partition thus became regular actions, and if the practice of partitioning lands in this form had been continued in this state, and if the present action was of that character, I do not see how it could be considered a special case, within the constitutional provision," p. 83. By the statement of the case, p. 80, it appears that the proceedings were instituted, not by petition, but by summons and complaint, thus making it not a special proceeding, but a regular action under the Code; that the defendants appeared and answered, and that the questions as to the construction and validity of the will of the original testator raised by the pleadings were regularly litigated. The reasoning of the learned judge, in which all the others seem to have concurred, appears therefore in direct conflict with the decision pronounced, and in affirmance of the general principle laid down in *Kundolf* vs. *Thalheimer*.

In this point of view the case seems not to justify, but, on the contrary, to impugn the conclusion come to in *Arnold* vs. *Rees*, foreclosure having always been a proceeding in the nature of an ordinary suit in chancery, commenced and prosecuted as such, and not by virtue of any special statutory authority; such statutory directions as exist being merely applicable to some few of the details, and not to the essential

principles of that remedy. See also dissenting opinion of Harris, J., in *Arnold* vs. *Rees*, 18 N. Y., 72.

The result of the above cases would tend to show that the original jurisdiction of these courts, in actions at law, is denied by the court of last resort; and that even in suits in equity commenced and prosecuted in the ordinary manner, and not dependent in their essence on the powers conferred by any special statutory authority, that jurisdiction, though for the present partly supported, is still involved in doubt; and that the whole question of such original jurisdiction may not improbably be made the subject of deliberation by that tribunal on some future occasion, according to the principles laid down in *Curtis* vs. *Leavitt*, and *Leavitt* vs. *Blatchford*, and other cases referred to in a previous chapter. That this may be so, is in fact expressly assumed by Comstock, J., in his opinion in *Arnold* vs. *Rees*, recommending the judgment which was in fact entered. *Vide* 18 N. Y., 59–61. See also, as to the non-existence of general equitable jurisdiction in these courts in relation to the exercise of a power specially conferred, *Wheaton* vs. *Gates*, 18 N. Y., 395.

These courts, though exercising substantially the powers of the late courts of common pleas, are not, like them, courts of general, but of limited and statutory jurisdiction. All facts conferring that jurisdiction, must, therefore, of necessity, appear upon the record, or their judgments will not be sustained. *Frees* vs. *Ford*, 2 Seld., 176; 1 C. R. (N. S.), 413. This overrules the reasoning on that point in *Kundolf* vs. *Thalheimer*, 17 Barb., 506; reversed on another point, as above noticed, 2 Kern., 593. See also *Gormley* vs. *McIntosh*, 22 Barb., 271; and *The People* vs. *Soper*, 3 Seld., 428. See, likewise, *The People* vs. *Hulbert*, 5 How., 446; 1 C. R. (N. S.), 75; 9 L. O., 245. Nothing can be presumed in favor of the jurisdiction of an inferior court; but, on the contrary, nothing will be intended against it, unless actually shown. *Barnes* vs. *Harris*, 4 Comst., 374.

A judgment by these courts for an amount exceeding that limited by the statute which confers jurisdiction is void. *Griswold* vs. *Sheldon*, 4 Comst., 581 (585 per Bronson, J.), 1 C. R. (N. S.), 261.

In the case of an habitual drunkard, it has been held that the jurisdiction of these courts is, by the conjoint operation of subdivisions 8 and 11 of section 30, when read in connection with section 2, of title II., chapter V., part II., of the Revised Statutes, 2 R. S., 52, limited to cases where the property of such drunkard does not exceed $250, and that any proceeding involving a larger amount, will be void for want of jurisdiction. *In re Smith*, 16 How., 567.

The power of the county court in proceedings for the sale of the estate of a religious incorporation, is of a strictly limited nature, and

if, in such a proceeding, the judge goes on to authorize any application of the proceeds not strictly warranted by the statute, his order will be inoperative for want of jurisdiction. *Wheaton* vs. *Gates*, 18 N. Y., 395. He exercises the powers heretofore conferred by statute on the chancellor, as such, not those of the late court of chancery, which are now vested in the Supreme Court.

An action of trespass, arising in a justices' court, and transferred to the county court, on the ground of title to land being in question, was held by the court of appeals, to be a case arising in a justices' court, and that jurisdiction had therefore been acquired, the legislature being sufficiently empowered by the constitution to confer it in such cases, *Cook* vs. *Nellis*, 18 N. Y., 126. See, likewise, *The Clyde and Rose Plankroad Company* vs. *Baker*, 12 How., 371; and *Brown* vs. *Brown*, 2 Seld., 106.

In *Mosier* vs. *Hilton*, 15 Barb., 657, it was held, that a power given by special statute to a local county court, in relation to the acquisition of real estate, by a railroad company, was not affected by the general repeal in section 29, but was saved and is still subsisting, under subdivision 11, of section 30, and section 471; and *McAllister* vs. *Albion Plankroad Company*, 11 Barb., 610, maintains the same doctrine as generally applicable to proceedings authorized to be taken in the county court by any special statute, this decision being based on section 471 alone.

As regards the appellate jurisdiction of these tribunals, it is held in *The People* vs. *County Judge of Rensselaer*, 13 How., 398, to extend to the judgment of a justice in proceedings under the mechanics' lien law, as well as to one rendered in all ordinary actions.

It must be borne in mind that, with the exception of their appellate powers, and some few items of the peculiar statutory authority formerly vested in the Courts of Common Pleas, and now attributed to these tribunals, the Supreme Court exercises an equal, or rather a paramount jurisdiction over the same matters; and, in the event of any conflict with that jurisdiction, possesses the power in most instances of removing the controversy within its own cognizance, by means of *certiorari*, prohibition, or special order of removal, as prescribed in subdivision 1 of section 30.

With the details of the proceedings, in which these courts exercise original jurisdiction, the Supreme Court cannot interfere. So held, and order made by a justice of the Supreme Court in supplementary proceedings on a county court judgment, vacated in *Blake* vs. *Locy*, 6 How., 108.

The proceedings in these courts are, under section 470, governed by the rules of the Supreme Court from time to time, so far as the same may be applicable.

Their jurisdiction, as common law tribunals, in proceedings for the naturalization of aliens, is maintained in *The People* vs. *Pease*, 30 Barb., 588. (600.)

CHAPTER V.

OF THE COURTS OF CITIES.

§ 19. *Jurisdiction and Powers—Statutory Provisions.*

These Courts, all of statutory and comparatively recent origin, possessed, when first established, a jurisdiction analogous in most respects to that of the tribunals treated of in the last preceding chapter, but of a strictly local nature. Since that establishment, the powers of several of these tribunals have been greatly augmented by successive enactments. In those created in the cities of New York and Buffalo, this has been done to such an extent as to place their jurisdiction, once acquired, substantially on the same footing as that of the Supreme Court. This peculiarity increases the difficulty of treating the subject of the general jurisdiction of this class of courts in a general point of view. This difficulty is not diminished by the fact that some of the earlier statutes, and also the section of the Code which defines their jurisdiction, are partly of general and partly of special application.

In treating of the statutory provisions applicable to these courts, it is proposed to cite, first, the provisions of the constitution, which, with one exception, bear upon the question in a general point of view; secondly, the provisions of the Code itself, applicable to these tribunals in general, drawing attention to the distinctions between the New York courts and those of other cities, apparent on the face of those provisions; and thirdly, to cite those sections of the Code itself, and such other statutes or statutory provisions as bear upon any one or more of these courts, separately and independently considered.

(*a.*) Constitutional Provisions.

The constitution itself provides both prospectively and retrospectively upon the subject.

The prospective provisions are contained in subdivision 5 of section 14, and in section 21 of article VI., and run thus:

§ 14, subd. 5. Inferior local courts of civil and criminal jurisdiction,

may be established by the legislature in cities; and such courts, except for the cities of New York and Buffalo, shall have an uniform organization and jurisdiction in such cities.

§ 21. The legislature may authorize the judgments, decrees, and decisions of any local inferior court of record, of original civil jurisdiction, established in any city, to be removed for review directly into the Court of Appeals.

The retrospective clauses are contained in article XIV. In section 5, providing for the transfer to the Supreme Court of all suits and proceedings pending in any Court of Common Pleas, there is a special exception of that in the city and county of New York.

By section 12, it is thus provided:

All local courts established in any city or village, including the Superior Court, Common Pleas, Sessions and Surrogates' Courts of the city and county of New York, shall remain until otherwise directed by the legislature, with their present powers and jurisdiction. The judges, clerks, &c., to continue in office for their then terms, or until the legislature should otherwise direct.

(*b.*) PROVISIONS OF CODE OF GENERAL APPLICATION.

These provisions are contained in section 33, which runs as follows:

§ 33. (39.) The jurisdiction of the Superior Court of the City of New York, of the Court of Common Pleas for the City and County of New York, of the Mayors' Courts of cities, and of the Recorders' Courts of cities, shall extend to the following actions:

1. To the actions enumerated in section one hundred and twenty-three and one hundred and twenty-four, when the cause of action shall have arisen, or the subject of action shall be situated, within those cities respectively.

2. To all other actions where all the defendants shall reside, or are personally served with the summons, within those cities respectively, or where one or more of several defendants, jointly liable on contract, reside or are personally served with the summons, within those cities respectively, except in the case of Mayors' and Recorders' Courts of cities, which courts shall only have jurisdiction where all the defendants reside within the cities in which such courts are respectively situated. The Supreme Court may remove into that court any action brought under this subdivision, and pending in the Superior Court, or Court of Common Pleas for the city and county of New York, and may change the place of trial therein, as if such action had been commenced in the Supreme Cour; such order for removal and for change of place of trial to be made in the Supreme Court upon motion; and, on filing a certified copy of such order in the office of the clerk of the Superior Court, or of the Court of Common Pleas, such cause shall be deemed to be removed into the Supreme Court, which shall proceed therein as if the same had originally been commenced there; and the clerk with

whom such order is filed must forthwith deliver to the clerk of the county in which, by such order, the trial is ordered to be had, to be filed in his office, all process, pleadings, and proceedings relating to such cause. Any action or proceeding pending in any Mayor's or Recorder's court, in which the judge is for any cause incapable of acting, may by such court be transferred to the county court; and thereupon the papers on file in the Mayor's or Recorder's court shall be transmitted to the county court; which shall thenceforth have jurisdiction of such action or proceeding.

3. To actions against corporations, created under the laws of this state, and transacting their general business, or keeping an office for the transaction of business within those cities respectively, or established by law therein, or created by or under the laws of any other state, government, or country, for the recovery of any debt or damages, whether liquidated or not, arising upon contract, made, executed or delivered within the state, or upon any cause of action arising therein.

The actions enumerated in sections 123 and 124 are as follows:

In section 123:

1. For the recovery of real property or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property.

4. For the recovery of personal property distrained for any cause.

In section 124:

1. For the recovery of a penalty or forfeiture imposed by statute.

2. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do any thing touching the duties of such officer.

The above section (33) was established as it now stands upon the amendment of 1852.

In the original Code the jurisdiction was less extensive, and all were placed on the same footing as regards its acquisition by residence or service. Nor was any given in actions against foreign corporations. The power of transfer into the Supreme Court was also absent.

In 1849 that power was added to the section, and it was otherwise verbally amended and slightly extended in operation.

It remained in this form until the amendment in 1852.

(*c.*) Distinctions between New York and other Local Tribunals.

On a review of the above provisions, the distinction to be drawn between the New York tribunals, and the Mayors' and Recorders' Courts of other cities, is obvious.

So far as it is conferred by subdivisions 1 and 3, their jurisdiction is similar.

Under subdivision 2 there is a radical difference. The Mayors' and Recorders' Courts are only competent to act, where all the defendants are resident within the cities in which they are situated. Their jurisdiction, in the class of transitory actions, is, therefore, of a *quasi* local, and so far of an inferior nature. It cannot be acquired, as in the New York

courts, by the mere accident of service; residence, and that a residence of all the defendants, is a prerequisite to its acquisition. Another type of inferiority is this, *i. e.*, that the powers of the Supreme Court to transfer within its own jurisdiction, by writ of *habeas corpus* or *certiorari*, any cause or proceeding pending in an inferior court, are still applicable to the Mayors' and Recorders' Courts. The Superior Court and New York Common Pleas are both, as hereafter shown, exempted from this supervisory power, and the only authority the Supreme Court can now exercise, in relation to them, is that specially conferred by this subdivision. Over the other courts it remains, as before, a general power. It will be seen, also, that the power of removal into the county court, given by the last clause of the subdivision, is applicable to the Mayors' and Recorders' Courts only, and not to the New York tribunals.

A similar distinction exists with reference to the review of their decisions. The appeal from those of the Mayors' and Recorders' Courts lies to the Supreme Court (Code § 344); from the New York tribunals it lies directly to the Court of Appeals. Code § 11, 333.

(*d.*) Special Provisions of Code. New York Common Pleas.

Proceeding with the provisions of the Code, the next that occurs is:

§ 34. (40.) The Court of Common Pleas for the city and county of New York, shall also have power to review the judgments of the Marine Court of the city of New York, and of the justices' courts in that city.

In 1848, that power was attributed to the Superior Court. The present section dates from 1849.

In the year 1857, a singular inconsistency took place in the action of the legislature upon this subject.

By section 76, of chapter 344, of that session, vol. I., p. 727, consolidating the provisions relating to the district courts (*i. e.*, the justices' courts), in the city of New York, it was thus provided: "The provisions of the Code of Procedure to review judgments in these courts" (referring to the specific sections), "shall apply to said courts, except that such appeals shall be to the Superior Court of the city of New York."

This statute was passed on the 13th of April, 1857, and, by section 82, was to take effect immediately. From that date, therefore, the jurisdiction in question, so far as regards those specific courts, stood retransferred from the Common Pleas to the Superior Court.

This change was of short duration, as, by section 21, of chapter 723, of the Laws of the same year, vol. II., p. 560, amending section 352, of

the Code, passed only four days after, *i. e.*, on the 17th of April, 1857, it was again provided that when the judgment to be reviewed should have been rendered by a general term of the Marine Court of the city of New York, "or by a justice of the justices' court of that city, the appeal shall be to the Court of Common Pleas for the city of New York." Though there is a regrettable confusion in the wording of these provisions, owing to the change of nomenclature of the New York justices' courts, effected by section 1 of the former statute, being unnoticed in the latter, still, there is no doubt that the temporary change is annulled, and the jurisdiction restored to the Common Pleas, after an interregnum in the Superior Court of twenty-four days, chapter 723 not being provided to take effect immediately.

The subject of this temporary transfer of jurisdiction was brought up before the general term of the Superior Court, and, after consultation with the justices of the Common Pleas, it was decided that the jurisdiction of the Common Pleas was restored, and that the Superior Court abrogated, by the measure secondly above cited. *Hawkins* vs. *Mayor of New York*, 5 Abb., 344; *Day* vs. *Swackhammer*, 5 Abb., 345, note. See also, *The People* vs. *Willis*, 5 Abb., 205. The temporary doubt entertained *obiter* in *Davis* vs. *Hudson*, 5 Abb., 61, has been disregarded, and the practice so established, by consent of both the courts in question. See statement at end of report, in *Day* vs. *Swackhammer*, *supra*.

(*e.*) Special Provisions of Code. Common Pleas and Superior Court.

The Code, dealing with the two courts above mentioned, but not with the other city courts, proceeds as follows:—

§ 35. (41.) The Superior Court of the city of New York, and the Court of Common Pleas for the city and county of New York, shall, within twenty days, appoint general and special terms of those courts respectively, and prescribe the duration thereof; and they may, from time to time, respectively, alter such appointments; and hereafter no fees shall be paid for any service of a judge of either of those courts.

§ 36. (42.) A general term shall be held by at least two of the judges of those courts respectively, and a special term by a single judge.

§ 37. (43.) Judgments upon appeal shall be given at the general term; all others, at the special term.

This provision is somewhat modified by subsequent amendments in section 265, which authorize judgments to be pronounced at general term, on exceptions heard there in the first instance, or on verdict subject to the opinion of the court. See also, section 47.

§ 38. (44.) The concurrence of two judges shall be necessary to pronounce a judgment at the general term. If two do not concur, the appeal shall be reheard.

§ 39. A crier shall be appointed by the Superior Court of the city of New

York, and by the Court of Common Pleas for the city and county of New York, respectively, to hold his office during the pleasure of the court. He shall receive a salary to be fixed by the supervisors of the city and county of New York, and paid out of the county treasury.

This section dates from the amendment of 1849. By chapter 173 of the Laws of 1859, p. 421, the power of filling a vacancy in the office of a judge of either of these courts, until the commencement of the political year next succeeding the first subsequent annual election, is given to the governor.

Both courts are now equally entitled to the benefit of section 28 of the Code. *Vide* Laws of 1853, chapter 529, p. 992.

§ 40. The Superior Court of the city of New York shall, from the first day of May, one thousand eight hundred and forty-nine, consist of six justices.

This and the following sections, down to the end of the title, date from 1849. They were first enacted by chapter 124 of the laws of that year, p. 168, passed March 24th, 1849, and amended by chapter 337, p. 487, passed 10th April, one day before the Code, and both taking effect immediately. These statutes are almost identical with the provisions before cited from the Code itself, as amended in that year. The differences are merely verbal.

The next three sections of the Code, originally forming part of the statute first above referred to, are virtually obsolete. They provide as follows:

§ 41. For the election of three additional justices of this court at the annual charter election in April, 1849.

§ 42. For the taking of votes on that occasion.

§ 43. For the classification and terms of office of the three additional judges so elected.

The powers of the additional judges thus elected, were held to be co-extensive with those of the original justices of this court, by Oakley, J., in *Huff* vs. *Bennett*, 2 C. R., 139.

The Code then proceeds thus:

§ 44. After the expiration of the terms of office under such classification, the term of office of all the justices of the Superior Court of the city of New York shall be six years; and any vacancy occurring in the offices created by this title, shall be filled in the manner prescribed for filling vacancies in the office of the present justices.

Vide supra statute of 1859, in relation to the intermediate power of appointment given to the governor in the event of such a vacancy.

§ 45. The justices elected pursuant to this title, subject to the provisions contained in section forty-nine, shall have the same powers, and perform the same duties, in all respects, as the present justices of such Superior Court, and shall receive the same salaries, payable in like manner.

§ 46. A general term of the Superior Court may be held by any two of the six justices thereof, and a special term by any one of them; and general and special terms, one or more of them, may be held at the same time.

§ 47. All civil suits at issue at the time of the passage of this act, that from and after the first of May, 1849, shall be placed upon the calendar of the Supreme Court, at any general or special term thereof, to be held in the city of New York, and which shall be in readiness for hearing on questions of law only, or are equity cases, may, by an order of that court, or of the judge holding such special term, be transferred to said Superior Court of the city of New York, and to be heard at the general terms thereof.

In 1849, this section concluded with the words "hereinafter provided for," special provisions being made by section 49 for the hearing of this class of cases by the three additional justices elected in that year. By chapter 2 of the laws of 1851, p. 8, those words are stricken out and section 49 repealed. This class of cases are now nearly if not entirely run out, and when heard at general term, are cognizable by any judges of the court holding that branch of it.

This section only applies to suits in equity, in which issue was joined before the passing of the Code. An action commenced under the Code was held not to be so transferable. *Giles* vs. *Lyon*, 4 Comst., 600; 1 C. R. (N. S.), 257. But when an issue had been so joined originally in the late Court of Chancery, the case was held to be properly transferred. *Palmer* vs. *Lawrence*, 1 Seld., 389.

§ 48. The said Superior Court shall have jurisdiction of every suit so transferred to it, and may exercise the same powers in respect to every such suit, and any proceedings therein, as the Supreme Court might have exercised, if the suit had remained in that court.

Section 49, specially providing for the hearing of this class of cases, has been since repealed, as above stated.

§ 50. Appeals from the judgments of the Superior Court in such suits, may be taken to the Court of Appeals, in the same manner as from the judgments of the Superior Court, in actions originally commenced therein.

§ 51. The provisions of section twenty-eight of this act, shall apply to the said Superior Court.

These provisions, above cited in chapter III., entitle this court to rooms, attendants, fuel, lights, and stationery at the charge of the county. The same privileges are extended to the Court of Common Pleas by chapter 529 of the Laws of 1853, p., 992.

Provisions of other Statutes, applicable to different Courts, as under.

(*f.*) To Superior Court and Court of Common Pleas.

The provisions of section 21 of article VI. of the constitution, before cited, authorizing the decisions of any local inferior court of original civil jurisdiction, established in a city, to be removed for review directly into the court of appeals, were carried out as to these tribunals, by section 3 of the amended judiciary act, chapter 470 of the Laws of 1847, which provides that writs of error thereafter issued to those two tribunals, shall be issued from the court of appeals, instead of the Supreme Court, there-

tofore the appellate authority. This change, which in effect elevates these two courts to an equality with the Supreme Court, in proceedings in which jurisdiction is once acquired, is continued by the Code, which provides for a similar review by way of appeal, sections 11, 333. The Superior Court of Buffalo is, as below noticed, the only other local tribunal which stands in the same category.

Both are specially exempted from any revisory jurisdiction of the Supreme Court, by way of writ of *habeas corpus* or *certiorari:* the Superior Court, by section 15 of chapter 137 of the Laws of 1828—the Common Pleas, by chapter 32 of the Laws of 1844—extending and applying to it the section last cited.

In the same section will be found the germ of the provision for removal in certain cases, in subdivision 2, section 33. It runs in these words: "but the Supreme Court shall have authority to make an order to remove into the said Supreme Court, any transitory action pending in the said Superior Court, in which the trial ought to be had elsewhere than in the city of New York."

By the 16th and 17th sections, provisions are made defining the practice in the Supreme Court, on a motion for that purpose; and, by section 18, power is given to any judge of the latter tribunal, or any officer authorized to perform the duties of a judge of the Supreme Court at chambers, to stay proceedings, pending an application for such an order.

By sections 4 to 7, inclusive, of chapter 186 of the Laws of 1830, similar powers are given to the Supreme Court, in relation to actions pending in the New York Common Pleas.

By sections 3 and 4 of chapter 276, of Laws of 1840, powers are given to both these tribunals to compel a witness to make a deposition for the purposes of any pending motion or proceeding.

By chapter 255 of the Laws of 1847, provisions are made for the election of the justices of the Superior Court and the judges of the Court of Common Pleas. These provisions affected both tribunals in common. The judicial officers, in both, when elected, were to be classified so that one of them should go out of office every two years—their terms of office beginning on the first of January, 1848. After the expiration of the terms, under such classification, the term of office of such judges or justices to be, for the future, six years—sections 3 and 4. This, it will be seen, is substantially the same arrangement as that contained in the Code, with reference to the additional justices of the Superior Court.

By section 5 provision is made for the filling of vacancies by election, and, by section 7, the then powers of the judges of both courts are attributed to those to be so elected. By section 6 the justices of the Superior Court are to select one of their number to be chief-justice, and the judges of the Common Pleas one of theirs to be first judge; and

in default of selection, the justice or judge elected for a full term, and having the shortest time to serve, to be such chief-justice or first judge. The salaries of the officers in question are provided for by section 8, provision being made by section 10, as to their former fees. By section 9 the previously-existing offices of justice of the Superior Court, and chief-judge and associate judge of the Common Pleas, are abolished, and the newly-appointed officers substituted, as from the 1st of January, 1848.

By section 49 of the amended judiciary act, chapter 470 of 1847, the following special disqualification is imposed upon the officers in question:

§ 49. No judge of the Superior Court of the city and county of New York, and no judge of the Court of the Common Pleas for the said city and county, shall practise or act as an attorney, solicitor, or counsellor in any court.

In addition to this such officers are, of course, subject to the general disqualifications before noticed in chapter III., under the head of the Supreme Court.

By chapter 379 of 1860, p. 645, exclusive jurisdiction of actions and special proceedings, in which the Mayor and Corporation of New York is a party defendant, is given to these two tribunals and to the Supreme Court.

(*g.*) To the Superior Court alone.

This Court was first created and its jurisdiction defined by chapter 137 of the Laws of 1828. Its original cognizance was that of a court of law, and it was so styled in the title of that act. It consisted of a chief-justice and two associate justices, appointed by the governor, holding office for terms of five years. It was empowered by section 5 to hear, try, and determine, according to law, all local actions arising within the city and county of New York; and all transitory actions, although the same may not have arisen therein. Provisions were added giving it the full powers and machinery of a Court of Record, to follow generally the forms of the Court of Common Pleas, subject to alterations by such rules of practice as the justices might, from time to time, establish. The process of the court, with the single exception of its subpœnas, ran only within the city and county of New York, and not into any other county in the state—sections 13, 14. Sections 15 to 18 contain the provisions above noticed, in relation to the removal of actions into the Supreme Court. Under section 19, all writs of error upon judgments of this tribunal, were made returnable before the Supreme Court. Under section 22 its judgments, when docketed, became liens upon real estate within the county. By section 23 full powers, the

same as those of the justices of the Supreme Court out of term, were given to the justices of this tribunal out of court. By section 24 it was invested with appellate jurisdiction, in lieu of that previously existing in the Supreme Court, over the Marine and Justices' Courts, to be exercised by writ of *certiorari*. Under section 27 power was given to the Supreme Court, by consent of the parties, to transfer New York causes to this tribunal.

Sundry formal amendments were made in this statute by chapter 24 of 1830 and chapter 170 of 1834. The additional powers conferred by sections 3 and 4 of the latter, for obtaining depositions to be used on a motion, have been before noticed.

By sections 3, 4, and 5, of chapter 461 of 1837, the appellate jurisdiction of this court, by writ of *certiorari*, as above, is more fully defined and provided for.

By section 33, article II., title II., chapter III., part III., of the Revised Statutes, 2 R. S., 281, the judges of this court are, as noticed in a previous chapter, invested with the full powers of Supreme Court commissioners, except only that they cannot stay proceedings in that tribunal.

(*h.*) To the New York Common Pleas alone.

The original jurisdiction of this tribunal is stated in title V., chapter I., part III., of the Revised Statutes. Section 1 of that title (2 R. S., 208) provides generally for the continuance of a Court of Common Pleas in each county, to possess the powers and exercise the jurisdiction of the courts of Common Pleas of the former colony, with the additions, limitations, and exceptions created and imposed by the constitution and laws of the state: every such court to have powers: 1. To hear, try, and determine, according to law, all local actions arising within the county, for which such court shall be held; and all transitory actions, although the same may not have arisen within such county. 2. To grant new trials. 3. To hear and determine appeals from justices' courts, in the cases and in the manner prescribed by law. 4. To exercise the power and jurisdiction conferred by law over the persons and estates of habitual drunkards; and 5. To exercise such other powers and duties as may be conferred and imposed by the laws of this state.

General directions are then given in relation to the practice in these courts. By section 22 (2 R. S., 215), the first judge of the County Courts of the city and county of New York, and the mayor, recorder, and aldermen of that city were appointed judges; and, by section 24, the clerk of the city and county of New York was to be *ex officio* clerk of the Court of Common Pleas for the city and county of New York. The remaining section of the title in question, applicable to this court, con-

tained sundry regulations as to its practice generally, and also, as a court of general sessions.

By chapter 88 of 1843, a special clerk was appointed for this court; and section 14, above noticed, was repealed. All judgments docketed by such clerk, were, under section 3 of this statute, to be a lien on real estate in the city and county, the same as if docketed by the county clerk; but, by section 6 of chapter 104 of 1844, this power was taken away, and a docketing with the county clerk made an essential prerequisite to the acquisition of such lien.

By chapter 186 of 1830, sundry regulations of practice were established; and, as before noticed, power was given to the Supreme Court to remove into its own cognizance, transitory actions, in which it was proper that the venue should be changed.

By chapter 32 of 1844, this court was, as also before noticed, placed on the same footing as the Superior Court, by abolition of the supervisory power of the Supreme Court, by writ of *certiorari*.

By chapter 94 of 1834, one associate judge; and, by chapter 116 of 1839, an additional associate judge was appointed, and invested with the same powers as the first judge, thus making up the court as at present constituted.

Consequent, upon the constitution of 1846, the organization of this court and of the Superior Court was remodelled, and its jurisdiction was subsequently defined by the Code, as above noticed. In 1854, the following further addition was made to that jurisdiction, by section 6 of chapter 198 of the laws of that year, p. 464.

§ 6. The said Court of Common Pleas for the city and county of New York has power and jurisdiction of the following proceedings:

"To remit fines and forfeited recognizances in the same cases and in like manner as such power was heretofore given by law to courts of Common Pleas, and to correct and discharge the dockets of liens and of judgments entered upon recognizances, and to exercise in the city of New York all the powers and jurisdiction now or hereafter conferred upon or vested in the said court, or the County Courts in their counties, and the powers and jurisdiction which were vested in the Court of Common Pleas for the city and county of New York before the enactment of the act designated as the Code of Procedure, passed April 12th, 1848."

It will be seen that under the above section this court now possesses, in addition to the jurisdiction conferred by section 33 as above cited, the whole of the jurisdiction possessed by the other county courts, as conferred by section 30. It is, therefore, peculiarly the County Court for the city and county of New York.

By the same statute, chapter 198, of 1854, a special clerk of this court is appointed, and provisions are made for the delivery to him, by

the county clerk, of the property, books, and papers appertaining to the court. This arrangement is that now subsisting.

By section 4 of chapter 513, of 1851, p. 954, original jurisdiction is conferred upon this court, of proceedings under the mechanics' lien law, such jurisdiction being exclusive, in cases where the claim exceeds $100, and concurrent with the justices' and marine courts in cases under that amount. And, by chapter 404 of the Laws of 1855, p. 760, any application for payment out of any surplus moneys arising from the sale of property foreclosed under a lien of this nature, is cognizable by this court, and this court only.

By chapter 344 of 1857, section 3, subdivision 3, power is given to any defendant in an action brought in the New York district courts, where the claim or demand shall exceed $100, to remove such cause as of right into this tribunal, on executing an undertaking for the amount of any judgment to be recovered against him.

But this transfer does not deprive the cause of its original character, so far as an ultimate review is concerned. Leave must still be obtained to carry up the case to the Court of Appeals, the same as in cases decided in a district or in the Marine Court in the first instance. *Smith* vs. *White*, 23 N. Y., 572.

(*i.*) Superior Court of Buffalo.

This court bears in its jurisdiction and powers a close analogy to those in New York. This assimilation is foreshadowed in subdivision 5 of section 14, article VI. of the constitution before cited, excepting the cities of New York and Buffalo from the provision that inferior local courts in cities shall have an uniform organization and jurisdiction.

In its origin this court was the Recorder's Court of the city of Buffalo. It was first established by chapter 210 of 1839; amended by chapter 109 of 1842. Its original jurisdiction extended to local actions arising in that city, and not elsewhere, with exclusive jurisdiction of appeals from, and the review by *certiorari* of judgments rendered by, any justice of the peace in such city. It had also concurrent jurisdiction with the county court of Erie county of transitory actions, and the general powers and authorities of a county court, and its judgments, when docketed, were a lien on real estate in the county. By chapter 362 of 1848, power was given to this court to review its decisions and grant new trials, and the mayor of the city was authorized to act in the absence or during a vacancy in the office of recorder.

By chapter 138 of 1850, p. 208, the powers of the Recorder's Court were largely increased, and were made equivalent to those possessed by the county and New York tribunals at that time. They are substantially the same, with but little variation, as those conferred by the statute

next cited, and therefore, as they are lengthy, it seems unnecessary to cite them twice over.

By chapter 96 of the laws of 1854, p. 222, the last named statute was amended, and the present tribunal substituted for the Recorder's Court. By chapter 361 of the laws of 1857, Vol., I. p. 753, sundry sections of this act are again amended. In citing them the amended versions will be given, drawing attention to the alterations made, as heretofore done in relation to the different sections of the Code.

The substitution above noticed is effected by section 1. The statute as amended runs as follows:

§ 1. The Court known as the Recorder's Court of the city of Buffalo, is hereby continued with the additional jurisdiction conferred by this act. It shall be composed of three justices, and shall be known as the Superior Court of Buffalo. It shall be a Court of Record, and its jurisdiction shall in all cases be presumed. But nothing in this act shall affect its jurisdiction of actions or proceedings now pending therein; nor does it affect any judgment or order already made, nor any proceeding already taken.

Sections 2 to 7, provide for the organization of the court thus constituted. The then Recorder of Buffalo was to be one of the justices till the expiration of his term. The office is made elective, and the term of office is eight years. The two other justices were to be elected in April, 1854, and to be classified, the justice drawing the shortest term to serve till the 31st of December, 1861; the other till the 31st of December, 1863; their terms of office to commence from the 1st of May then next. The duration of this last term seems to conflict with the previous provision fixing the term of office at eight years.

By sections 9 to 14 inclusive, the jurisdiction and powers of this tribunal are defined as follows:

§ 9. The said court shall have jurisdiction of the following actions and proceedings, where the cause of action arises, or the subject thereof is situate in the city of Buffalo.

1. For the recovery of real property, or of any estate or interest therein, or for the determination, in any form, of any such right or interest, or claim thereto, and for injuries to real property and chattels real.

2. For the partition of real property.

3. For the foreclosure of mortgages of real property, and chattels real.

4. For the admeasurement of dower.

5. For the sale, mortgage, or other disposition of real property of an infant, habitual drunkard, lunatic, idiot, and persons of unsound mind.

6. To compel a specific performance by an infant heir, or other person, of a contract, respecting real property and chattels real.

7. For the mortgage or sale, by a religious corporation, of its real property, and the application of the proceeds thereof.

8. For the recovery of a penalty or forfeiture.

9. For the recovery of personal property distrained for any cause.

10. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of, or under color of his office; or against a person who, by his command or in his aid, does any thing touching the duties of the office.

§ 10. The said court shall have jurisdiction, also, in all other civil actions, whether the cause of action arise or the subject of the action be situate in the city of Buffalo or not.

1. In an action arising on contract, when the defendant, or when one or more of several defendants reside, or are personally served with the summons, or occupy a tenement for the transaction of his or her ordinary business in that city, or when the contract was made in that city.

2. In an action for any other cause, when the defendant or defendants proceeded against reside in that city, or occupy a tenement therein for the transaction of their ordinary business, or are personally served with summons in that city.

3. In an action arising on contract, or against common carriers, upon the custom or duty, when all the defendants reside out of the state, but one or more of them has property in the city.

4. When the defendant is a corporation, created under the laws of this state, and transacts its general business, or keeps an office, or has an agency established for the transaction of business in that city, or is established therein by law.

5. When the defendant is a corporation, created by or under the laws of another state, government, or country, and has property in said city, or an agency established therein.

6. When the action or proceeding is against the city of Buffalo or its officers.

§ 11. The said court shall also have the care and custody of all idiots, lunatics, persons of unsound mind, and habitual drunkards, residing in said city of Buffalo, and of their real and personal estate.

§ 12. The said court shall, within said city, have concurrent jurisdiction with the Supreme Court, of writs of prohibition, of *mandamus*, of *habeas corpus*, of *certiorari*, of *ad quod damnum*, of *ne exeat*, and of all other common-law and statutory writs; of the remedies heretofore obtained by any writ now abolished, which may now be obtained by civil action, and of all special proceedings whatsoever; and shall have power to hear, adjudge, and determine the same.

The said court shall also have exclusive jurisdiction in every case in which the title to real estate shall come in question, in an action commenced in a justices' court in said city, where such action shall be discontinued and another action shall be commenced for the same cause, as provided by sections 55, 56, 57, 58, 59, 60, 61, and 62 of the Code of Procedure; in every case the condition of the undertaking required by the said fifty-sixth section shall

be, that the defendant shall give an admission in writing of the service of a summons and complaint in the said Superior Court, if the plaintiff shall deposit such summons and complaint with the justice, as provided in said section; all the provisions of the said sections applicable to County Courts shall, in such actions, apply to the said Superior Court.

N. B. The first clause of the above section was inserted on the amendment of this statute in 1857. The second clause constituted the section as it stood in 1854.

§ 13. In all cases where, by the provisions of this act, the jurisdiction of the said court is not made to depend upon the personal service of the summons in the said city, the summons may be served in the same place and in the same manner as it could be, if the action or proceeding were pending in the Supreme Court of this state.

§ 14. Writs of subpœna, attachments for contempts, precepts for the collection of interlocutory costs, and all writs and process awarded by said court, or any judge thereof, may be issued to and executed in any county of the state; and the said court shall have the same powers as the Supreme Court to enforce all its process, orders, and judgments, and to grant new trials and rehearings.

This section as it stands dates from 1857. In 1854, the first clause of the section was confined to writs of subpœna only, and the words, "and rehearings," were omitted from the second.

By sections 15 to 18, powers are given for the removal into the Supreme Court of transitory actions, for the purpose of changing the venue into another county, and also of any action by consent of the parties, analogous to those previously noticed under the heads of the New York Superior Court and Common Pleas.

By section 19, exclusive jurisdiction is given to the Court of Appeals to review the judgments of this court, and provision is made for appeals from the special to the general terms of the court itself, in all cases where a similar appeal could be taken in the Supreme Court, in an action or proceeding therein.

The former appeal, as in that tribunal, lies only from the decision of the general term, and the Court of Appeals will not review a final judgment rendered by the special term only, though consequent on a previous decision on a demurrer reviewed by the full bench of the court. *Hollister Bank of Buffalo* vs. *Vail*, 15 N. Y., 593.

The above section was amended in its phraseology in 1857. Its purview was the same in 1854.

By section 20, this court is constituted as the final appellate tribunal for review of judgments rendered by a justice of the peace of the city of Buffalo, instead of the Supreme Court. See *Burgart* vs. *Stork*, 12 How., 559; see also, Code, § 352, amendment of 1862. But this clause

does not extend to judgments in cases arising in justices' courts in the county of Erie, out of the city.

By section 21, the judgments of this court, when docketed in any county of this state, become liens, and are enforceable against the property or person of the judgment debtor, precisely as judgments of the Supreme Court. The remedy here given against the person, dates from the amendment of 1857; the other portions of the section, from 1854.

Section 22 provides for the holding and adjournment of general and special terms. The former, under section 23, may be held by two justices, and all issues at law are to be tried thereat. The concurrence of two justices shall be necessary to pronounce a judgment at a general term, and if two do not concur, the cause shall be reheard. The special terms are to be held by a single justice, at which issues of fact are to be tried.

By sections 24 and 25, provisions are made for the continual transaction of chamber business by one of the justices; and to each of such justices there are given the powers of the former recorder of Buffalo, and also, all the powers possessed by a justice of the Supreme Court out of court, or at chambers. Full provisions are also made for the hearing or continuance, before any of the justices, of any notice or proceeding noticed or commenced before another.

N. B.—These sections, as they stand, date from the amendment of 1857. The amendment of section 24 is merely formal; that of section 25 radical and substantial. In 1854, it merely gave to each of the justices the powers of a county judge in Supreme Court proceedings.

By section 26, all the provisions of the Code, except title IV., of part II., applicable to the Supreme Court, and not in conflict with the provisions of that act, are made applicable to the court in question.

N. B.—The title referred to, is that which relates to the fixing and change of venue.

Under section 27, the practice of this tribunal is to be that of the Supreme Court, subject always to such changes not inconsistent with any statute, as may be made therein, by rules of the court in question.

The section goes on to provide for the recovery of the ordinary double costs by public officers, or persons acting under them, on succeeding in any action.

The 29th and 30th sections, both amended in 1857, provide for the summoning and empannelling of jurors, and the furnishing suitable places for transaction of the business of the court.

Sections 31 to 36, inclusive, relate to its criminal jurisdiction.

By section 37, all the provisions of law relating to the late Recorder's Court, not inconsistent with that act, are made applicable to the Superior Court.

The act of 1854 took effect from the 1st of May, 1854; the amendments of 1857 immediately, *i. e.*, the 10th of April, 1857.

By the latter statute, the following section, before noticed in chapter III., was added to the original act:

§ 39. If any action or proceeding is pending in said court before the general term, and two of the justices of said court, from any cause, shall be disqualified to hear or decide the same, the court shall, by order, transfer the same to the Supreme Court, which last court shall, upon a certified copy of such order being filed with its clerk, become fully possessed of such action or proceeding.

It will be observed, that the jurisdiction thus conferred upon this court is of the very highest nature, consistent with its peculiar attributes as a local tribunal. In all essential respects it is equivalent to that of the Superior Court and Court of Common Pleas of the city and county of New York. In some, its attributes are even superior and its cognizance of wider scope. See section 12, first clause, and compare section 10 and its different subdivisions with section 33 of the Code. See likewise the power to make rules changing the practice of the Supreme Court, which seems virtually to exempt this tribunal from the liability to be governed by the Supreme Court rules from time to time, imposed upon the similar jurisdictions in New York by section 470 of the Code.

In the *International Bank* vs. *Bradley*, 19 N. Y., 245, the following points are decided in favor of the jurisdiction of this court:

That the mode of its organization, as above stated, is constitutional;

And that, in support of its jurisdiction, it is to be presumed, after judgment, that a non-resident indorser of a note dated at Buffalo, made his indorsement within that city.

(*j.*) Mayors' and Recorders' Courts.

The following special disqualification, in addition to those before noticed in chapter III., is, by section 50 of the amended judiciary act, chapter 470 of 1847, imposed upon persons filling the office of recorder:

§ 50. No recorder shall practise as an attorney, solicitor, or counsellor, in any court of which he shall be, or shall be entitled to act as a member, or in any cause or proceeding originating in any such court; nor shall any partner of, or person connected in law business with any recorder, practise as an attorney, solicitor, or counsellor in any court of which such recorder shall be, or shall be entitled to act as a member, or in any cause or proceeding originating in any such court.

The three courts first below mentioned were organized prior to the revision of the statutes in 1828. The others are of subsequent institution, as below referred to.

(*k.*) MAYOR'S COURT OF ALBANY.

The original powers of this tribunal were to hear, try, and determine according to law, all local actions arising within the city of Albany, and also all transitory actions, although the same might not have arisen therein. It was to be held by the mayor, recorder, and aldermen of the city of Albany, or the mayor and recorder jointly, or each of them singly, with or without the presence of any of the aldermen. But any alderman might sit as a judge, and in case of the absence of the mayor and recorder, or of their offices being vacant, any three aldermen were empowered to hold a court. In its records the words "judges of the said court," were to be a sufficient description.

By chapter 328 of 1830, it was made the special duty of the recorder to preside in and hold the court. Under chapter 275 of 1842, section 14, no judge of the court, other than the recorder, is competent to make orders in vacation, unless in case of his absence, death, or inability.

By chapter 86 of 1842, it was further provided that no action shall be removed from this court on account of the amount of debt or damages claimed therein. Chapter 24 of 1848 also relates to it, but does not interfere with or alter its jurisdiction. Under chapter 386 of 1840, its judgments were directed to be docketed with the clerk of the court before they became a lien.

(*l.*) MAYOR'S COURT OF HUDSON.

The original organization of this court, so far as regards the judges who constitute it, and their powers, was, in all respects, similar to that of the Mayor's Court of Albany. Its original jurisdiction was to hear, try, and determine, according to law, all actions, real, personal, and mixed, arising within that city and not elsewhere. By chapter 101 of 1829, that jurisdiction was extended to all causes of action wherever arising, but limited, as to appeals, to those from the judgment of a justice in that city. By chapter 189 of 1844, it was empowered to try all local actions arising within the city of Hudson, and all transitory actions, although the same may not have arisen therein; and, by the same statute, its judgments, when docketed, were enforceable by *fieri facias* in any county of the state. Before that, they were governed by chapter 386 of 1840 above noticed.

By chapter 320 of 1848, the powers and duties of a justice of the Supreme Court at chambers, are conferred upon the recorder of this city.

(*m.*) MAYOR'S COURT OF TROY.

The organization of this court was similar, in all respects, to that of the two last noticed, and its judgments stood upon the same footing as those of the Mayor's Court of Albany above noticed. Its jurisdiction

similarly extended to all local actions arising within the city of Troy; and, also, all transitory actions, although the same may not have arisen therein. By chapter 86 of 1848 criminal jurisdiction was conferred upon it. By section 9 it was provided that no personal action, pending in it, shall be removed therefrom, by writ of *certiorari*, unless the debt or damages claimed, or the matter or thing demanded, shall exceed the sum of $500; and, also, that its judgments may be docketed in any county in the same manner, and with the like effect as judgments of the Supreme Court.

By section 11 the powers of a Supreme Court commissioner are conferred on the recorder. As before noticed, the constitutionality of this provision has been doubted; but it is finally recognized by *Hayner* vs. *James*, 17 N. Y., 316, overruling *Griffin* vs. *Griffith*, 6 How., 428.

(*n.*) Mayor's Court of Rochester.

This tribunal, established by chapter 145 of the Laws of 1844, as a court of record, and possessing an organization similar, and a jurisdiction analogous to that of the three tribunals last above noticed, has since been abolished, and its jurisdiction transferred to the Supreme Court, by chapter 303 of the Laws of 1849.

(*o.*) Recorder's Court of Utica.

This court was first established by chapter 319 of 1844. It is to be held by the recorder of that city, to be called "The Recorder's Court of the City of Utica," and to be a court of record. Its powers were, first, to hear, try, and determine, according to law, all local actions arising in said city, and not elsewhere. It possessed concurrent jurisdiction with the County Court of Oneida county, in appeals from and writs of *certiorari* on judgments rendered by any justice of the peace in said city, and also in transitory actions where the defendant resided there. Its general authority and its practice were to be the same as that of the County Courts, and its judgments, when docketed, were to be similarly enforceable.

By chapter 291 of the Laws of 1845, section 3, the full powers of a court of Common Pleas in relation to special proceedings, wherein the subject-matter of such proceedings should arise or be within the said city, were conferred upon it, concurrently with the County Court of Oneida, such proceedings and its decisions to be subject to appeal and removal by writ of *certiorari*, as in a county court.

It was also provided, by the same section, that the power and duties of the recorder, at chambers, in respect to suits and proceedings cognizable before such court, should be the same as those of a first judge of the County Courts.

Chapter 95 of the Laws of 1846, and 320 of 1844, relating to this court, do not affect its civil jurisdiction and powers, as above noticed.

(*p.*) CITY COURTS ORGANIZED SINCE THE CONSTITUTION OF 1846.

The two tribunals below noticed both lie within this category. Both seem to fall directly within the letter of subdivision 5, section 14, article VI. of that constitution, providing that any inferior courts of civil and criminal jurisdiction, established by the legislature in cities, shall, except for the cities of New York and Buffalo, "have an uniform organization and jurisdiction in such cities."

It will be seen by the analysis below given, that in the organization of the tribunals now in question, this provision has been entirely disregarded. The question does not seem, however, to have been raised, down to the present time.

(*q.*) RECORDER'S COURT OF OSWEGO.

This court is established by chapter 374 of the Laws of 1848. Its style is "The Recorder's Court of the City of Oswego," and it is to be held by the recorder of that city, or, in case of his absence or inability to serve, by the mayor and any two aldermen. By section 2, its jurisdiction is defined as being that conferred on the Mayors' and Recorders' courts by the Code of that year, passed the same day. Its process is under section 16, to be directed to the sheriff of Oswego county, and to have the same effect as the process of County Courts; and its judgments, under section 19, are, when docketed, similarly enforceable in any county.

By section 20, the powers and duties of the recorder at chambers, are the same as those of a judge of the County Court, in County Court proceedings, at chambers; and by section 21, the powers of a judge of the late Courts of Common Pleas at chambers, or out of court, or of a Supreme Court commissioner, are conferred upon him.

By chapter 134 of 1849, p. 186, all the provisions of the Code of 1848, applicable to the Recorders' Courts then named in that section—*i. e.*, Buffalo and Utica—are made applicable to proceedings in this court. The rest of the amendments made by that statute relate to its criminal jurisdiction.

Further amendments are made in relation to that branch of jurisdiction, by chapter 96 of 1857, vol. I., p. 202. By section 4, the recorder is invested with the powers of a county judge or justice of the Supreme Court in supplementary proceedings in Oswego county, whether the action be in his own or any other court.

(r.) City Court of Brooklyn.

The organization of this court is effected by chapter 125 of the Laws of 1849, p. 170, subsequently amended by chapter 102 of 1850, p. 148. The amended sections will be cited, noticing the changes made, according to the plan before pursued.

Section 1 provides for the election of a city judge, to hold office for 6 years. By section 2, the said judge alone, or, in case of his absence, inability to act, or vacancy in said office, the mayor and any two aldermen of that city are authorized to hold a court of civil jurisdiction, to be called "The City Court of Brooklyn," to be a court of record, and its jurisdiction to extend to the following actions:

1. To the actions enumerated in section 103 of the Code of Procedure, when the cause of action shall have arisen, or the subject of the action shall be situated within the said city.

N. B.—This refers to the Code of 1848, not that of 1849, though passed the same day. *Vide Griswold* vs. *The Atlantic Dock Company*, 21 Barb., 225. Section 103 of that measure comprised sections 123 and 124 of the present. The provisions of those sections have been before cited, in relation to the Superior Court and Court of Common Pleas of New York, the jurisdiction of which is analogous in this respect. It may be shortly defined as embracing the whole class of strictly local actions.

2. To all other actions where all the defendants shall reside, or be personally served with the summons within said city.

3. To actions against corporations created under the laws of this state, and transacting their general business within said city, or established by law therein.

Section 3 provides for the holding of monthly terms. By section 4 this court is invested with the same powers as the Supreme Court in relation to actions within its jurisdiction. Its practice is to be the same, as far as practicable, and it has power to review all of its decisions and to grant new trials.

Under section 5 its judgments are placed on the same footing as judgments in the Supreme Court, and it possesses the same powers as that tribunal, over the dockets of these judgments and over its process.

Under section 6, an appeal lies from its judgments, and from any intermediate order, involving the merits and necessarily affecting the judgment, to the Supreme Court at general term; such appeal to be governed by the provisions of law relative to appeals from an inferior jurisdiction.

This is an amended section. In 1849 this appeal was governed by the provisions of law relative to appeals to the Court of Appeals. In *Gou-*

lard vs. *Castillon*, 12 Barb., 126, it was held that the appeal granted as above, does not lie from a judgment entered in this court on the report of a referee, until after the court, on special application, has first refused to correct any error committed. A further appeal now lies to the Court of Appeals under the Code, but, prior to 1851, the general term of the Supreme Court was the ultimate tribunal.

Sections 7 to 10 inclusive, all amended in 1851, provide for matters of detail not affecting the jurisdiction.

Sections 11 and 12 relate to its criminal powers. By section 13 its terms are regulated, those in May, July, September, November, January, and March in each year being devoted to civil, the others to criminal business.

By section 22, the costs recoverable in this, are the same as those allowed in the Supreme Court.

Under section 24, the city judge has, in suits pending in this court, the same powers at chambers as a justice of the Supreme Court. He may also exercise, within the county of Kings, all the powers of a justice of the Supreme Court at chambers, and possesses generally the powers of a county judge at chambers, or of a Supreme Court commissioner. His powers as a justice of the Supreme Court at chambers are, however, strictly local, and do not extend to the issuing of a *habeas corpus* running into another county, without proof that there is no officer in that county authorized to grant such writ. *Dooley's Case*, 6 Abb., 188.

The sections following, from 27 to 36 inclusive, do not relate to this court, but to a police justice, to be elected as there provided.

By section 37, any vacancy in the office of city judge may be supplied by the council till the next charter election; and, by section 38, the former municipal court of the city is abolished, and its jurisdiction and proceedings transferred to the police justice, to be elected as above.

It will be seen that the powers and jurisdiction of this court are, in some respects, analogous, in others, greatly inferior to those of the New York local tribunals. In transitory actions against joint debtors, its cognizance is of narrower scope, residence, or service within the city of all the defendants being necessary to acquire jurisdiction; and it has no powers to entertain an action against a foreign, but only against a domestic corporation.

The equitable jurisdiction of this court, when acquired, is recognized as being the same as that of the former Court of Chancery, in *McNulty* vs. *Prentice*, 25 Barb., 204, (215.) But, though extensive, that jurisdiction is of a limited and inferior nature, and all facts necessary to confer it must appear upon the record of its judgment, or it will not be

evidence in another court. *Simmons* vs. *De Barre*, 8 Abb., 269; affirming 6 Abb., 188.

And, the jurisdiction of this court being strictly local, a referee appointed by it has no power to act, unless within the limits of the city of Brooklyn, *Bonner* vs. *McPhail*, 31 Barb. 106.

§ 20. *New York Local Tribunals.—Decisions as to Jurisdiction.*

The arrangements as to the business of these courts, as transacted by the general term, or by the single justice or judge, are identical, or nearly so, with those in the Supreme Court, as noticed in chapter III. The powers, duties, and disqualifications of those officers are also similarly identical, and the general practice substantially the same. That practice is, in fact, regulated by the rules of the Supreme Court (§ 470), in the biennial revision of which their judges take part; but both the Superior Court and Common Pleas have also laid down, and, from time to time, are in the habit of making special regulations for their own guidance. Their powers, in this respect, seem never to have been questioned, nor does such appear likely to be the case, as these regulations merely affect matters of internal detail, and do not profess to override or conflict with the general regulations established by the assembled judiciary, under the section in question.

The decisions of both these tribunals are now fully and constantly reported; those of the Common Pleas since 1855, and those of the Superior Court from a period antecedent to the Code. These reports are necessarily of high authority, and possess a peculiar character of internal unity, which, in the more widely-diffused organization of the Supreme Court, is occasionally wanting. Both of them, the Superior Court especially, have, on numerous occasions, asserted their independence of the Supreme Court, and disregarded its rulings, when contrary to their own views on the same subject. As instances of this, compare *Ford* vs. *Babcock*, 2 Sandf., 518; 7 L. O., 270, with *Cole* vs. *Jessup*, 2 Barb., 309, overruled on that point, and *Ford* vs. *Babcock* sustained, by the Court of Appeals, 6 Seld., 96; 10 How., 515; compare, also, *Washington Bank of Westerly* vs. *Palmer*, 2 Sandf., 686, with *President of Bank of Ithaca* vs. *Bean*, 1 C. R., 133. See, likewise, this doctrine directly laid down in *Reynolds* vs. *Davis*, 5 Sandf., 267; and the right asserted in *Cashmere* vs. *De Wolf*, 2 Sandf., 379.

And, when it has once acquired jurisdiction of a controversy, this court does not recognize any action of the Supreme Court interfering with the exercise of that jurisdiction. *Bennett* vs. *Le Roy*, 14 How., 178; 5 Abb., 55; see also, 6 Duer, 683. Nor will it, when invoked, interfere

in a similar manner with the exercise of jurisdiction by another tribunal competent to act. *Grant* vs. *Quick*, 5 Sandf., 612.

See also, statement as to the general jurisdiction of this court having been defined, by the Court of Appeals, to be as wide as that of an ordinary action under the Code, given at 3 Duer, 160, case of *State of New York* vs. *Mayor, &c., of New York*, erroneously referred to at 5 Abb., 59. That jurisdiction is generally so asserted in *Cashmere* vs. *Crowell*, 1 Sandf., 715.

Once acquired, the jurisdiction of this and the other tribunals treated of in this chapter, cannot afterwards be collaterally impeached by a party who has had an opportunity, and has omitted to contest it, *Dyckman* vs. *Mayor of New York*, 1 Seld., 434. A voluntary appearance cures all defects as to jurisdiction over the person. *Smith* vs. *Dipeer*, 2 C. R., 70; *Watson* vs. *The Cabot Bank*, 5 Sandf., 423; *Varian* vs. *Stevens*, 2 Duer, 635.

In the dissenting opinion of Bosworth, J., in *Woolsey* vs. *Judd*, 4 Duer, 596, doubts are thrown over the competency of this, or, in fact, of any other court entertaining a controversy in equity in a matter of less value than $100, but the decision of the majority of the general term is adverse, and asserts the possession of general jurisdiction in equity, whatever may be the value of the matter in dispute. Same case, 4 Duer, 379; 11 How., 49.

See the general equity jurisdiction of this tribunal asserted, and claimed as extending to a suit to compel specific performance by a religious incorporation of their contract for sale of real estate, authorized by the Supreme Court according to the statute, in *Bowen* vs. *The Irish Presbyterian Congregation of the city of New York*, 6 Bosw., 245.

The jurisdiction of this tribunal is asserted to be concurrent with that of the United States Courts, in a matter of salvage, in *Cashmere* vs. *De Wolf*, 3 Sandf., 379. The dictum of Paine, J., in *Sturgis* vs. *Law*, 3 Sandf., 451, apparently conflicting with this case, is not so, in fact, being based on general views as to the powers of a court of mere common law jurisdiction to deal with a controversy of this nature.

The student should carefully distinguish between the relative jurisdiction of these courts, in strictly local, and in transitory actions.

Partition is of the former nature, and, in an action for that purpose, jurisdiction depends upon the situation of the property in New York, irrespective of the residence of the parties. *Varian* vs. *Stevens*, 2 Duer, 635. See also *Nichols* vs. *Romaine*, 9 How., 512.

In suits of this nature the jurisdiction of both these tribunals is absolute, and equal to that of the Supreme Court in like cases. *Vide Althause* vs. *Radde*, 3 Bosw., 410. (428, 438.)

It would seem, however, that no tribunal, except the Supreme Court,

has jurisdiction of a suit for partition brought by an infant plaintiff. *Vide Jennings* vs. *Jennings*, 2 Abb., 6 (14) and chapter 277 of 1852, there cited.

In *Ring* vs. *McCoun*, 3 Sandf., 524, the Superior Court decided against its own jurisdiction to compel a conveyance of real property in another county, on the ground that the action was local. This case stands affirmed in *Ring* vs. *McCoun*, 6 Seld., 268. In *Cook* vs. *Chase*, 3 Duer, 643, it is also clearly intimated that an action to enforce a lien on real property in Brooklyn is not within its cognizance.

Where, however, the nature of the controversy itself, though involving a claim affecting lands in another court, is not local, but transitory, this court will assume jurisdiction. So held in the case of a bill for specific performance, in *Auchincloss* vs. *Nott*, 12 L. O., 119.

The jurisdiction of this court was asserted in a suit for divorce, the requisitions of the Revised Statutes being satisfied in relation to the residence of the parties. *Forrest* vs. *Forrest*, 6 Duer, 102.

Its powers to entertain a suit against a foreign corporation, upon any cause of action, in which such corporation is duly brought into court, are maintained in *The New York Floating Derrick Company* vs. *New Jersey Oil Company*, 3 Duer, 648, and *Watson* vs. *The Cabot Bank*, 5 Sandf., 423; and its powers to take cognizance of a controversy, between individuals and the corporation of New York itself, are recognized by the Court of Appeals in *The People* vs. *Sturtevant*, 5 Seld., 263. This is now made a matter of special statutory provision. *Vide* chapter 379 of 1860, above cited.

In actions of a local nature, and also in transitory actions against joint debtors, one of whom resides in the city of New York, and has been there served; service may be made upon the defendants, in the former, and upon the other defendants in the latter case, in any county of the state, and the service will be valid. *Porter* vs. *Lord*, 4 Duer, 682, 13 How., 254; 4 Abb., 43. See generally as to service on joint debtors, under the section as it now stands, —— vs. ——, 1 Duer, 662. Previous to the amendment of 1852, service on joint debtors in this manner was not sufficient. *Vide Delafield* vs. *Wright*, 3 Sandf., 746. It seems that a voluntary appearance, though under protest, waives all objection as to the mode of service. *Mahaney* vs. *Penman*, 1 Abb., 34. See, however, *Delafield* vs. *Wright*, *supra*, and *Granger* vs. *Schwartz*, 11 L. O., 346. Jurisdiction must appear upon the record, *Frees* vs. *Ford*, 2 Seld., 176. In *Mahaney* vs. *Penman* it was held that a qualified appearance as above confers it, as a defendant cannot appear and protest simultaneously. See *Clason* vs. *Corley*, 5 Sandf., 454; 10 L. O., 237; affirmed 4 Seld., 426.

To render the jurisdiction by service effectual, that service must be

made *bona fide*. If the party served has been induced to come within the jurisdiction, by a false statement, the service will be set aside. *Carpenter* vs. *Spooner*, 2 Sandf., 717. See similar principle asserted in *Goupil* vs. *Simonson*, 3 Abb., 474. So, where service was made on a resident of a foreign state, whilst attending as a witness, such service was, in like manner, set aside. *Seaver* vs. *Robinson*, 3 Duer, 622.

No action can be taken by these courts, prior to the acquisition of jurisdiction. It has been even held that an attachment cannot be issued by the Superior Court, before the summons in the action has been actually served. *Fisher* vs. *Curtis*, 2 Sandf., 660; 2 C. R., 62; *Granger* vs. *Schwartz*, 11 L. O., 346. See, also, as to an action against a foreign corporation, *McDonough* vs. *Phelps*, 15 How., 372.

This doctrine is, however, qualified, and it is laid down that such an attachment may be issued before, and to accompany the summons, to be executed simultaneously with or after the service of the latter, in the more recent case of *Gould* vs. *Bryan*, 3 Bosw., 626.

In an attachment under the Revised Statutes, all necessary jurisdictional facts must be distinctly proved. *Payne* vs. *Young*, 4 Seld., 158. See, also, *Cantwell* vs. *The Dubuque Western Railroad Company*, 17 How., 16, as to an attachment under the Code. But, when jurisdiction is once acquired by service on one joint debtor, the property of any other non-resident may be attached in this court. —— vs. ——, 1 Duer, 662. And such was also the case, as to an attachment under the Revised Statutes, when issued by a firm, one partner of which was a resident. *Renard* vs. *Hargous*, 3 Kern., 259.

The power of removal given to the Supreme Court, in subdivision 2 of section 33, is not exercisable by that tribunal as of right, but is discretionary, and should not be exercised, unless for good cause shown. *Campbell* vs. *Butler*, 4 Abb., 55.

Neither of the courts immediately in question are competent to exercise any special statutory powers, conferred upon the former court of Chancery, or upon the Supreme Court as such. So held, as to a commission of lunacy, *in re Brown*, 4 Duer, 613; 1 Abb., 108; as to the custody of infant children, pending an action for divorce. *In re De Angelis*, 1 C. R. (N. S.), 349. Nor, being courts of limited jurisdiction, can they properly interfere in a case not provided for by statute. In such a case the Supreme Court is the proper forum. So held, as to an application for process to compel the attendance of witnesses, to be examined under a foreign commission. *In re a Petition*, &c., 5 Sandf., 674.

On the same principles, it has been held, that this court cannot entertain a suit for winding up the affairs of a foreign corporation. *Day* vs. *U. S. Car Spring Company*, 2 Duer, 608; or, statutory proceedings for dissolution of a domestic incorporation, *Kattenstroth* vs. *The Astor*

Bank, 2 Duer, 632; *Brahe* vs. *The Pythagoras Association*, 4 Duer, 658; 11 How., 44.

This court is, however, competent to exercise all statutory authorities specifically given to the Supreme Court, in relation to proceedings in a suit when once commenced. *Gould* vs. *McCarty*, 1 Kern., 575.

Its judges, as before noticed, have all the powers of Supreme Court commissioners. *Renard* vs. *Hargous*, 2 Duer, 540, affirmed, 3 Kern., 259. But, in a case of *habeas corpus*, that power is strictly statutory, and cannot be exercised in matters of discretion, incident to the general equitable jurisdiction of the Supreme Court. *The People* vs. *Porter*, 1 Duer, 709, 11 L. O., 228; *The People* vs. *Cooper*, 8 How., 288. See as to the exercise of jurisdiction in *habeas corpus*, *The People* vs. *Lemmon*, 5 Sandf., 681, affirmed by the Supreme Court on *certiorari*, 26 Barb., 270. The exercise of jurisdiction by a judge, under this authority, is, as appears by the case last cited, reviewable by the Supreme Court. He acts, in fact, as a subordinate officer of that tribunal, and not as a judge of his own court.

The appeal lying from this court to the Court of Appeals, the decisions of the latter are, of course, controlling upon its action. See instances of submission in such cases, in *Schufeldt* vs. *Abernethy*, 2 Duer, 533; *Oakley* vs. *Aspinwall*, 3 Kern., 500.

In cases, however, where a distinction can be drawn between the facts on which its own decision or that of the Court of Appeals is based, it has, on more than one occasion, repeated its former adjudication after a reversal. Compare *Cook* vs. *Litchfield*, 5 Seld., 279, with same case, 2 Bosw., 137; also *Bowen* vs. *Newell*, 2 Duer, 584, with the affirmance in 3 Kern., 290, and the previous reversal of a former judgment, 4 Seld., 190, 12 L. O., 231.

Several of the cases directly applicable to the Court of Common Pleas, being also applicable to the Superior Court, have been before noticed in this subdivision.

In *Harriott* vs. *The New Jersey Railroad Company*, 8 Abb., 284, it is held that, to enable a non-resident plaintiff to maintain an action in the Common Pleas, against a foreign corporation, it must be shown either that the contract was made, or the cause of action arose, or the subject of the action is situated within the state, or the court will not acquire jurisdiction. It is plain that this ruling applies equally to the Superior Court.

In an action against joint tortfeasors, jurisdiction is acquired by the Common Pleas by service on one of them. *McKenzie* vs. *Hackstaff*, 2 E. D. Smith, 75.

In cases arising on mechanics' liens in the city of New York, the Common Pleas, as against the Supreme Court, has exclusive jurisdic-

tion of proceedings for their enforcement. *Noyes* vs. *Burton*, 17 How., 449.

Prior to the present organization of the Court of Common Pleas under the Code, its decisions were reviewable by the Supreme Court. The decisions of the latter tribunal, whilst holding that position, are to be taken, by the former, as conclusive. *Updike* vs. *Campbell*, 4 E. D. Smith, 570; *White* vs. *Chouteau*, 1 E. D. Smith, 493.

CHAPTER VI.

JUSTICES' COURTS.

§ 21. *Jurisdiction of Justices' Courts in General.—Statutory Provisions.*

Pursuing the analysis of the different courts of civil jurisdiction, whose practice is affected by the Code, we come, in the last place, to the courts in question, including the Marine and District Courts of the city of New York.

These tribunals are all of inferior and strictly limited jurisdiction, defined by the Code or other subsequent statutes. Their practice, though regulated in some few particulars by the provisions of the former measure, is essentially different from that of the higher tribunals. It falls, therefore, with some slight exceptions, entirely without the scope of the present treatise, and, accordingly, the consideration of it in the present chapter will be strictly confined to a citation of the provisions of the Code itself, and of any other statutes bearing upon those provisions, or on the subject of jurisdiction, including a short notice of some few decisions bearing upon the latter subject, with the single exception of that portion of those provisions which relate to the removal into the superior jurisdiction of cases here commenced, which will be treated in the usual manner. At a subsequent stage of the work, in which the appeal from these tribunals to the higher jurisdiction is considered, any points bearing on their practice, necessary to be noticed with reference to such appeals, will be dwelt upon.

The provisions of the Code itself run as follows:

TITLE VI.

Of the Courts of Justices of the Peace.

§ 52. (45.) The provisions contained in sections two, three, and four of the article of the Revised Statutes, entitled "Of the jurisdiction of justices'

courts," as amended by sections one and two, of the act concerning justices' courts, passed May 14th, 1840, and the provisions contained in sections 59 to 66, of the same article, both inclusive, are repealed, and the provisions of this title substituted in place thereof. But this repeal shall not affect any action heretofore commenced in a court of a justice of the peace.

The first three sections of the Revised Statutes above referred to, were those by which the jurisdiction of these courts was formerly defined. Those of sections 59 to 66 provided for the removal of cases involving the title to real estate, and are re-enacted below, with some alterations.

By chapter 158 of 1861, p. 446, the following is substituted for section 53 (46) of the Code as it stood before; save only as regards subdivision 2, which was amended as it now stands, in 1862:

Justices of the peace shall have civil jurisdiction in the following actions, and no others; excepting as in the second section, it is provided:—

1. In actions arising on contracts for the recovery of money only, if the sum claimed does not exceed two hundred dollars.

2. An action for damages for injury to rights pertaining to the person, or to the personal or real property, if the damages claimed do not exceed two hundred dollars.

3. An action for a penalty not exceeding two hundred dollars.

4. An action commenced by attachment of property, as now provided by statute, if the debt or damages claimed do not exceed two hundred dollars.

5. An action upon bond conditioned for the payment of money, not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by instalments, an action may be brought for each instalment as it becomes due.

6. An action upon a surety bond taken by them; though the penalty or amount claimed exceed two hundred dollars.

7. An action upon a judgment rendered in a court of a justice of the peace, or by a justice or other inferior court in a city, where such action is not prohibited by section 71.

8. To take and enter judgment on the confession of a defendant, where the amount confessed shall not exceed five hundred dollars, in the manner prescribed by article 8, title 4, chapter 2, of part 3, of the Revised Statutes.

9. An action for damages for fraud in the sale, purchase, or exchange of personal property, if the damages claimed do not exceed two hundred dollars.

The second section retains the operation of a subdivision added to this section in 1860, by chapter 131 of the Laws of that year, p. 209. That subdivision runs thus:

10. An action to recover the possession of personal property claimed, the value of which, as stated in the affidavit of the plaintiff, his agent, or attorney, shall not exceed the sum of one hundred dollars.

§ 2. The plaintiff in such action, at the time of issuing the summons, but

not afterward, may claim the immediate delivery of such property as hereinafter provided.

§ 3. Before any process shall be issued in an action to recover the possession of personal property, the plaintiff, his agent, or attorney shall make proof by affidavit, showing:

1. That the plaintiff is the owner, or entitled to immediate possession, of the property claimed, particularly describing the same.

2. That such property is wrongfully withheld or detained by the defendant.

3. The cause of such detention or withholding thereof, according to the best knowledge, information, and belief of the person making the affidavit.

4. That said personal property has not been taken for any tax, fine, or assessment, pursuant to statute, or seized by virtue of an execution or attachment against the property of said plaintiff; or if so seized, that it is exempt from such seizure by statute.

5. The actual value of said property.

§ 4. On receipt of such affidavit, and an undertaking, in writing, executed by one or more sufficient sureties, to be approved by the Justice of the Peace before whom such an action is commenced, to the effect that they are bound in double the value of such property as stated in said affidavit for the prosecution of said action, and for the return of said property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against said plaintiff, the Justice shall indorse upon said affidavit a direction to any constable of the county in which said Justice shall reside, requiring said constable to take the property described therein from the defendant, and keep the same, to be disposed of according to law; and the said Justice shall at the same time issue a summons directed to the defendant, and requiring him to appear before said Justice at a time and place to be therein specified, and not more than twelve days from the date thereof, to answer the complaint of said plaintiff; and the said summons shall contain a notice to the defendant that in case he shall fail to appear at the time and place therein mentioned, the plaintiff will have judgment for the possession of the property described in said affidavit, with the costs and disbursements of said action.

§ 5. The constable to whom said affidavit, endorsement, and summons shall be delivered, shall forthwith take the property described in said affidavit, if he can find the same, and shall keep the same in his custody. He shall thereupon, without delay, serve upon said defendant a copy of such affidavit, notice, and summons, by delivering the same to him personally, if he can be found in said county; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at usual place of abode of the defendant, with some person of suitable age and discretion. And shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the Justice who issued the said summons.

§ 6. The defendant may at any time after such service, and at least two

days before the return day of said summons, serve upon plaintiff or constable who made such service, a notice in writing that he excepts to sureties in said bond or undertaking; and if he fail to do so, all objection thereto shall be waived. If such notice be served, the sureties shall justify, or the plaintiff give new sureties on the return day of said summons, who shall then appear and justify, or said justice shall order said property delivered to defendant, and shall also render judgment for defendant's costs and disbursements.

§ 7. At any time before the return day of said summons, the said defendant may, if he has not excepted to plaintiff's sureties, require the return of said property to him, upon giving to the plaintiff, and filing same with the justice, a written undertaking, with one or more sureties, who shall justify before said justice on the return day of said summons, to the effect that they are bound in double the value of said property, as stated in plaintiff's affidavit, for the delivery thereof to said plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against said defendant; and if such return be not required before the return day of said summons, the property shall be delivered to said plaintiff.

§ 8. The qualification of sureties and their justification under this act, shall be the same as provided in sections one hundred and ninety-four and one hundred and ninety-five of the Code, in respect to bail on arrest in the Supreme Court.

§ 9. Sections two hundred and fourteen, two hundred and fifteen, and two hundred and sixteen of the Code, shall apply to proceedings and actions brought under this act, substituting the word constable for the word sheriff whenever it occurs in either of said sections.

§ 10. The actions so commenced shall be tried in all respects as other actions are tried in justices' courts.

§ 11. In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to plaintiff, or the defendant by answer shall claim a return thereof, the justice or jury shall assess the value thereof, and the injury sustained by the prevailing party by reason of the taking or detention thereof, and the justice shall render judgment accordingly, with costs and disbursements.

§ 12. If it shall appear by the return of a constable that he had taken the property described in the plaintiff's affidavit, and that defendant cannot be found, and has no last place of abode in said county, or that no agent of de fendant could be found on whom service could be made, the justice may proceed with the cause in the same manner as though there had been a personal service.

§ 13. For the indorsement on said affidavit, the justice shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

As regards the Marine and District Courts in the city of New York, the whole of this last subdivision is, however, practically abolished by chapter 484 of the Laws of 1862, p. 970,

section 17, which extends to these tribunals the whole of that portion of the Code which confers the provisional remedy of replevin, and augments their jurisdiction in this class of cases, to controversies where the value of the property claimed does not exceed two hundred and fifty dollars.

As above noticed, subdivision 10 dates from the special statute of 1860; the prior portion of the section from that of 1861, with the exception of subdivision 2, which dates from 1862, as above noticed.

In 1861, the jurisdiction of these Courts was doubled, so far as regards the amount in controversy, two hundred being substituted for one hundred dollars *passim*, and $500 for $250, in subdivision 8.

The last previous amendment was in 1857. In 1849 the section was also enlarged, and extended in its operation from the original provisions of 1848.

§ 54. (47.) But no justice of the peace shall have cognizance of a civil action,

1. In which the people of this State are a party, excepting for penalties not exceeding one hundred dollars;

2. Nor where the title to real property shall come in question, as provided by sections 55 to 62, both inclusive;

3. Nor of a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction;

4. Nor of a matter of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars;

5. Nor of an action against an executor or administrator, as such.

Dates from 1849. In 1848 the limitation in subdivision 1, was $50.

§ 55. (48.) In every action brought in a court of a justice of the peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defence, set forth in his answer any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The justice shall thereupon countersign the same, and deliver it to the plaintiff.

§ 56. (49.) At the time of answering, the defendant shall deliver to the justice a written undertaking, executed by at least one sufficient surety, and approved by the justice, to the effect that, if the plaintiff shall, within thirty days thereafter, deposit with the justice a summons and complaint in an action in the Supreme Court, for the same cause, the defendant will, within ten days after such deposit, give an admission in writing of the service thereof.

Where the defendant was arrested in the action before the justice, the undertaking shall further provide, that he will at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable, not exceeding one hundred dollars.

This section as it stands dates from the amendment of 1858. Previously, the undertaking ran for thirty days instead of twenty, as the period of deposit, and ten days instead of twenty, for the giving of the admission. Down to 1851, the forum of transfer was, as now, the Supreme Court. In 1851 it was changed to the County Court, and so remained till 1858.

§ 57. (50.) Upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the Supreme Court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice may be recovered of the plaintiff.

The same change as to the forum was made in this, as in the preceding section.

§ 58. (51.) If the undertaking be not delivered to the justice, he shall have jurisdiction of the cause, and shall proceed therein; and the defendant shall be precluded, in his defence, from drawing the title in question.

§ 59. (52.) If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and render judgment against the plaintiff for the costs.

Dates as it stands from 1849; the difference in 1848 was merely verbal.

§ 60. (53.) When a suit before a justice shall be discontinued, by the delivery of an answer and undertaking, as provided in sections fifty-five, fifty-six, and fifty-seven, the plaintiff may prosecute an action for the same cause, in the Supreme Court, and shall complain for the same cause of action, only, on which he relied before the justice; and the answer of the defendant shall set up the same defence, only, which he made before the justice.

This section has been subject to the same change, as to the forum of substitution.

Down to 1851, the concluding words were, "the answer of the defendant shall be the same which he made before the justice." This wording having given rise to some difficulty, as will be noticed below, it was then changed.

§ 61. (54.) If the judgment in the Supreme Court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial.

Similar change to that in those preceding.

§ 62. (55.) If, in an action before a justice, the plaintiff have several causes of action, to one of which the defence of title to real property shall be interposed, and, as to such cause, the defendant shall answer and deliver an undertaking, as provided in sections fifty five and fifty-six, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the Supreme Court; as to the other causes of action, the justice may continue his proceedings.

All actions pending in any County Court, on the 7th day of May, 1858, in all cases in which a plea of title was interposed in actions originally commenced in a justice's court, are transferred to and vested in the Supreme Court, with full power and jurisdiction to proceed therein, as commenced in said Supreme Court, by reason of a plea of title having been interposed in a justice's court in like cases.

The last clause was added as the amendment of 1861. Same changes as to forum, as in those preceding.

§ 63. (56.) A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk, shall be noted thereon, and entered in the docket; and, from that time, the judgment shall be a judgment of the County Court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered; except that it shall be a lien, only from the time of filing and docketing the transcript. But no such judgment, for a less sum than twenty-five dollars, exclusive of costs, hereafter docketed, shall be a lien upon, or enforced against real property.

Dates as it stands from 1849. In 1848, the provisions were less specific, and that limiting the lien was omitted.

§ 64. (57.) The following rules shall be observed in the courts of justices' of the peace:

1. The pleadings in these courts, are:

1. The complaint by the plaintiff.
2. The answer by the defendant.

2. The pleadings may be oral, or in writing; if oral, the substance of them shall be entered by the justice in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket.

3. The complaint shall state, in a direct and plain manner, the facts constituting the cause of action.

4. The answer may contain a denial of the complaint, or of any part thereof, and also notice, in a plain and direct manner, of any facts constituting a defence.

5. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

6. Either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defence, although it be taken as true.

7. If the court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.

8. In case a defendant does not appear and answer, the plaintiff cannot recover, without proving his case.

9. In an action or defence, founded upon an account or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off.

10. A variance between the proof on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled, to his prejudice thereby.

11. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party.

12. Execution may be issued on a judgment heretofore or hereafter rendered in a justice's court, at any time within five years after the rendition thereof, and shall be returnable sixty days from the date of the same.

13. If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner as other executions and judgments of the County Court, except as provided in section 63.

14. The court may, at the joining of issue, require either party, at the request of the other, at that, or some other specified time, to exhibit his account on demand, or state the nature thereof, as far forth as may be in his power, and in case of his default, preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated.

15. The provisions of this act, respecting forms of action, parties to actions, the rules of evidence, the times of commencing actions, and the service of process upon corporations, shall apply to these courts.

The defendant may, on the return of process, and before answering, make an offer in writing to allow judgment to be taken against him for an amount to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceedings shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.

The concluding clause, enabling an offer, was added on the amendment of 1860, otherwise the section dates substantially from 1849. Slight verbal changes were made in 1851 and 1852. In 1848, the provision was short and general.

N. B.—As below noticed, the jurisdiction of these tribunals in the city of New York, has since been considerably increased. In the country districts, and in other cities, it is unchanged, and section 64 remains applicable to all in common.

The provisions of the Revised Statutes by which, in matters unprovided for by that section, the practice of these courts is governed, will be found in title IV., chapter II., part III., of the Revised Statutes (2 R. S., 225, *et seq.*); and in the later statutes collated with them in the more recent editions.

Under section 6 of the above chapter, and chapter 140 of the Laws of 1846, a justice of the peace being or becoming an innholder or tavern-keeper, has no power or jurisdiction, or loses it on becoming so. Under section 7 of the same chapter, any justice being a member of the senate or assembly, or a judge of a County Court, is not obliged to take cognizance of any business brought before him, but may act or not, at his discretion.

With respect to the former disqualification, it was held in *Rice* vs. *Milks*, 7 Barb., 337, that it only extends to regular proceedings in the justice's court, and does not deprive the justice of any statutory authority, conferred upon him individually.

Justices of the peace are also subject to most of the other disqualifications imposed on judicial officers, as noticed in the previous chapters. So held, as to that of relationship to one of the parties, on a confession of judgment, *Chapin* vs. *Churchill*, 12 How., 367; to sitting where he is himself a party. *Baldwin* vs. *McArthur*, 17 Barb., 414.

Or where, on a previous suit for the same matter, he had acted as counsel for the plaintiff. *Carrington* vs. *Andrews*, 12 Abb., 348. Where a justice of the Marine Court was a material witness, it was held that he should not have tried the cause. *Brown* vs. *Brown*, 2 E. D. Smith, 153. See, as to removal of cause under these circumstances, *Commissioners of Excise of Saratoga County* vs. *Doherty*, 16 How., 46. The section of the Judiciary Act which forbids the partner or clerk of a judge to practise before him as an attorney, has, however, been held not to apply to these courts. *Fox* vs. *Jackson*, 8 Barb., 355.

In the city and county of New York, and the county of Kings, none but admitted attorneys of the Supreme Court are now to be allowed to practise in these tribunals. See chapter 484 of 1862, p. 976, sections 1 and 2; chapter 53 of 1862, p. 179. This restriction is, however, confined to these counties. In the others, the right to practise is unlimited.

§ 22. *Jurisdiction in New York and other Cities.—Statutory Provisions.*

These provisions are contained in title VII., and run thus—

TITLE VII.

Of Justices' and other Inferior Courts in Cities.

Chapter I.

The Marine Court of the city of New York.

§ 65. The Marine Court of the city of New York shall have jurisdiction in the following cases, and no other:

1. In actions similar to those in which courts of justices of the peace have jurisdiction, as provided by sections 53 and 54.

2. In an action upon the charter or a by-law of the corporation of the city of New York, where the penalty or forfeiture shall exceed twenty-five dollars, and not exceed one hundred dollars.

3. In an action between a person belonging to a vessel in the merchant service, and the owner, master, or commander thereof, demanding compensation for the performance, or damages for the violation of a contract for services on board such vessel, during a voyage performed, in whole or in part, or intended to be performed, by such vessel, though the sum demanded exceed one hundred dollars.

4. In an action by or against any person belonging to or on board of a vessel in the merchant service, for an assault and battery or false imprisonment, committed on board such vessel, upon the high seas, or in a place without the United States, of which the ordinary courts of law of this State have jurisdiction, though the damages demanded exceed one hundred dollars. But nothing in this or the last preceding subdivision of this section, shall give the court power to proceed, in any of the cases therein referred to, as a court of admiralty or maritime jurisdiction.

The jurisdiction of this court has been greatly enlarged and its importance greatly increased by subsequent independent statutes.

It is a court of early institution, and is noticed in title III., chapter III., part III. of the Revised Statutes, § 1.

Its reorganization and the election of two justices, is regulated by chapter 144 of 1849, amended by chapter 377 of the same year.

By chapter 389 of 1852, its number of justices was increased to three. And by section 9, in all cases in which its jurisdiction was limited, so as not to exceed $100, that limitation was increased, so that the recovery of either party might thereafter be $250. This act was passed

on the 17th of April, and came into operation on the 7th of May, 1852. This increase of jurisdiction bears upon subdivisions 1 to 6 inclusive, and 9 of section 53; and, also, upon subdivision 1 of section 54, above cited. This and similar enlargements of jurisdiction have, however, been held not to be retrospective in their effect; as regards the costs in suits then pending. *Dunbar* vs. *Duffy*, 11 L. O., 349.

By chapter 617 of 1853, p. 1165, passed on the 21st of July, 1853, and taking effect immediately, the jurisdiction was again greatly enlarged. By section 1, it was enacted that this court should have jurisdiction over and cognizance of actions of assault and battery, false imprisonment, malicious prosecution, libel and slander, where the damages claimed do not exceed $500.

By section 2, in cases in which the jurisdiction was limited, as above, to a recovery by either party of $250, that jurisdiction was extended to $500, "notwithstanding that the accounts of both parties may exceed $400." This bears upon the same subdivisions of sections 53 and 54, as are above noticed; and likewise upon subdivision 4 of the latter.

By section 5, the power of reviewing its own decisions at general term, was, for the first time, conferred upon it. This last change occasioned a good deal of difficulty, and a conflict between this court and the New York Common Pleas, the appellate jurisdiction, until obviated by the amendment of section 352 of the Code, in 1857. The appeal from the decision of the single judge lies to the general term, as above, and from the general term to the Court of Common Pleas. The right to this form of appeal dates from the measure of 1853, above cited. *People* vs. *Gale*, 13 How., 260, 3 Abb., 309. See hereafter under the head of appeals.

Its internal practice as to the issuing and service of summons, and the entry of judgment by default, on a verified complaint, without further proof, is further regulated by chapter 295 of 1857.

By chapter 334 of that year, its jurisdiction in actions against the Mayor, Aldermen, and Commonalty of the city of New York, was curtailed, and limited to actions in which the demand does not exceed $200; but this last branch of cognizance seems to be now wholly taken away by chapter 379 of 1860, p. 645.

By the mechanics' lien act, chapter 513 of 1851, section 6, this court has also original jurisdiction of cases where the amount claimed does not exceed $100; and this irrespective of the original amount of the accounts between the parties. *Foley* vs. *Gough*, 4 E. D. Smith, 724.

Under chapter 484 of 1862, p. 970, sections 1 and 2, none but regularly admitted attorneys are henceforth entitled to practise in this court, or in the District Courts in New York city.

And, by section 3 of the same statute, the rules of the Supreme Court

are to apply to the same tribunals, so far as they can be made applicable.

And the statute in question effects other very important general alterations in the mode and form of procedure in both.

Chapter II.

The District Courts in the city of New York.

§ 66. The assistant justices' courts in the city of New York, shall hereafter be styled the justices' courts in the city of New York, and shall have jurisdiction in the following cases:

1. In actions similar to those in which justices of the peace have jurisdiction, as provided by sections 53 and 54.

2. In an action upon the charter or a by-law of the corporation of the city of New York, where the penalty or forfeiture shall not exceed one hundred dollars.

The jurisdiction of these tribunals has also been considerably augmented, and their whole constitution remodelled by subsequent legislation.

They are noticed as "Assistant Justices' Courts," in title III., chapter II., part III., of the Revised Statutes, section 2. Their election and organization into six districts is provided for by chapter 153 of the Laws of 1848, and further regulated by chapter 514 of 1851.

By chapter 324 of 1852, their style is changed to that of "District Courts in the City of New York."

By chapter 65 of 1854, the 6th district was divided into three parts, and two additional districts, the 7th and 8th, created out of it.

By chapter 344 of 1857, all the laws relating to these courts were consolidated, and their jurisdiction increased as follows by section 3:

§ 3. These courts have jurisdiction in the following actions:

1. In actions similar to those provided for by sections 53 and 54 of the Code of Procedure, where the sum recovered shall not exceed $250, notwithstanding the accounts of both parties shall exceed $400.

2. In an action upon the charter, ordinance, or by-law of the corporation of the city of New York, or a statute of this state, where the penalty *shall* exceed $250.

This singular and obvious error in the original section is corrected by section 5 of chapter 334 of 1858, by the insertion of the word "not" after shall.

By subdivision 3 of the same section, the following power of removal into the Common Pleas is given:

In any action commenced in pursuance of this section, where the claim or demand shall exceed the sum of $100, upon the application of the defend-

ant, the Justice shall make an order removing the same, at any time after issue joined, and before the trial of the same, into the Court of Common Pleas in and for the city and county of New York, upon the defendant executing to the plaintiff an undertaking, with one or more sufficient sureties, to be approved of by the Justice of the court in which such action is commenced, to pay to the plaintiff the amount of any judgment that may be awarded against the defendant by the said Court of Common Pleas.

This section will be noticed as conferring not merely a power, but a positive right to removal, on compliance with its provisions.

By the remaining sections of this act, numbering in all, the above inclusive, eighty-two, the practice of these courts is regulated, and the former statutes, the Code excepted, were generally repealed. Sections 53 and 54 of the latter measure are substantially retained, by reference as above noticed. The remainder, section 66 excepted, are positively saved by section 48, running thus:

The provisions of sections 55 to 64 both inclusive, and of section 68 of the Code of Procedure, shall apply to these courts, except that the transcript of judgment specified in the latter section, shall be furnished by the clerk of the court in which the judgment was rendered, and also except that the execution may issue as well out of the District Court in which the judgment was rendered, as out of the Court of Common Pleas.

By section 49 power is given to any party recovering an amount exceeding the jurisdiction, to remit the excess and enter judgment for the residue.

Under section 77 the justices of these courts are invested with powers as to the administration of oaths, the taking and certifying of depositions and acknowledgments, similar to those possessed by a judge of a court of record, and also empowered to perform the duties imposed by the Revised Statutes, in the taking of foreign depositions, and in summary proceedings to recover the possession of land, and likewise as to certain criminal proceedings. See, as to further alterations in the practice of these courts, in common with that of the Marine Court, chapter 484 of the Laws of 1862, p. 970, above noticed.

By chapter 334 of the Laws of 1857, these courts are absolutely deprived of all jurisdiction in actions against the Mayor, Aldermen, and Commonalty of the city of New York. See also chapter 379 of the Laws of 1860, p. 645.

Under section 6 of the mechanics' lien law, chapter 513 of the Laws of 1851, they possess, in common with the Marine Court, original jurisdiction of cases under that statute, where the sum claimed does not exceed one hundred dollars.

Chapter III.

The Justices' Courts of Cities.

§ 67. (60.) The justices' courts of cities shall have jurisdiction in the following cases, and no other:

1. In actions similar to those in which justices of the peace have jurisdiction, as provided by sections 53 and 54.

2. In an action upon the charter or by-laws of the corporations of their respective cities, where the penalty or forfeiture shall not exceed one hundred dollars.

In 1848 these courts were specified by name, as "The Municipal Court of the City of Brooklyn," and the Justices' Courts of the cities of Albany, Troy, and Hudson, respectively. The present section dates from 1849.

Chapter IV.

General Provisions.

§ 68. (61.) The provisions of sections fifty-five to sixty-four, both inclusive, relating to forms of action, to pleadings, to the times of commencing actions, to the rules of evidence, to filing and docketing transcripts of judgments, to their effect, and the mode of enforcing them, and to proceedings where title to real property shall come in question, shall apply to the courts embraced in this title; except that, after the discontinuance of the actions in the inferior court, upon an answer of title, the new action may be brought either in the Supreme Court, or in any other court having jurisdiction thereof; and except also that in the city and county of New York, a judgment for twenty-five dollars or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as, and be deemed a judgment of, the Court of Common Pleas for the city and county of New York.

This section as it stands dates from 1851. In 1848 it was substantially the same, except that in the latter part, any judgment, without regard to amount, became a lien when docketed. In 1849 the present limitation was inserted. The amendment of 1851 consisted in adding the words "and be deemed," in the concluding sentence.

It will be observed, however, that, as regards an action discontinued on the ground of title to real estate, the transfer is not solely to the Supreme Court, as in the former title, but may be to any other court having jurisdiction.

The New York District Courts have been held not to be justices' courts, within the scope of subdivision 10 of section 53, as added by the special statute of 1860, above cited, and to have no jurisdiction to entertain an action, or to administer the statutory remedy in the nature of replevin thereby created. *Loomis* vs. *Bowers*, 22 How., 361.

§ 23. *Various Points as to Jurisdiction.*

The following decisions relate to the subject of the jurisdiction of these tribunals, generally considered.

The amount of debt or damages claimed, regulates the acquisition of that jurisdiction. *Murray* vs. *Degross*, 12 L. O., 311; 3 Duer, 668; *Laughran* vs. *Orser*, 15 How., 281; 6 Duer, 697. If the claim exceed the statutory limit, there will be a total failure to acquire it. *Bellinger* vs. *Ford*, 14 Barb., 250.

The mere reduction of an original claim, exceeding $400, by payments reducing it to that sum, does not constitute a matter of account, so as to deprive the justice of jurisdiction. But where the defendant seeks to set off items arising in a course of mutual dealing, and not specifically appropriated as payments, it will be otherwise. *Ward* vs. *Ingraham*, 1 E. D. Smith, 538. In the latter case, provided the amounts proved on both sides exceed $400, no jurisdiction will be acquired. *Stillwell* vs. *Staples*, 3 Abb., 365; 5 Duer, 691; *Brady* vs. *Durbrow*, 2 E. D. Smith, 78; *Gilliland* vs. *Campbell*, 18 How., 177. And, where the evidence is conflicting, the finding of the justice, that he is ousted of jurisdiction, will be held conclusive. *Parker* vs. *Eaton*, 25 Barb., 122. To cases under the mechanics' lien law, this limitation does not apply; but the court will have jurisdiction whatever may have been the original amount, provided the claim does not exceed the special limitation of $100. *Foley* vs. *Gough*, 4 E. D. Smith, 724. Although executors or administrators cannot be sued, there is no restriction on their suing in these tribunals; and the above disqualification has been held, not to extend to a suit on an administration bond brought against the obligor. *O'Neil* vs. *Martin*, 1 E. D. Smith, 404. See, however, *Mahoney* vs. *Gunter*, 10 Abb., 431.

Under the Code of 1848, a justice had no power to take a judgment by confession. His previous authority was taken away, and was not restored till the amendment of 1849. *Daniels* vs. *Hinkston*, 5 How., 322. Such a confession may be made in court, by consent, on the case coming on for trial, without writing or affidavit. Such a case does not fall within subdivision 8. *Gates* vs. *Ward*, 17 Barb., 424.

Of the class of equitable actions in general, these courts have no jurisdiction. So held, as to a suit, to enforce the note of a married woman against her separate estate. *Coon* vs. *Brook*, 21 Barb., 546; *Cobine* vs. *St. John*, 12 How., 333. See, however, *Walker* vs. *Swayzee*, 3 Abb., 136, as to the power of entering a personal judgment against her; but this doctrine seems untenable under the statute as it then stood. Nor

have they of an action for enforcement of an equitable lien against real estate. *Quimby* vs. *Sloan*, 2 Abb., 93 (98); 2 E. D. Smith, 594.

These courts cannot entertain jurisdiction of an action against a sheriff for a false return. *Laughran* vs. *Orser*, 15 How., 281; 6 Duer, 697; *Worden* vs. *Brown*, 14 How., 327. *Van Vleck* vs. *Burroughs*, 6 Barb., 341, which would seem to conflict with this, was before the Code, by which the former general jurisdiction in actions on the case was taken away.

Nor are they competent to entertain an action for damages for fraudulent representations. *White* vs. *Seaver*, 25 Barb., 235.

Though the New York District Courts have no cognizance of an action for seamen's wages, this does not preclude them from entertaining a suit upon the contract of a shipping agent, to pay advance wages before the seaman proceeds to sea. *Loftus* vs. *Clark*, 1 Hilt., 310.

Their jurisdiction does not extend to an action against a foreign corporation. *Paulding* vs. *The Hudson Manufacturing Company*, 2 E. D. Smith, 38; 3 C. R., 223.

In the same case, it was held that this objection may be waived by appearance, and pleading to the merits.

See likewise, as to the point that objections grounded on the improper issue or service of process, may be waived by appearance and pleading to, and going to trial upon the merits, *Sperry* vs. *Major*, 1 E. D. Smith, 361 (364); *Snyder* vs. *Goodrich*, 2 E. D. Smith, 84; *Bray* vs. *Andreas*, 1 E. D. Smith, 387; *Cushingham* vs. *Phillips*, *ibid.*, 416; *Andrews* vs. *Thorp*, *ibid.*, 615; *Monteith* vs. *Cash*, *ibid.*, 412; 10 L. O., 348; *Miln* vs. *Russell*, 3 E. D. Smith, 303; *Ingersoll* vs. *Gillies*, *ibid.*, 119; *De Agreda* vs. *Faulberg*, *ibid.*, 178; *Aldrich* vs. *Ketcham*, *ibid.*, 577; *Dempsey* vs. *Paige*, 4 E. D. Smith, 218; *Gossling* vs. *Broach*, 1 Hilt., 49. *Robinson* vs. *West*, 1 Sandf., 19, to the same effect, was, however, reversed by the Supreme Court, in error. *Vide Robinson* vs. *West*, 11 Barb., 309.

As a general rule, however, objections founded on a want of jurisdiction of the controversy, or of the person, or by reason of an improper issue, or an insufficient or wrongful service of process, are incapable of waiver, and may be raised at any time; and it is the duty of the justice to dismiss the action when the fact appears. See *Sperry* vs. *Major*, *supra*; *Snyder* vs. *Goodrich*, 2 E. D. Smith, 84; *Beattie* vs. *Larkin*, *ibid.*, 244; *Belden* vs. *The New York and Harlem Railroad Company*, 15 How., 17; *Sherwood* vs. *Saratoga and Washington Railroad Company*, 15 Barb., 650; *Fitch* vs. *Devlin*, *ibid.*, 47; *Wheeler* vs. *The New York and Harlem Railroad Company*, 24 Barb., 414; *Cornell* vs. *Smith*, 2 Sandf., 290; *Allen* vs. *Stone*, 9 Barb., 60; *Robinson* vs. *West*, 11 Barb., 309; *Bellinger* vs. *Ford*, 14 Barb., 250. And not only is an attach-

ment issued by a justice without the security required by statute void, but it confers no protection to those acting under it. *Davis* vs. *Marshall*, 14 Barb., 96.

But an objection of this nature cannot be raised collaterally in another action. Proceedings must be taken directly in the suit itself. *New York and Erie Railroad Company* vs. *Purdy*, 18 Barb., 574. See, however, dictum of Bronson, J., dissenting, in *Barnes* vs. *Harris*, 4 Comst., 374, (379).

The same general rules as to presumption, apply to these courts, as to the others of limited jurisdiction, treated of in the preceding chapters. No presumption can, as a general rule, be made in favor of that jurisdiction, but, when shown, nothing will be presumed against it without actual proof. *Vide Barnes* vs. *Harris*, 4 Comst., 374; *Foster* vs. *Hazen*, 12 Barb., 547. And where an official return of service is made, the usual presumption as to the proper discharge of his duties, by the officer making it, will be indulged. *Vankirk* vs. *Wilds*, 11 Barb., 520; *Reno* vs. *Pinder*, 20 N. Y., 298.

In relation to actions on judgments brought under subdivision 7 of section 53, the special prohibition of section 71 must be borne in mind. Under that section, such an action cannot be brought in the same county within five years after the rendition of the judgment, unless in one of the following cases—the death, resignation, incapacity to act, or removal from the county of the justice, that process was not personally served on the defendant, or all the defendants, in case of the death of some of the parties, or where the docket or record of such judgment is lost or destroyed.

An action of this nature is not limited to a claim for $100, but may be brought for any sum due on the judgment sued upon. *Humphrey* vs. *Persons*, 23 Barb., 313.

As regards the New York local courts, it has been held that, before bringing such an action, as between the same parties, leave of the court must be obtained, on notice to the adverse party, under the general provision for that purpose in section 71. *Vide Thompson* vs. *Sutphen*, 2 E. D. Smith, 527; and *Mills* vs. *Winslow*, *ibid.*, 18; 3 C. R., 44; overruling *McGuire* vs. *Gallagher*, 2 Sandf., 402.

The judgments of these courts, when duly docketed, effect a lien on real estate coextensive in time with that effected by a judgment of the Court of Common Pleas. *Waltermire* vs. *Westover*, 4 Kern., 16; *Nicholls* vs. *Atwood*, 16 How., 475.

On the render of judgment, the justice is *functus officio*, and cannot entertain any further application or make any further order in the cause. *Carpentier* vs. *Willett*, 18 How., 400.

And if, on the other hand, he renders judgment prematurely, before

the case is closed, the judgment will be void. *Prentiss* vs. *Sprague*, 1 Hilt., 428.

§ 24. *Removal of Cause where Title to Real Estate is in question.*

The point as to when a controversy is or is not within the purview of the sections above cited, has been made the subject of considerable debate, as appears by the following adjudications:

Where it is necessary for the plaintiff to establish his title in order to recover at all, the objection lies, and it is the duty of the justice, at whatever stage of the trial this shall appear, to dismiss the action. So held, where a tenant denied title of his lessor's assignee. *Main* vs. *Cooper*, 26 Barb., 468. And the justice, in such a case, cannot take cognizance of the cause, even by consent. *Vide Striker* vs. *Mott*, 6 Wend., 465; *McNamara* vs. *Bitely*, 4 How., 44. But to entitle the defendant to such a dismissal, the attention of the justice must be called to the fact. *Browne* vs. *Scofield*, 8 Barb., 239.

Title comes into question in an action in the nature of the former action for waste. *Snyder* vs. *Beyer*, 3 E. D. Smith, 235. So in an action for trespass in cutting wood, resisted on the ground of right to cut it; or for a trespass, resisted on the ground of right of way. *Boyce* vs. *Brown*, 3 How., 391; 7 Barb., 80; *Fredonia and Sinclearville Plank Road Company* vs. *Wait*, 27 Barb., 214; *Striker* vs. *Mott*, *supra*; *Smith* vs. *Mitten*, 13 How., 325. See also dictum in *Roulston* vs. *Clark*, 3 E. D. Smith, 366. (373.)

A mere allegation in the defendant's answer, that a plaintiff in an action for damages was where he had no right to be, does not put title to land into question. *Pierret* vs. *Moller*, 3 E. D. Smith, 574. Nor is such the case in a similar action for a mere injury to the plaintiff's possession as occupant. *Hardrop* vs. *Gallagher*, 2 E. D. Smith, 523; *Squires* vs. *Seward*, 16 How., 478. Or in an action for obstructing a river claimed to be a public highway, resisted on the ground of right to erect a dam under special grant from the legislature. *Browne* vs. *Scofield*, 8 Barb., 239. Or in action by a plank road company for toll, grounded on proof of incorporation and possession, title not being contested by the answer. *Fredonia and Sinclearville Plank Road Company* vs. *Wait*, 27 Barb., 214. See likewise collaterally *Squires* vs. *Seward*, 16 How., 478.

If the defendant, being apprized by the complaint that title will come in question, and having the opportunity of taking the objection in his answer, omits to do so, and goes to trial, the justice will retain his jurisdiction. Section 59 is not applicable to cases where the question of title is apparent on the face of the complaint, and the defendant

omits to avail himself of his privilege, but only where that question first comes up on the trial. *Adams* vs. *Rivers*, 11 Barb., 390; *Fredonia and Sinclearville Plank Road Company* vs. *Wait*, 27 Barb., 214; *White* vs. *Seaver*, 25 Barb., 235. Where the defendant himself, under a general denial, proved the plaintiff's title as part of his own case, jurisdiction was held not to be ousted, the title not being disputed. *Hastings* vs. *Glenn*, 1 E. D. Smith, 402.

The mere fact that title is necessary to be proved by the plaintiff in an action for injury to his possession, will not oust jurisdiction, unless such title is disputed by the defendant. *Bellows* vs. *Sackett*, 15 Barb., 96.

The following decisions, though made directly on the question of costs, bear upon the question:

An issue joined upon a license to do an act on real estate, does not involve the title to real property. *Launitz* vs. *Barnum*, 4 Sandf., 637. Nor is the question raised in an action for a trespass, defended on the sole ground that defendant was entitled to enter for the purpose of blasting and removing rock, pursuant to a contract, plaintiff's title not being contested. *O'Reilly* vs. *Davies*, 4 Sandf., 722. But, where defendant justified on the ground that, under a contract for sale of the premises in question, he was entitled to a right of entry to remove, at a future period, certain shrubs growing thereon, it was held that title came in question. *Powell* vs. *Rust*, 8 Barb., 567; 1 C. R. (N. S.), 172. A mere license to a purchaser to enter until default in payment of part of his purchase-money, was held, however, not to involve the question of title, in an action by such purchaser against the vendor for re-entry after such a default. *Dolittle* vs. *Eddy*, 7 Barb., 74. Nor is the question of title involved in an action for damages for breach of an agreement to convey, when the only question was as to whether an inchoate right of dower was or was not a subsisting incumbrance. *Smith* vs. *Riggs*, 2 Duer, 622.

A good deal of difficulty has been raised by the original wording of section 60, which prescribed that the defendant's answer should be the same as that which he made before the justice. It was contended, that under this section, such answer must be identically the same, and could not be altered or amended in any respect, or replied to. *Vide McNamara* vs. *Bitely*, 4 How., 44; *Cusson* vs. *Whalon*, 5 How., 302, 1 C. R. (N. S.), 27. See *Boyce* vs. *Brown*, 3 How., 391, affirmed 7 Barb., 80, *per contra*. In *Wendell* vs. *Mitchell*, 5 How., 424, it was, on the contrary, considered that the pleading in such a case might be amended in point of form, but not in matters of substance. It was also afterward held that such an answer might, and must be replied to. *Kiddle* vs. *Degroot*, 1 C. R. (N. S.) 202, 272. In *Jewett* vs. *Jewett*, 6 How., 185, it was further held

that the whole of the pleadings in these cases were to be governed by the rules of the courts above, the only restriction being, that the cause of action and the ground of defence must be the same as before the justice. *Jewett* vs. *Jewett* is acknowledged as authority in *Smith* vs. *Floyd*, 18 Barb., 522 (526), and it was settled by the Court of Appeals in *Wiggins* vs. *Tallmadge*, 7 How., 404, that the answer in the court above in such cases, need not be in the identical words of the original answer below, provided it contains the same substantial defence, and that any portion of the original defence might, in such second answer, be abandoned. The power of the court above to amend the pleadings in such a case, upon appeal, is asserted in *Gould* vs. *Glass*, 19 Barb., 179; and the question seems now fully settled by the last amendment of the section, prescribing merely that the defence, and not that the answer, shall be the same.

It seems that it is not incumbent for the plaintiff to give notice to the defendant of the deposit of the summons and complaint with the justice, and that if the latter, in ignorance of that fact, omit to give an admission of service as required by section 58, he will be remediless, the court above having no jurisdiction of the action to enable them to entertain a motion in it, until actual service of the summons. *Davis* vs. *Jones*, 4 How., 340; 3 C. R. 63.

If, however, the plaintiff accept service of the answer in the court above, without the formal admission provided for by the section, it will be a substantial performance of the undertaking, and his right to a literal compliance will be waived. *Wiggins* vs. *Tallmadge*, 7 How., 404.

The giving of the undertaking under section 56 is a matter of substance, and unless it is shown to have been given, the justice will not be held to be ousted of his jurisdiction. *Lalliette* vs. *VanKeuren*, 7 How., 409.

For the purposes of an appeal, an action discontinued and recommenced as above, is an action commenced in a justice's court. *Cook* vs. *Nellis*, 18 N. Y., 126; *Brown* vs. *Brown*, 2 Seld., 106; 6 How., 320; *Pugsley* vs. *Kesselburgh*, 6 Seld., 420; 7 How., 402; *Wiggins* vs. *Tallmadge*, 7 How., 404. See, also *Lalliette* vs. *Van Keuren*, 7 How., 409. Prior to 1857, the Supreme Court was the ultimate tribunal in this class of cases. Since the amendment of that year, they are appealable to the Court of Appeals.

It seems that, whilst this class of cases remained transferable to the County Courts, they were competent to entertain one so arising, irrespective of the residence of the defendants; and jurisdiction of the person may be shown on the record, by making the proceedings before the justice part of the judgment-roll. *Clyde and Rose Plank Road Company* vs. *Baker*, 12 How., 371, affirmed 22 Barb., 323.

CHAPTER VII.

OF OFFICERS OF THE COURT.

§ 25. *Preliminary Observations.—Delegation of Judicial Powers.*

Having thus considered the different courts established for the administration of justice within this state, and the duties and powers of the judicial officers by whom justice is so administered, it remains to notice, in the last place, the various subordinate officers who exercise inferior functions, having reference to that administration, or by whom proceedings in those courts are carried out.

The functions of these officers, and the power of compelling the due performance of those functions, on the part of the suitors in the different courts whose practice forms the subject of this work, will be shortly treated of in the present chapter. It is not proposed, however, to enter at any great length into the numerous points of detail relative to the exercise of those functions, and not bearing directly upon the progress of a suit or proceeding, when instituted. This consideration falls rather within the limits of an elementary than those of a practical treatise. The office of sheriff, in particular, has formed the subject of several separate works.

The powers of the judges themselves, and the different restrictions upon the exercise of those powers, have been noticed in the previous chapters. In some few instances, the powers so conferred are capable of partial delegation. One of those instances, *i. e.*, the making of orders of course in the Supreme Court by a county judge, or Supreme Court commissioner, has been already noticed. Another instance of such delegation is that of a referee, who, under section 272 of the Code, is entitled to exercise *pro hâc vice* all the powers and functions of a judge. The same is the case with respect to proceedings before a sheriff's jury, over which the sheriff presides, and exercises for the time being judicial functions. In the taking of testimony by commission, the commissioners also stand to a certain, but limited extent, in the place of the court. Commissioners for the making of partition, and admeasurement of dower, likewise exercise *quasi* judicial powers. Again, commissioners *de lunatico inquirendo*, or in the case of an idiot or habitual drunkard, preside judicially; and the first commissioner in particular, performs most of the ordinary functions of a judge at the trial of a cause, on the execution of such a commission.

§ 26. *Clerk of the Court.*

This officer is charged with all the multifarious minor duties connected with the due registration and safe keeping of the records belonging or incident to any suit or proceeding in the court for which he acts, and is invested with numerous minor authorities connected with those powers. He is bound to keep his office continually open for certain specified hours, amounting to the whole of the ordinary business day. *Vide* 2 R. S., 285, § 54.

By chapter 276 of 1860, p. 480, these hours are defined as follows:

In the county of New York, from 9 A. M. to 4 P. M.

In the other counties, from 8 A. M. to 6 P. M., between the 31st of March and the 1st of October; and for the other six months, from 9 A. M. to 5 P. M.; Sundays and holidays excepted.

Before the constitution of 1846, there were special clerks of the Supreme Court and Court of Chancery, and other officers styled clerks of counties, the latter being more peculiarly the depositaries of records, the former charged with the general business of the tribunals for which they were appointed. By the constitution, article VI., § 19, this arrangement was changed, and it was provided that the clerks of counties should be clerks of the Supreme Court, with such powers and duties as should be prescribed by law. They are elective officers for terms of three years. They may be required to give security, and are subject to removal by the governor. Constitution, article X. The power of appointment to any vacancy until the next election rests with the same officer. 1 R. S., 124, § 49; chapter 58 of 1836, § 2. Pending the organization of a new county, and until all proceedings for that purpose are completed, the clerk for such county, though elected, has no power, and his acts will be void. *Lanning* vs. *Carpenter*, 23 Barb., 402.

Under section 13 of the judiciary act, the clerks of counties hold all the former powers of the clerks of the Supreme Court, and registrars and clerks in Chancery in all the counties in this state. They are also clerks of the county courts within their counties, except only in the city and county of New York.

The Court of Common Pleas in that city has its own clerk, and such is the case also as to all the other courts in cities, whether of superior or inferior jurisdiction. The clerk of the Court of Appeals is likewise a separate and independent officer. His election is provided for by the section of the constitution above cited.

Under the Revised Statutes, 1 R. S., 376, §§ 56–59, the clerks of counties are each bound to appoint a deputy to act during his incapacity or absence, or in the event of a vacancy; but the powers of this

officer cease, on such vacancy being filled by appointment. *People* vs. *Snedeker*, 4 Kern, 52. A deputy clerk may perform any ordinary ministerial act; such, for instance, as certifying to the genuineness of the signature of a commissioner of deeds, and such act will be valid. *Lynch* vs. *Livingston*, 8 Barb., 463; affirmed, 2 Seld., 422.

Under the Code, numerous *quasi*-judicial duties are imposed upon the clerk of the court, whether acting as clerk of the court or of any specific tribunal. On the entry of judgment by default, in an action on contract for the recovery of money only, he assesses the amount of that recovery—section 246, subdivision 1. He enters up judgment upon a confession (§ 384), or upon an offer, if accepted (§ 385). He is also charged with the computation of interest and the taxation of costs, upon the entry of judgment of whatever nature—sections 310, 311. (See also as to costs on foreclosure by advertisement, 2 R. S., 652, § 3.) And this is so peculiarly his duty, that it is not competent for a judge of the court to tax such costs in the first instance. *Van Schaick* vs. *Winne*, 8 How., 5.

But his authority extends only to the taxation of costs on a judgment; it does not extend to those of an interlocutory nature. *Morison* vs. *Ide*, 4 How., 304; *Eckerson* vs. *Spoor*, 4 How., 361; 3 C. R., 70; *Nellis* vs. *De Forest*, 6 How., 413. But he may do so, as referee, by special direction of the court. *Mitchell* vs. *Westervelt*, 6 How., 265; affirmed, 6 How., 311.

He is the party whose especial duty it is to make up the judgment-roll, on the entry of judgment in all cases—Code § 281. *Renouil* vs. *Harris*, 2 Sandf., 641, 1 C. R., 125.

But when he has taxed costs on a judgment, his taxation may be reviewed by a judge of the court. *Whipple* vs. *Williams*, 4 How., 28. See also note, 3 C. R., 24. See likewise *Goodyear* vs. *Baird*, 11 How., 377; *Schultz* vs. *Whitney*, 17 How., 471; 9 Abb., 71. And when the court, whose judgment he enters, has made a decision on the subject of costs, he is bound to follow that decision, even though manifestly wrong. *Chapin* vs. *Churchill*, 12 How., 367.

The presumption lies, in the absence of proof to the contrary, that he has regularly done his duty. *American Exchange Bank* vs. *Smith*, 6 Abb., 1. Any irregularity, however, on his part, when shown to exist, will be corrected, and the parties will not be allowed to suffer from it. *Neele* vs. *Berryhill*, 4 How., 16; *Renouil* vs. *Harris*, 2 Sandf., 641; 2 C. R., 71. But relief of this nature rests in the discretion of the court, and may, if no injustice is done, be denied. *Chapin* vs. *Churchill*, 12 How., 367.

He is bound to keep in his office a book for the entry of judgments (Code, § 379); and also, by rule 9 of the Supreme Court, a complete

register of all suits and proceedings pending, and all other necessary books, and such others as the courts of his district, at general term, may direct.

The performance of his duty is compellable by attachment, and the form of notice, on an application for that purpose, is prescribed by rule 8.

An important part of his duty consists in the making of official searches amongst the records in his office, for the purposes of title or otherwise. His duty, in this respect, in the city of New York, is regulated by special statute—chapter 142 of 1853.

His fees are prescribed by statute. As between the parties, it is competent for him to refuse them, if he so chooses. *Schermerhorn* vs. *Van Voast*, 5 How., 458; 1 C. R. (N. S.), 400.

Although his is the office in which the records of naturalization of aliens are kept, he has no power to issue a certificate of citizenship. That power is not ministerial, but judicial, and is vested in the judges only. *In re Clark*, 18 Barb., 444; 10 How., 246; 1 Abb., 901.

Both the clerk and the deputy clerk of any court, are each, during his continuance in office, disqualified from practising in such court as a counsellor, solicitor, or attorney. 1 R. S., 109, § 25.

The clerk of any court of record, including therefore the county clerk, within his county, possesses, under 2 R. S., 284, section 49, general authority to take and certify to any oaths or affidavits required or authorized by law, in any cause, matter, or proceeding; except oaths on the actual trial, oaths of office, and other oaths required to be taken by particular officers.

As to his duty to perform such service, when required; his right to insist on prepayment of the fees for that service; and the waiver of that right by giving credit to the party bound to pay them, see *Purdy* vs. *Peters*, 23 How., 328.

§ 27. *Oaths and Acknowledgments.—Commissioners of Deeds.*

As above noticed, the clerk of each court of record possesses a general power for the administration of oaths, in suits or proceedings. Under the same section (2 R. S., 284, section 49), the same power is given to any judge of any court of record, circuit judge, Supreme Court commissioner, or commissioner of deeds; and, when so taken and certified by any of such officers, or by the clerk, as above, such oath or affidavit may be used in any court within the state, of record or not of record; or before any judicial or other officer, before whom any such cause, matter, or proceeding may be pending.

Affidavits to be read in the Supreme Court may, also, under the same section, be taken before any commissioner appointed for that purpose by the justices of said court. Under chapter 344 of 1857, section

75, the clerk of each of the New York District Courts is likewise authorized to administer oaths in the city of New York, in the same manner, and with the like effect as if he was the clerk of a court of record. The administration of oaths by these different officers is however, as a general rule, more especially confined to proceedings pending in their own particular courts.

For these purposes, and also for that of taking acknowledgments of deeds, undertakings, and satisfactions, the ministration of the officers styled commissioners of deeds, is also widely and generally available, and the facilities in this respect have of late been considerably extended.

The authority of this class of officers is conferred by the Revised Statutes. They are appointed for any county or city, and their original powers under 2 R. S., 282, 283, section 41, were, in addition to that above noticed as to oaths, to take the proof and acknowledgment of deeds, and the discharge of mortgages; and also to take the acknowledgment of bail, and of satisfaction of judgments in the Supreme Court, or in the courts of the county or city for which they are appointed. Under 2 R. S., 282, section 40, the same power is vested in the judges of County Courts. By chapter 238 of the Laws of 1840, the office of commissioner of deeds is abolished in the several towns of this state, and the powers and duties of such commissioners transferred to the justices of the peace in such towns.

The powers of these several officers are strictly local, and none of them has any general authority to act, out of the local limits for which he is appointed. In any acknowledgment or affidavit taken by them, it is therefore an indispensable requisite that the venue, where such acknowledgment or affidavit is taken, should appear upon its face. If this is omitted, the certificate will be a nullity, and the proceeding of no avail. *Lane* vs. *Morse*, 6 How., 394; *Cook* vs. *Staats*, 18 Barb., 407.

By 1 R. S., 759, section 18, it is further provided that any certificate of acknowledgment taken before a commissioner of deeds, or judge of the County Courts, not of the degree of counsellor at law, shall not be of any effect in any other county than that of his residence, unless there be subjoined to it a certificate of the clerk of such county, identifying his authority and signature. This certificate must therefore be obtained in all such cases. The fee for this service is twenty-five cents. The deputy clerk is competent to grant such a certificate. *Lynch* vs. *Livingston*, 8 Barb., 463; affirmed, 2 Seld., 422.

By chapter 360, of 1859, p. 869, all the powers of commissioners of deeds are conferred upon notaries public of this state, in addition to their former powers, and without official seal. If his certificate is to be used out of the city for which such notary is appointed, his signature

must be authenticated by the county clerk as above. See, as to the full powers of a notary under the above statute, *People* vs. *Hascall*, 18 How., 118.

The power of taking acknowledgments of deeds within this state, is also, by virtue of 1 R. S., 757, section 4, vested in the present judges of the Supreme Court, and of the county and city courts, in addition to commissioners of deeds and justices of the peace, as above, but with the same local limitations as before noticed. The same powers are conferred on the same officers, as to the satisfaction of mortgages, by 1 R. S., 761, section 28; and, under 2 R. S., 362, section 23, a satisfaction of judgment may, in like manner, be acknowledged before some judge of the court in which the judgment was rendered, or before some judge of the county courts, or a commissioner of deeds. And, lastly, by chapter 271 of 1833, section 2, every written instrument, except promissory notes and bills of exchange, or wills, may be proved or acknowledged in the same manner as a conveyance of real estate, and the certificate of the proper officer endorsed thereon, shall entitle it to be received in evidence, as if it were such a conveyance.

The taking of acknowledgments out of the state, has been, from time to time, provided for as follows:

By 1 R. S., 757, section 4, subdivision 2, the power of taking acknowledgments without the state, but within the United States, is conferred upon the following officers: The chief-justice, and associate justices of the Supreme Court of the United States; district judges of the United States; the judges or justices of the Supreme, Superior, or Circuit Courts, of any state or territory within the United States; and the chief judge, or any associate judge of the Circuit Court of the United States, in the District of Columbia—but limited in each case to the place or territory to which the jurisdiction of the court to which such judicial officer belongs shall extend. Under chapter 222 of 1829, similar powers are given to the mayors of Philadelphia and Baltimore; and, by chapter 109 of 1845, to the mayor of any city in the United States.

By chapter 259 of 1858, provision is made for the recording of documents acknowledged or proved in any other state or territory, according to its laws, when both the grantor and the officer before whom it was proved or acknowledged shall be dead.

As to acknowledgments taken out of the United States, the following powers are conferred by 1 R. S., 757, sections 5 and 6:

If the parties reside in any state or kingdom in Europe, or in North or South America, the acknowledgment may be taken before any minister plenipotentiary, or any minister extraordinary, or any chargé d'affaires, of the United States, resident within such state or kingdom. If in France, before the consul of the United States in Paris; if in

Russia, before the consul at St. Petersburgh; if in the United Kingdom of Great Britain and Ireland, or its dominions, before the mayor of London, the mayor or chief magistrate of Dublin, the provost or chief magistrate of Edinburgh, or the consul of the United States at London. By section 7, such proofs or acknowledgments must be duly certified under the hand and seal of office of such officers. By chapter 222, of 1829, these facilities are extended, and acknowledgments may be taken before any consul of the United States resident in any foreign port or country, or before a judge of the highest court in Canada.

By 1 R. S., 757, section 8, an acknowledgment may also be taken before any person specially authorized by commission under the seal of the Court of Chancery; which power is no doubt exercisable by the present Supreme Court.

Under 1 R. S., 758, sections 9 to 12, inclusive, sundry provisions are made relating to acknowledgments and proofs, to the effect that the person making them must be known to, or identified before the officer, and also as to the separate examination of married women residing within this state; but, without the state, a married woman may acknowledge as if she were a *feme sole*.

In relation to the taking of affidavits in foreign states or countries, the following provision is made by 2 R. S., 396, section 25:

In cases where, by law, the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:

1. It must be certified by some judge of a court having a seal, to have been certified or taken before him, specifying the time and place where taken.

2. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

N. B.—A master extraordinary in Chancery in England, cannot take an affidavit to be used in this state. His powers in that respect are merely local. *Vide Lahens* vs. *Fielden*, 1 Barb., 22.

By chapter 206 of 1854, the power of taking oaths and affirmations is specially given to the officers named in 1 R. S. 757, sections 5 and 6 (*vide supra*), and also to any other consul or vice-consul, or minister resident of the United States, appointed to reside in any foreign port or place. Such taking must be certified under the hand and seal of such officers respectively.

In regard to the taking of both acknowledgments and affidavits, in other states and foreign countries, the facilities have of late years been continually increasing.

By chapter 290 of 1840, power is given to the governor to appoint

and commission one or more commissioners in each of the other states and territories of the United States, or in the District of Columbia, with full power and authority to take acknowledgments, and to administer oaths and affirmations, with the same effect as an officer residing within the state.

By chapter 270 of 1850, amended by chapter 788 of 1857, and chapter 222 of 1859, the exercise of this power is regulated in detail, the former statute being repealed. By section 1 that power is again conferred, and the same authority is given to such commissioners, when appointed, in the very fullest terms, so as to extend beyond a question to every description of acknowledgment or affidavit. Their powers are strictly local. Section 5.

By the act of 1850, the authority, as in the Revised Statutes, is confined to the United States; by the amendment of 1857 it is extended, so as to authorize such appointments in Canada. In both, the number of such commissioners is not to exceed five in any one city or county. This number is extended to ten in any one county by chapter 222 of 1859. Each of such commissioners is to take an oath, and to prepare an official seal, an impression of which, together with his signature, is to be filed in the office of the secretary of state at Albany. His certificate is to be under his hand, and under such official seal; and before the document so certified can be used or read in evidence, it must be authenticated by the official certificate of the secretary of the state, to the effect prescribed by section 4. The fee for this certificate is twenty-five cents. Section 6. It will therefore be necessary on the receipt of any document so certified, to enclose it forthwith to that officer, at Albany, postage paid, with the above fee, and also the return postage, or a stamped envelope, enclosed.

By chapter 195 of 1848, amended by chapter 303 of 1853 (since repealed), chapter 111 of 1854 (superseded in effect though not repealed), and chapter 61 of 1856, these facilities are further increased, as to the proof and acknowledgment of deeds made by persons resident within any other state or territory of the United States, or the District of Columbia; and they may now be taken by any officer of any such state or territory, authorized by its laws to take acknowledgments. Section 2, which has been the subject of all the amendments above noticed, prescribes the mode of authentication of the signature and authority of the officer so acting, which is to be by a certificate under the name and official seal of the clerk, register, recorder, or the prothonotary of the county in which such officer resides, or of the County or District Court or Court of Common Pleas thereof. This certificate should, of course, be procured simultaneously with the taking of an acknowledgment in that form.

A special power to take affidavits is also conferred by chapter 471 of 1862, p. 870, upon persons holding the rank of colonel or any higher rank in the New York state volunteers in the service of the United States, and any commissioned officer in said service, and who is a counsellor of the Supreme Court of this state.

By chapter 308 of 1858, amended by chapter 283 of 1862, p. 478, the governor is further empowered to give a similar commission to that authorized by the statute of 1850, with similar powers as to the taking of acknowledgments and affidavits, to one or more, not exceeding three, commissioners, in each of the following cities, viz.: London, Liverpool, and Glasgow, in Great Britain; in Dublin, Belfast, Cork, and Galway, in Ireland; and Paris and Marseilles, in France. Such commissioners have also the additional power, under section 1, of certifying the existence and correctness of a copy of any patent-record, or other document remaining of record in any public office or official custody in Great Britain or France, such certificate to be evidence. *Vide* sections 8 and 9. Similar provisions to those of the statute above referred to, are made with reference to the official seals of such commissioners, and the necessity of the authentication of their acts by the secretary of state, who is entitled to the same fee for such authentication. See instructions above given. The fees of these commissioners are prescribed by section 7. By the amended measure of 1862, the governor is empowered, in his discretion, at any time hereafter, to appoint a commissioner for any other foreign state or country, with the same powers as above.

It may not be out of place to mention that similar arrangements exist for taking acknowledgments and depositions relating to property or proceedings in other states or territories, by commissioners appointed for this state. Affidavits for use in the English courts may be sworn before a British consul or vice-consul.

It is irregular for the attorney for one of the parties to a suit to act as commissioner of deeds in taking an affidavit in that suit. *Gilmore* vs. *Hempstead*, 4 How., 153. But such is not the case with regard to affidavits unconnected with, or preparatory to a suit before it is actually pending. The rule is merely technical. A confession of judgment sworn to before the plaintiff's attorney, was accordingly held good in *Post* vs. *Coleman*, 9 How., 64.

The office of commissioner of deeds being merely ministerial, and not judicial, relationship to the parties is no disqualification. *Lynch* vs. *Livingston*, 8 Barb., 463; affirmed, 2 Seld., 422.

§ 28. *Sheriffs.*

This officer may be shortly defined as the executive agent of the different courts of justice, for enforcement of their judgments or orders,

and the summoning and empannelling of juries for the trial of causes pending within their jurisdiction. He is likewise invested with *quasi*-judicial functions in presiding over what is termed a sheriff's jury, summoned for the assessment of damages, on judgment by default, on a writ of inquiry, or other special writ directed to him, and, also, in cases where the title to property on which a levy has been made by him is contested. *Vide* 2 R. S., 286, § 58. He is likewise, when employed by the parties to an action, bound to act as their official agent in the service of process or papers. He further acts virtually on their employment, in taking property under the provisional remedy of replevin. He is, *ex officio*, custodian of the jails within his county, and of the prisoners confined therein, whether on civil or criminal process. 1 R. S., 380, § 75. The office is elective for a term of three years, subject to removal by the governor for cause shown. Constitution, art. X. § 1. He can hold no other, and is ineligible for re-election during three years. 1 R. S., 112. See, also, constitution of 1846, art. X., § 1. In case of his removal or death, the governor may supply the vacancy until the next election. 1 R. S., 123, § 44; 1 R. S., 124, § 49; ch. 58, of 1840. The out-going sheriff continues the proceedings under a levy actually made by him whilst in office, and is fully empowered for that purpose. *Vide* 2 R. S., 438, § 67–69 inclusive. Of all other matters left unfinished in his office, and of the prisoners in his custody, the incoming sheriff takes charge.

On going into office he gives an official bond for the due discharge of his duties, the penalty being $20,000 in the city of New York, and $10,000 in other counties (1 R. S., 378, § 67, 68); and, in default of his doing so, the office becomes vacant. Constitution of 1846, article X., § 1. He is also bound to appoint an under-sheriff, who holds during his pleasure, and supplies his place during any vacancy. 1 R. S., 379, § 71, 72.

He may appoint as many deputies as he thinks proper, from whom he takes bonds similar to his own, and he and the under sheriff may also depute persons to do particular acts. 1 R. S., 379, § 73, 74. A deputy, when appointed, may resign his office, which resignation discharges his sureties from responsibility as to his future acts. *Gilbert* vs. *Luce*, 11 Barb., 91.

In the event of both offices being vacant, the coroner, or one of the coroners of the county, acts in the sheriff's place till the vacancy is supplied, giving a similar bond. Should the latter neglect or refuse to do so, the first judge of the county appoints a special sheriff during the vacancy. 1 R. S., 380–382, § 78–86 inclusive. The whole of article V., title II., chapter XII., part I., of the Revised Statutes (1 R. S., 378–382 inclusive) relates to the duties and powers of the officers in question.

The sheriff is bound to keep a proper office, continually open during business hours, and the leaving of notices or papers at that office, or, if he have no office, then with the county clerk, is service on him. *Vide* 2 R. S., 285, § 55–57. Sheriffs, under-sheriffs, deputy sheriffs, sheriffs' clerks, and coroners, are all, during their continuance in office, disqualified from practising as counsellors, solicitors, or attorneys. 1 R. S., 109, § 27.

In the event of the sheriff himself being a party to any action, process against him is directed to and executed by the coroner. See article 8, title VI., chap. VII., part III., of the Revised Statutes, 2 R. S., 442–444. See similar authority in case of replevin, 2 R. S., 533, § 67. Should both sheriff and coroner be parties, such process then issues to persons specially appointed by the court, and styled elisors.

The duties and responsibilities of both sheriff and coroner, under the Revised Statutes, are expressly continued by the Code in the following terms:

In relation to executions (which subject will be more fully considered hereafter, under that head), by section 291, which runs as follows:

§ 291. Until otherwise provided by the legislature, the existing provisions of law, not in conflict with this chapter, relating to executions and their incidents, the property liable to sale on execution, the sale and redemption thereof, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties, and the liability of their sureties, shall apply to the executions prescribed by this chapter.

In relation to the service of process, and generally, in section 419, in the following terms:

§ 419. Whenever, pursuant to this act, the sheriff may be required to serve or execute any summons, order, or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and, if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and all the provisions of this act relating to sheriffs, shall apply to coroners when the sheriff is a party.

The performance of the formal duties of the sheriff, or the payment over of moneys in his hands, is compellable by attachment. The mode of proceeding in such cases is regulated by rule 8 of the Supreme Court. See hereafter under the head of proceedings for contempt. The party has in addition a remedy by action; and, in a case where the title to a fund in the sheriff's hands was actually disputed, he was compelled to resort to that mode of procedure, instead of an attachment. *Wilson* vs. *Wright*, 9 How., 459.

In the execution of process directed to him, the sheriff is bound to exercise the utmost diligence, and acts under the strictest responsibility, and at his own peril; nor will the court interfere to direct him as to the mode of that execution. *Bowie* vs. *Brahe*, 2 Abb., 161.

The ordinary presumption as to the due performance of official acts lies, however, in his favor. *Smith* vs. *Hill*, 22 Barb., 656.

He is not responsible for any acts done by him within the limits of his authority, when acting under process regular on its face. *Vide Cross* vs. *Phelps*, 16 Barb., 502, (503); *Landt* vs. *Hilts*, 19 Barb., 283. And this, even though the judgment on which such process issues be voidable. *Sheldon* vs. *Stryker*, 21 How., 329. See also generally as to the right to protection of a judicial or ministerial officer acting merely in error. *Stanton* vs. *Schell*, 3 Sandf., 323.

But if, under process, however regular, he takes the goods of a wrong party, it will be no protection to him, even though so directed by the process itself. *Stimpson* vs. *Reynolds*, 14 Barb., 506; *Marsh* vs. *Backus*, 16 Barb., 483; *Kuhlman* vs. *Orser*, 5 Duer, 242; *King* vs. *Orser*, 4 Duer, 431. But an action of trespass does not lie against him by the owner of goods, for taking them out of the possession of another party, on process against that party. *Foster* vs. *Pettibone*, 20 Barb., 350.

If he knowingly omits to make a sufficient levy on attachment, there being property enough to answer for the debt, he will be liable to the creditor for any deficiency. *Ransom* vs. *Halcott*, 18 Barb., 56; 9 How., 119; and if collusion or an omission to levy on property be shown in a case of execution, the court will interfere to prevent the fraud from being effectuated. *Eagle* vs. *Bonneau*, 2 Sandf., 679; 3 C. R., 205.

He is bound, at the request of the party, to prosecute and collect any bonds or securities taken by him in the course of his duty, or he will be liable for the omission. Nor can he require an indemnity for so doing. *Swezey* vs. *Lott*, 21 N. Y., 481.

He is responsible for the safety of property under his charge, and bound to exercise full diligence; but his responsibility is not that of an insurer, and the question of negligence or the reverse, is one of fact. *Moore* vs. *Westervelt*, 21 N. Y., 103; reversing same case, 2 Duer, 59.

He is responsible, and becomes a trespasser, if he take property exempt from execution. *Hoyt* vs. *Van Alstyne*, 15 Barb., 568. He is also responsible for any surplus property, or any damage to that surplus. *Waterbury* vs. *Westervelt*, 5 Seld., 598. And, if he sell goods in an illegal manner, as after sun-down, he will be responsible to the debtor, and held a trespasser *ab initio*. *Carnrick* vs. *Myers*, 14 Barb., 9.

He is also liable in attachment for taking goods out of the possession of a consignee, entitled to their custody, as holding a lien. *Brownell* vs. *Carnley*, 3 Duer, 9. He is likewise liable as a trespasser, if, on an exe-

cution against one partner, he sells entire property of the partnership. *Bates* vs. *James*, 3 Duer, 45.

If, when money ought to be applied by himself, he allows another person to take the control of it, he will be liable for the acts or omissions of such person. *Van Tassel* vs. *Van Tassel*, 31 Barb., 439.

He is answerable for the acts of his deputies, and liable, jointly with them, for any misfeasance on their part. *Waterbury* vs. *Westervelt*, 5 Seld., 598; *King* vs. *Orser*, 4 Duer, 431; *Sheldon* vs. *Paine*, 6 Seld., 398. Also, jointly with his indemnitors, for a sale wrongfully made. *Herring* vs. *Hoppock*, 3 Duer, 20; 12 L. O., 167. Likewise, jointly with plaintiff in attachment, for a wrongful levy. *Marsh* vs. *Backus*, 16 Barb., 483: and, when he takes the property of a third party, the onus lies on him to prove his right to do so. *Cross* vs. *Phelps*, 16 Barb., 502.

When the title to property levied on by him is contested, he may summon a jury to try the question of title. *Vide* 2 R. S., 286, § 58. In such cases, he has also a right to demand an indemnity from the party, before proceeding, and it has been held that he may demand such an indemnity, even after the sale of the property, and before paying the proceeds over. *Westervelt* vs. *Frost*, 1 Abb., 74. He is, however, generally prohibited from taking any bond, obligation, or security, by color of his office, in any other case or manner than such as are provided by law; and any such security taken otherwise is to be void. *Vide* 2 R. S., 286, § 59. An assignment of any bond taken by him for the benefit of a party is compellable, and may be made by the under-sheriff, or other party acting during a vacancy. 2 R. S., 286, § 60.

In an action against him, the fact that the process in which that action is based is voidable, cannot be set up by him as a defence. *Grosvenor* vs. *Hunt*, 11 How., 355; *Bacon* vs. *Cropsey*, 3 Seld., 195. The same is the case in an action for an escape. *Ginocchio* vs. *Orser*, 1 Abb., 433; *Hutchinson* vs. *Brand*, 6 How., 73; affirmed, 5 Seld., 208. *Renick* vs. *Orser*, 4 Bosw., 384. But, if such process be not merely voidable but void, he will not then be liable. *Ginocchio* vs. *Orser*, *supra*; *Carpenter* vs. *Willett*, 18 How., 400.

When held liable for a false return, he cannot make use of the judgment on which he is held for his own benefit. *Carpenter* vs. *Stilwell*, 1 Kern., 61; reversing same case, 12 Barb., 128.

The measure of damages against him, on an action for a false return on execution, is the amount directed to be levied, and interest. *People* vs. *Lott*, 21 Barb., 130; *Ledyard* vs. *Jones*, 3 Seld., 550. He cannot show that that amount was not due under the judgment (*Bacon* vs. *Cropsey*, 3 Seld., 195), "or that the judgment is still collectable;" but he may show, in mitigation, that defendant had no property on which he could have levied. *Ledyard* vs. *Jones*, 4 Sandf., 67; affirmed, 3 Seld., 550.

His own return, or the return of his deputy, is conclusive against him in all cases. *Sheldon* vs. *Payne*, 3 Seld., 453; *Kuhlman* vs. *Orser*, 5 Duer, 242. If, however, the party interferes with the execution of the process, and makes the deputy his official agent for any purpose, both will be discharged. The mere giving of instructions, however, upon which the deputy does not act, will not have that effect, and the liability will continue. *Sheldon* vs. *Payne*, *supra*. *Same case*, 6 Seld., 398.

In certain cases, he becomes himself liable as bail for a party in custody. See hereafter under the head of arrest. In these cases he has the same rights and remedies as other bail, in relation to the surrender of the principal. *Buckman* vs. *Carnly*, 9 How., 180; *Sartos* vs. *Merceques*, 9 How., 188. See as to the extent of his liability, in such a case, *Metcalf* vs. *Stryker*, 31 Barb., 62, 10 Abb., 12; *Gallarati* vs. *Orser*, 4 Bosw., 94.

His other powers and duties, under the special provisions of the Code, the limitations applicable to proceedings against him, the fees which he is entitled to receive, the nature and form of proceedings against him or his sureties, on his official bond or otherwise, and his privileges as to the venue in those proceedings, will be hereafter considered under their appropriate heads.

When liable for an escape, the death of the escaped prisoner does not discharge him. *Tanner* vs. *Hallenbeck*, 4 How., 297. Nor is the insolvency of such party a defence, *per se;* it only goes to the measure of damages. *Loosey* vs. *Orser*, 4 Bosw., 391; *McCreery* vs. *Willet*, 4 Bosw., 643; affirmed, 23 How., 129; *Daguerre* vs. *Orser*, 10 Abb., 12, note.

But the return of the prisoner before service of summons, though after it is actually delivered to the coroner, discharges his liability. *Wiggin* vs. *Orser*, 5 Duer, 118.

If the prisoner be taken out of his hands by a superior authority, whose acts he cannot control or influence, he will not be liable. *Wickelhausen* vs. *Willet*, 21 How., 40; 12 Abb., 319. Otherwise, however, when he is so taken merely by a justice's warrant. *Brown* vs. *Tracy*, 9 How., 93.

The affidavit of his deputy, of the service of any process or paper, is, as between third parties, *primâ facie* evidence, but capable of disproof. *Van Rensselaer* vs. *Chadwick*, 7 How., 297. But his official return, as to any matter in which such return is directed by statute, is conclusive. *Columbia Insurance Company* vs. *Force*, 8 How., 353; *Larned* vs. *Vandenburgh*, 7 How., 379; *Russell* vs. *Gray*, 11 Barb., 541.

But such return is no evidence whatever of the service of any paper as to which it is not directed, as of an order in supplementary proceedings. Such service can only be proved by affidavit. *Utica City Bank* vs. *Buell*, 9 Abb., 385; 17 How., 498.

§ 29. *Other Ministerial Officers.*

The authorized depositary of moneys brought into court by the authority of different tribunals, is, in the absence of special directions on the subject, the county treasurer of the county in which the action is triable, and, in New York, the chamberlain of that city. The statutory provisions on that subject will be found at 1 R. S., 369–371. See likewise as to moneys belonging to infants, chapter 386 of 1859, p. 912. The performance of their duties in this respect is regulated by rules 81 to 83, inclusive. The clerk of the court is also occasionally charged with a deposit of this nature.

Receivers, committees of the person or estate of lunatics, and guardians, are also, to a certain extent, qualified officers of the court. Their functions as such will be hereafter considered.

§ 30. *Attorneys and Counsel.*

Though exercising no ministerial office, attorneys and counsel are, in strictness, officers of the court. They derive from it their authority to act, the exercise of their functions is subject to its supervision and control, and, in certain cases, they may be compelled by it to act without fee or reward. See 2 R. S., 444 and 445, as to suits *in formâ pauperis.*

Before the constitution of 1846, the offices were separate. They are now blended together, and the same person generally exercises both functions under the same retainer. Their capacities and authority, however, are still distinct, when separately employed. *Vide Easton* vs. *Smith*, 1 E. D. Smith, 318.

Both professions are thrown open, by the constitution, to any male citizen of good moral character, and who possesses the requisite qualifications of learning and ability. Art. VI., section 8. By section 75 of the judiciary act, chapter 280 of 1848, the mode of admission is prescribed, which is to take place at a general term; and the mode of examination on this occasion is regulated by rules 1 and 2. See generally as to such examination, *in re Pratt*, 13 How., 1.

Under chapter 202 of 1860, p. 342, graduates of the law school of Columbia College are also to be admitted to practice.

The constitutionality of this provision was drawn into question in the following cases: *Matter of the Law Graduates of the University of New York*, 31 Barb., 353; 19 How., 97; 10 Abb., 348; *In the matter of Admission of Graduates, &c.*, 19 How., 136; 10 Abb., 358. These cases are, however, reversed, and the constitutionality of the statute

established by the Court of Appeals. *Matter of Application of Henry W. Cooper*, 22 N. Y., 67; 20 How., 1; 11 Abb., 301.

The general term also possesses the power of removal and suspension of these officers. See section 75 of judiciary act; above cited. An attorney and counsellor, when so admitted, is entitled to practise in all the courts of the state. Constitution, art. VI., § 8, *supra*. But he can only be admitted by the Supreme Court, as above. No other court is competent to do so. *In re Brewer*, 3 How., 169.

By the amended judiciary act, chapter 490 of 1847, section 46, power is given to any person of good moral character, though not admitted, to appear for another person, provided he is specially authorized to appear for him in writing, or by personal nomination in open court.

This power, for obvious reasons, has been but infrequently exercised, and, when attempted to be exercised, has been made the subject of considerable discussion. It has been held, on several occasions, to be unconstitutional. *Bullard* vs. *Van Tassel*, 3 How., 402; *McKean* vs. *Devries*, 3 Barb., 196; 1 C. R., 6. See also *Weare* vs. *Slocum*, 3 How., 397. It seems, however, by a note at 1 C. R., 106, that, in another district, a party so nominated was allowed to appear; and *Le Roy* vs. *Harley*, 1 Duer, 637; 11 L. O., 29, admits the right, though declining to pass upon the question, and holding that a nomination so made must be approved and authorized by the court, and that, without such approval, all the acts of the nominee will be unauthorized and void. See to the same effect, *Bridenbecker* vs. *Mason*, 16 How., 203. Nor is such a special attorney entitled to have any costs taxed in his favor. *Bullard* vs. *Van Tassel*, *supra*.

Attorneys and counsellors, when admitted, hold their offices for life, subject to removal or suspension for any deceit, malpractice, or misdemeanor. 1 R. S., 109, §§ 23 to 25. The general term is the forum for such an application, on which, the party accused is entitled to a copy of the charges made against him, and to an opportunity of being heard in his defence.

It has been held, that an attorney cannot practise, whilst resident out of the state. *Richardson* vs. *Brooklyn City and Newtown Railroad Company*, 22 How., 368. This disability is, however, now removed by special statute—chapter 43 of 1862, p. 139.

By section 303 of the Code, subsequently cited under the head of costs, the measure of compensation, as between attorney and client, formerly regulated by law, is now left entirely to the agreement, express or implied, of the parties.

All the former checks upon the relation are, in this respect, entirely swept away, and, where the bargain between the attorney and client is in any manner fair, and not procured or induced by fraud or overreach-

ing, the court will not interfere to regulate, but will, on the contrary, carry it out. See *Rooney* vs. *Second Avenue Railroad Company*, 18 N. Y., 368 (373); *Benedict* vs. *Stuart*, 23 Barb., 420; *Satterlee* vs. *Frazer*, 2 Sandf., 141. (142).

Nor, as between attorney and client, are taxable costs any longer the measure of compensation, but proof of the value of his services must be given in all cases. *Garr* vs. *Mairet*, 1 Hilt., 498; *Moore* vs. *Westervelt*, 3 Sandf., 762; *Stow* vs. *Hamlin*, 11 How., 452. See, also, *Easton* vs. *Smith*, 1 E. D. Smith, 318. See, however, as to their being, *prima facie*, the measure of value, *Keenan* vs. *Dorflinger*, 19 How., 153; 12 Abb., 327, note.

The court, however, will still interfere summarily, with regard to arrangements between them and their clients, to prevent fraud, or to relieve against an unreasonable or oppressive bargain. See *Barry* vs. *Whitney*, 3 Sandf., 696; 1 C. R. (N. S.), 101. See, also, *Benedict* vs. *Stuart*, 23 Barb., 420. (423.) Nor can an attorney retain property acquired by a fraud, and the court will interfere to prevent it, though in a case where, between party and party, it would have denied relief. *Ford* vs. *Harrington*, 16 N. Y., 285. See generally, on the subject of the alteration effected by section 303, dictum of Hand, J., in *Barber* vs. *Crosset*, 6 How., 45; 1 C. R. (N. S.), 401. The court will interfere, on the other hand, in a proper case, to protect the attorney from fraud committed on the part of, or through the instrumentality of his client. *Marquat* vs. *Mulvey*, 9 How., 460.

Under article III., title II., chapter III., part III., of the Revised Statutes (2 R. S., 297, 298), several provisions are made respecting the responsibility of these officers. Under section 68, they are indictable for deceit or collusion. By section 69, treble damages are recoverable against them for wilful delay or extortion. A penalty is imposed by section 70, for allowing proceedings in their name, by persons not their partners or clerks. The allowing a subpœna to be so issued, falls within this prohibition. *Yorks* vs. *Peck*, 31 Barb., 350.

By section 71, it is provided, that no attorney, counsellor, or solicitor shall, directly or indirectly, buy or be interested in buying any bond, bill, promissory note, bill of exchange, book debt, or other thing in action, with the intent, or for the purpose of bringing any suit thereon; whilst, by section 72, he is equally prohibited from making or procuring loans, either in money or value, as an inducement, or in consideration of placing in his or any other hand, any debt, demand, or thing in action, for collection; and a violation of either of those provisions subjects him to indictment and removal from office.

By section 74, however, these severe provisions are relaxed so as not to prohibit his receiving any bond, &c., for any estate, real or per-

sonal, or for services actually rendered, or a debt antecedently contracted, or from buying or receiving a bill of exchange, draft, or other thing in action, for the purpose of remittance, and without intent to violate any of the preceding sections.

A mortgage has been held to be within the meaning of this prohibition. *Hall* vs. *Bartlett*, 9 Barb., 297. But, in the same case, it was decided that a foreclosure by advertisement was not a suit within the meaning of the statute, which, being penal, must be strictly construed, and the intent clearly established. A loan, pending an action already commenced, or made for the purpose of obtaining security for a previous debt, has been held not to be within the prohibition. *Vide Baisted* vs. *Dean*, 12 Wend., 143; and *Watson's Executors* vs. *McLaren*, 19 Wend., 557.

An attorney who has dissolved partnership, pending a suit, is not liable for the frauds of his former partner, committed after that dissolution. *Ayrault* vs. *Chamberlin*, 26 Barb., 83.

An attorney who has received money belonging to his client, must pay it over at once, or an attachment will lie against him. And this rule extends not merely to moneys received by him in a suit or proceeding, but also to moneys placed in his hands in his professional character, for investment. *In re Grant* vs. *Chester*, 16 How., 260; 7 Abb., 357.

An attorney is, it would seem, privileged from serving as a juror (*vide* 2 R. S., 416, section 35); and also from arrest whilst employed in some cause pending, and then to be heard, but not beyond the actual sitting of the court; or when sued with any other person. 2 R. S., 290, § 86.

He cannot, as before noticed, act as an attorney, whilst filling the office of judge, clerk of a court, sheriff, sheriff's clerk or deputy, or coroner; nor can he, or his clerk, be bail in an action. See *Blankman* vs. *Hilliker*, 1 L. O., 188, 189. But it would seem that this disability does not extend to his executing any undertaking or security prescribed by statute, saving only bail on arrest. *Vide Walker* vs. *Holmes*, 22 Wend., 614; *Hoffman* vs. *Rowley*, 13 Abb., 399.

All communications passing between him and his client, with reference to business in which he is employed, are privileged, and he cannot be compelled, nor will he be allowed to disclose them. And this same privilege extends to similar communications between his clerk and such client. *Sibley* vs. *Waffle*, 16 N. Y., 180. The privilege in question is not confined to communications with reference to a suit or proceeding, but extends to any professional business whatever. *Williams* vs. *Fitch*, 18 N. Y., 546; *Church* vs. *Richards*, 3 E. D. Smith, 89. The communication must, however, be made for the purposes of consulta-

tion or advice, or the privilege may be lost. Same case, p. 97, per Ingraham, J.

But where there appears to be a combination between the attorney and client, to make use of the privilege of the former for the purpose of withholding important evidence, it will not be sustained. *People* vs. *Sheriff of New York*, 29 Barb., 622; 7 Abb., 96. See likewise, same views held, and the privilege in question fully considered, from a point of view unfavorable to its continuance. *Mitchell's case*, 12 Abb., 249.

Nor does the privilege of the attorney excuse him from being compelled to testify as to negotiation between the parties, or between himself and the adverse party. *Woodruff* vs. *Hurson*, 32 Barb., 557.

A party to any litigation, of full age and sound mind, has his option to appear by attorney or in person (2 R. S., 276, § 11), and this privilege would seem to extend to a married woman, in those cases in which she is competent to sue alone. *Vide* Code, § 114. The attorney for an infant is employed by his guardian. In the case of a person of unsound mind the committee is the acting party. See Code, §§ 115–134.

Once employed, the authority of the attorney continues pending the suit, until judgment, and also over the proceedings for enforcing such judgment when rendered. And, at any time within two years, he may enter satisfaction. 2 R. S., 362, § 24. During the whole of that time he has full control over all proceedings; and all papers, except process to bring his client into contempt, must be served on him, and on him only, by which his client will be bound. Service on the client himself will be of no effect. Code, §§ 417, 418; *Bogardus* vs. *Livingston*, 7 Abb., 428; *Tripp* vs. *De Bow*, 5 How., 114. See, however, as to the duty of the attorney being in strictness fulfilled, on judgment being perfected, *Adams* vs. *Fort Plain Bank*, 23 How., 45.

And, until changed, his authority continues on a writ of error or appeal, and service must be made on him, and not on the party. *Same case.* See also rule IV. of Court of Appeals.

When employed, he is bound to the exercise of the utmost skill, care, and diligence, and is responsible for his omission in any of these respects. His client is, however, bound to furnish him with the necessary funds, and, if this be omitted, he may decline to proceed, but, in this case, he cannot retain his client's papers.

His undertakings, consents, and admissions are enforceable for the benefit of the adverse party, and bind his client. To be binding, however, they must be in writing, or reduced to the form of an order. Rule 13.

The attorney has authority to open a judgment by default without

consulting his client, but he does so at his own peril, should loss be shown to have accrued. *Clussman* vs. *Merkel*, 3 Bosw., 402.

And even an unauthorized appearance by him may suffice to bind the client by his acts. *Bogardus* vs. *Livingston*, 2 Hilt., 236: *A fortiori*, where there is any thing amounting to a ratification. *Johnston* vs. *McAusland*, 9 Abb., 214.

But the client may be relieved against an unauthorized stipulation, depriving him of a substantial right, in a matter outside the ordinary conduct of the suit. *People* vs. *Mayor of New York*, 11 Abb., 66. See general note as to attorney's authority, p. 74.

His authority is of course determined by the client's death, and he cannot claim to act for the representatives without a fresh retainer.

He may be changed by consent, or upon cause shown, and upon such terms as may be just, upon the application of his client, by order of a justice of the court, and not otherwise (rule 12); and the client has a right to make such a change, without inquiry into his motives. *Trust* vs. *Repoor*, 15 How., 570.

When made, notice of such substitution must be served on the adverse party, *Bogardus* vs. *Richtmeyer*, 3 Abb., 179, as, until such notice, service on the former attorney will remain good service, and bind the client.

When so changed, he has a lien on the papers in his hands for the amount of his compensation, and cannot be compelled to deliver those papers over, until that lien is discharged, or reasonable provision made for it. He may, however, be compelled to produce them on a pressing emergency. *Trust* vs. *Repoor*, 15 How., 570.

If, however, he take a special security for his compensation, such lien will be waived. And where his claim is doubtful, he may be required to take security, if tendered, and to deliver up the papers. *Cunningham* vs. *Wilding*, 5 Abb., 413.

A reference to ascertain the amount of his lien, is the proper course to be pursued in the event of any dispute, and, until it is decided, he will not be compelled to deliver over the papers. *In re Russell*, 1 How., 149; see order, p. 150, and, in a suit by him for his fees, a reference is the proper course. *Bowman* vs. *Sheldon*, 1 Duer, 607; 11 L. O., 219.

But the right to compel him to deliver papers, extends only to papers in a suit strictly considered; any held by him as a trustee, or for the purposes of an accounting, he has a right to retain, until fully discharged.

He has, also, a lien on all moneys received by him, for the amount of his compensation, and likewise, on any judgment recovered by him; the client cannot satisfy such a judgment to the prejudice of

that lien, and it extends not merely to his taxable costs, but also to the amount of any stipulated compensation.

This point is settled by *Rooney* vs. *The Second Avenue Railroad Company*, 18 N. Y., 368. It had been previously made the subject of very considerable discussion, as to whether such lien had, or had not, been abolished by section 303 of the Code.

Its existence had been previously maintained, and the attorney's lien protected in the following cases: *Sweet* vs. *Bartlett*, 4 Sandf., 661; *Wilkins* vs. *Batterman*, 4 Barb., 47; *Sherwood* vs. *Buffalo and New York City Railroad Company*, 12 How., 136; *Spear* vs. *Hyers*, unreported, cited 2 Whitt. Pr. (2d edition), p. 225; *Anderson* ads. *Johnson*, 1 C. R. (N. S.), 209; 9 L. O., 113, note; *Haight* vs. *Holcomb*, 16 How., 173; 7 Abb., 210, affirming *pro tanto; Same case*, 16 How., 160; *Ward* vs. *Wordsworth*, 1 E. D. Smith, 598; also as *Ward* vs. *Syme*, 9 How., 16, reversing same case, 1 C. R. (N. S.), 208, 9 L. O., 113. By these decisions, the following, to the contrary effect, are clearly overruled: *Davenport* vs. *Ludlow*, 4 How., 337; 3 C. R., 66; *Noxon* vs. *Gregory*, 5 How., 339; *Benedict* vs. *Harlow*, 5 How., 347. (350.)

The same principle has been carried out, and the attorney's lien protected, in the following more recent cases, carrying out the principles as laid down in *Rooney* vs. *The Second Avenue Railroad Company*, *supra; Shackleton* vs. *Hart*, 20 How., 39, 12 Abb., 325, note; *East River Bank* vs. *Kidd*, 13 Abb., 337, note; *Hall* vs. *Ayer*, 19 How., 91; 9 Abb., 220. See also *Owen* vs. *Mason*, 18 How., 156; see also generally, *Ackerman* vs. *Ackerman*, 14 Abb., 229; reversing same case, 11 Abb., 256.

And the attorney's lien has been held to extend, not merely to his taxable costs and stipulated compensation, but also to his counsel fees. *Ackerman* vs. *Ackerman*, *supra; Haight* vs. *Holcomb*, 16 How., 160. This latter decision stands reversed on this point. See same case, 16 How., 173, 7 Abb., 120. But this reversal is disapproved, and the case held to fall within the principle of *Rooney* vs. *The Second Avenue Railroad Company*, in *Hull* vs. *Ayer*, 19 How., 91, 9 Abb., 220. See likewise as to the attorney's lien not being affected by payments to him for counsel fees, *Easton* vs. *Smith*, 1 E. D. Smith, 318.

The attorney's lien, or his rights as assignee of the client's claim, will also be protected as against an attempted set-off between the parties. *Vide Smith* vs. *Lowden*, 1 Sandf., 696; *Gihon* vs. *Fryatt*, 2 Sandf., 638; *Van Pelt* vs. *Boyer*, 8 How., 319; *Roberts* vs. *Carter*, 17 How., 341; 9 Abb., 366, note; *Robbins* vs. *Alexander*, 11 How., 100; *Nash* vs. *Hamilton*, 3 Abb., 35; *Ely* vs. *Cook*, 2 Hilt., 406; 9 Abb., 366; *East River Bank* vs. *Kidd*, *supra*. See, however, the right of set-off main-

tained in *Crocker* vs. *Claughly*, 2 Duer, 684; *Hayden* vs. *McDermott*, 9 Abb., 14; and in favor of an attorney, assignee, in *Bagley* vs. *Brown*, 3 E. D. Smith, 66. See, as to the right of the attorney to the benefit of a judgment entered up for costs only, *Wright* vs. *Smith*, 13 Barb., 414.

But the rights of an attorney, in this respect, can only be protected on motion, where the court proceeds outside the statute. They cannot be so in a cross-action, where the set-off is regularly pleaded. *Vide Martin* vs. *Kanouse*, 17 How., 146; 9 Abb., 370, note.

And the motion for such purpose must be made within a reasonable time. The right to relief may be lost by laches. *Wimans* vs. *Mason*, 33 Barb., 522; 21 How., 153. Nor, on a motion for other purposes, will the court look outside the motion-papers to see whether the attorney's lien has been disregarded. *De Graw* vs. *Boardman*, 13 Abb., 337, note.

And any stipulation or offer made by the attorney to waive or reduce his compensation will be enforced, but, in the latter case, his lien will be maintained for the reduced amount. *McKenzie* vs. *Rhodes*, 13 Abb., 337.

In strictness, however, the attorney acquires no lien till the recovery of judgment. Pending the previous litigation, the parties have a right to settle the controversy without regard to his interests. *Vide Benedict* vs. *Harlow*, 5 How., 347; *McKenzie* vs. *McKenzie*, 21 How., 467. And the same rule holds good as to the costs of an appeal or a writ of error, settled before the hearing. *Shank* vs. *Shoemaker*, 18 N. Y., 489; *Brown* vs. *Comstock*, 10 Barb., 67; *Sweet* vs. *Bartlett*, 4 Sandf., 661. See the subject of this right, in any case in which there is no collusion or intent to deprive the attorney of his costs, very fully examined in *McDowell* vs. *Second Avenue Railroad Company*, 4 Bosw., 670.

Where there has been any fraud or intent to deprive the attorney of his costs, the courts have, however, interfered, and allowed him to go on and collect them. *Rasquin* vs. *Knickerbocker Stage Company*, 21 How., 293; 12 Abb., 324. See also *Keenan* vs. *Derflinger*, 19 How., 153; 12 Abb., 327, note; and *Wood* vs. *Trustees of the Northwest Presbyterian Church*, 7 Abb., 210, note, carrying the principle still further.

In *Creighton* vs. *Ingersoll*, 20 Barb., 541, an attorney who had been changed before judgment, was held to have a lien on the fund subsequently recovered, for his costs up to the time of change.

And a settlement in fraud of the attorney will be set aside. *Marquat* vs. *Mulvey*, 9 How., 460.

The attorney's lien is, however, personal, and cannot be enforced in the hands of an assignee of his claim, nor will his taking a transfer of the assignee's judgment revive it. *Chappell* vs. *Dann*, 21 Barb., 17.

BOOK II.

AS TO ACTIONS GENERALLY CONSIDERED.

CHAPTER I.

OF PARTIES TO AN ACTION.

§ 31. *Statutory Provisions.*

The provisions of the Code effect a complete revolution in the old common-law rules with respect to parties; and substitute for them, with little or no modification, the antecedent doctrine of the Courts of Equity. The equitable interest will, therefore, as a general rule, be the grand criterion as to who are or are not necessary parties to an action when commenced.

The following extract from the report of the commissioners will throw light upon their intentions in framing those provisions.

"The rules respecting parties in the courts of law, differ from those in the courts of equity. The blending of the jurisdiction makes it necessary to revise these rules to some extent. In doing so, we have had a three-fold purpose in view; first, to do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such; second, to require the presence of such parties as are necessary to make an end of the controversy; and, third, to allow, otherwise, great latitude in respect to the number of parties who may be brought in."

See on the same subject, *Wallace* vs. *Eaton*, 5 How., 99; 3 C. R., 161; *Hollenbeck* vs. *Van Valkenburgh*, 5 How., 281; 1 C. R. (N. S.), 33; *St. John* vs. *Pierce*, 22 Barb., 362, and *Grinnell* vs. *Schmidt*, 2 Sandf., 706; 3 C. R., 19; 8 L. O., 197.

The provisions in question are contained in title III. of part II. Before citing them, it may be as well to draw attention also to the two first sections of title I. of the same part, which bear generally on the subject.

TITLE I.

Of the Form of Civil Actions.

§ 69. (62.) The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action.

Dates from 1849. Substantially the same in 1848.

§ 70. (63.) In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

The two remaining sections of that title relate to matters of detail in practice, and will accordingly be cited hereafter.

Title III. of Part II. runs thus:

TITLE III.

Of the Parties to Civil Actions.

§ 111. (91.) Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section one hundred and thirteen; but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract.

But an action may be maintained by a grantee of land in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

The last clause in this section was added in 1862. That as to assignments of choses in action, in 1851. The rest of the sentence dates from 1848, with a formal change in 1849.

§ 112. (92.) In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence, existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

The words "transferred in good faith," &c., down to the end of this section, were added to it on the amendment of 1849. Otherwise, it dates from 1848.

§ 113. (93.) An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

The first sentence of this section is in the original Code; the second, defining who is a trustee of an express trust, dates from the amendment of 1851.

§ 114. (94.) When a married woman is a party, her husband must be joined with her, except that,

1. When the action concerns her separate property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

And in no case need she prosecute or defend by a guardian or next friend.

N. B.—The commencement and the two subdivisions are in the original Code. The supplementary sentence, as it now stands, was inserted in the amendment of 1857. In 1851, a provision was made of directly contrary import. It ran thus, and remained the law from 1851 to 1857:

"But where her husband cannot be joined with her, as herein provided, she shall prosecute or defend by her next friend."

§ 115. (95.) When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

The words "or a county judge," were inserted in 1849. Otherwise, the section dates from 1848.

§ 116. (96.) The guardian shall be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or, if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State; if he has none, then to the infant himself, if over fourteen years of age and within the State; or, if under that age and within the State, to the person with whom such infant resides.

And in actions for the partition of real property, or for the foreclosure of a mortgage or other instrument, when an infant defendant resides out of this State, the plaintiff may apply to the court in which the action is pending, at any special term thereof, and will be entitled to an order, designating some suitable person to be the guardian for the infant defendant, for the purposes of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant; and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant himself, or by service upon any relation or person with whom the infant resides, and either by mail or personally upon the person so served.

The concluding clause was added on the amendment of 1862. The form of the two preceding subdivisions was substantially settled upon that of 1851, with slight verbal improvements in 1852.

In the original Code, the provisions were less comprehensive.

§ 117. (97.) All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

§ 118. (98.) Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.

The last moiety of the sentence, "or who is a necessary party," &c., was first inserted in 1849.

§ 119. (99.) Of the parties to the action, those who are united in interest, must be joined as plaintiffs or defendants; but, if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

The concluding clause, authorizing a party to sue or defend for his class, was first inserted in 1849.

§ 120. (100.) Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff.

§ 121. (101.) No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued, by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made, to be substituted in the action. After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order.

The concluding clause was added on the amendment of 1862; that preceding, commencing "After a verdict," &c., on that of 1857. The prior portion is in the original Code, the provision as to a supplemental complaint being transferred to this from the next, in 1849.

§ 122. (102.) The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

A defendant, against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before answer, upon affidavit that a person, not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

The second branch of the first clause of this section, and the whole of the provisions as to interpleader, were added upon the amendment of 1851.

In the original Code, the section merely provided, permissively, for the bringing in of additional parties when necessary, by amendment or by supplemental complaint, and on summons. The first sentence was settled as it stands in 1849, with a verbal change in 1851.

The provision of the Code in section 173, enabling the court, "before or after judgment, in furtherance of justice, and on such terms as may be proper, to amend any pleading, by," amongst other things, "adding, or by correcting a mistake in the name of any party," may be considered as so far a corollary to and in furtherance of the above provision.

General Remarks.—It is obvious that to consider the law as to parties with that full detail which a thorough examination would demand, is utterly beyond the scope and would be foreign to the objects of an ordinary work on practice. The subject, in its general bearings, forms the staple of several independent treatises, to which the reader is accordingly referred. All that will be attempted by the author on the present occasion, will be a short mention, for the information of the student, of some of the general features of that law; and, for the convenience of the practitioner, a notice of some of the recent decisions since the passage of the Code, following the arrangement of the subject adopted in that measure.

§ 32. *Real Party in Interest.*

(*a.*) Competency to Sue.

The rule as laid down by sections 111 and 112, is primarily and in terms applicable to the case of a plaintiff. It is obvious however that the same principle must hold good as to the joinder of defendants, and that, in all cases, the person really interested is the proper party.

Though its previous consistency is slightly impaired by the addition in 1862, as to suits by a grantee of land in the name of his grantor, the rule itself is too obvious in its scope, and too clear in its terms, to need specific explanation. Its application has, however, given rise to numerous questions, as below noticed.

(*b.*) Owner of Property.

A mere consignee of goods, as agent for the consignors, cannot maintain an action for an injury to them during the voyage; the owner or shipper is the proper party. *Ogden* vs. *Coddington*, 2 Smith, 317; *Price* vs. *Powell*, 3 Comst., 322; *Dows* vs. *Cobb*, 12 Barb., 310. But, *primâ facie*, a consignee will, however, be presumed to be the owner, until the presumption is rebutted. *Price* vs. *Powell, supra.* And see generally as to the right of a consignee to sue, even though no formal bill of lading have been given, *Brower* vs. *Brig Water Witch*, 19 How., 241. As to stoppage *in transitu*, and the right of the vendor of goods to reclaim them at any time before they actually reach the hands of an insolvent vendee, see *Harris* vs. *Pratt*, 17 N.Y., 249; affirming same case, 6 Duer, 606.

The creditors of an insolvent have been held to have the right to sue for money received by his trustee, under a void assignment, in exclusion of that of a receiver for one only, under supplementary proceedings. *Smith* vs. *Woodruff*, 1 Hilton, 462; but this latter conclusion is contrary to *Porter* vs. *Williams*, 5 Seld., 142; 12 How., 107.

The party injured is the only proper plaintiff in injunction to prevent the erection of a building. A public officer cannot properly sue. *Lamport* vs. *Abbott*, 12 Abb., 340.

An action under the statute of betting and gaming must be brought by the real depositor of money, though the name of another may have been used in making the bet. *Ruckman* vs. *Pitcher*, 20 N. Y., 9.

Special property in a chattel, accompanied by the right to its present possession, is sufficient ownership to support an action for injury to such chattel during that possession. *Harrison* vs. *Marshall*, 4 Smith, 271; and present possession is sufficient to ground an action for conversion by a stranger. *Paddock* vs. *Wing*, 16 How., 547.

The lessor of property is not liable for the wrongful act of his lessee. *Blackwell* vs. *Wiswall*, 14 How., 257; 24 Barb., 355.

In an action on a policy of insurance, on which the loss is made payable to a mortgagee, that mortgagee, during his mortgage, is the owner, and can alone sustain the action. *Ripley* vs. *The AstorInsurance Company*, 17 How., 444; *Ennis* vs. *The Harmony Fire Insurance Company*, 3 Bosw., 516. But where, on a marine policy, the loss was made payable to a third mortgagee, the owner warranting the vessel to be free from all liens, it was held the insurance was that of the owner and not of the mortgagee, and that the existence of the prior mortgages was a breach of the warranty and fatal to the policy. *Bidwell* vs. *The Northwestern Insurance Company*, 19 N. Y., 179.

In *The Mutual Insurance Company of Buffalo* vs. *Eaton*, 11 L. O., 140, it was held that an insurance company, who had paid a loss occasioned by collision, could not maintain an action in their own name against the wrong-doer; but that such an action could only be brought in the name of the owner of the property injured; it being further held that the company, under such circumstances, has a right to bring an action in that form, on indemnifying the actual plaintiff, and would be protected against his acts. A demurrer was accordingly allowed on that ground.

Where, however, an agent had inserted his name in the policy as special payee, it was held that the action was properly brought in the name of his principal. *Lane* vs. *Columbus Insurance Company*, 2 C. R., 65. And an alienee of a policy may sue in his own name, and might do so, even before the Code. *Bodle* vs. *The Chenango County Mutual Insurance Company*, 3 Comst., 53.

The real owner, not the mere holder of a promissory note, is the proper plaintiff. *Parker* vs. *Totten*, 10 How., 233; *White* vs. *Brown*, 14 How., 282. See, also, *Clark* vs. *Phillips*, 21 How., 87. A bona fide endorsee or holder may, however, recover, though the payment of the price to the payee be contingent on future collection. *Cummings* vs. *Morris*, 3 Bosw., 560. A transferee without consideration, for the mere purpose of bringing suit, cannot maintain it. *Killmore* vs. *Culver*, 24 Barb., 656. Nor, where the plaintiff has a right to money due on a note, is his title to recover affected by the fact that he has not the actual possession of the note. *Selden* vs. *Pringle*, 17 Barb., 458. The presumption of law lies, however, until rebutted, that the holder of a negotiable bill of exchange, or promissory note, is its owner. *James* vs. *Chalmers*, 5 Sand., 52; affirmed, 2 Seld., 209; *Mottram* vs. *Mills*, 1 Sand., 37.

The mere delivery, with intent to transfer the payee's interest, was held sufficient to entitle the transferee to sue on a contingent order for

seaman's wages. *Loftus* vs. *Clark*, 1 Hilt., 310. And a party holding promissory notes, as trustee for himself and others, may recover. *Fletcher* vs. *Derrickson*, 3 Bosw. 181.

An action for an injury to a house from negligent blasting, was held to be properly brought against the contractor by a lessee, and the liability of the latter to his landlord under an agreement to repair, did not impair his right to sue. *Ulrich* vs. *McCabe*, 1 Hilt., 251.

A legatee of specific securities may sue in his own name to recover them, either with the assent or after the final discharge of the executor. *Seré* vs. *Coit*, 5 Abb., 481. The same is the case with a *cestui que trust* of a portion of a specific fund, after that proportion has been set apart by a proceeding binding on the trustee. *General Mutual Insurance Company* vs. *Benson*, 5 Duer, 168.

The *cestui que trust* is the only proper person to maintain an action as against the trustee. *Female Association of New York* vs. *Beekman*, 21 Barb., 565; *Griffen* vs. *Ford*, 1 Bosw., 123.

The equitable owner of property in possession may maintain an action for damages to the freehold. *Rood* vs. *New York and Erie Railroad Company*, 18 Barb., 80.

A suit in equity for the benefit of a lunatic, must be brought in his own name. The power of a committee to sue as such is statutory, and confined to the enforcement of debts or claims, transferred to him, or to the possession or control of which he is entitled. *McKillip* vs. *McKillip*, 8 Barb., 552.

A subsequent grantee may maintain an action against the original grantor on a covenant running with the land. *Colby* vs. *Osgood*, 29 Barb., 339.

The owner of lands, redeeming under a sale on execution, may sue for waste intermediate between the sale and his redemption. *Thomas* vs. *Crofut*, 4 Kern., 474.

A bank is the proper party to sue on a draft payable to the order of their cashier. *Camden Bank* vs. *Rogers*, 4 How., 63; 2 C. R., 45. An association formed under the general banking law, may sue either in the name used by it, or in that of its president. *The East River Bank* vs. *Judah*, 10 How., 135.

The interest of a plaintiff must be actual at the time of the commencement of the suit: where therefore a mortgagor of chattels, remaining in possession, had actually sold the property to a third party, relief was denied to him in a suit to set aside the mortgage. *James* vs. *Oakley*, 1 Abb., 324.

An inchoate purchaser of property at a sheriff's sale, cannot maintain an action against other persons not parties to the suit in which the

judgment of sale was rendered, before completing his purchase and taking a deed of the property. *Blanco* vs. *Foote*, 32 Barb., 535.

Nor, on the other hand, can a grantor of land maintain an action in respect of the title to it, though he may have specially agreed to that effect with his grantee. He has no title left. *Townsend* vs. *Goelet*, 11 Abb., 187.

An action upon an administration bond, actually assigned by the surrogate under sections 63 and 65 of chapter 460, of 1837, to a party entitled under his decree to payment of a distributive share, was held to be properly brought in the name of that party. *Baggott* v. *Boulger*, 2 Duer., 160. When, however, an action had been brought in the name of the people, the relator being joined on a similar bond, for the benefit of a creditor, under a mere direction that the bond be prosecuted, pursuant to section 23, chapter 320 of 1830, it was held to be rightly so brought. *The People* vs. *Laws*, 3 Abb., 450. This decision is affirmed, 4 Abb., 292. By this ruling, however, the authority of *Baggott* vs. *Boulger*, which proceeds on a different provision, is not denied. *Bos* vs. *Seaman*, 2 C. R., 1, inclines to the same conclusion as *The People* vs. *Laws*, and the opinion, which merely expresses a doubt, does not support the head note. See the subject of bonds of this nature further considered in the next section.

A surety on an undertaking on appeal, who had paid the amount of his liability to the plaintiff, was held entitled to sue the latter in his own name to recover back that amount, on a subsequent reversal by the Supreme Court of the United States. *Garr* v. *Martin*, 1 Hilt., 358. As to letting in sureties to defend in the place of their principal, see *Jewett* vs. *Crane*, 13 Abb., 97; 35 Barb., 208.

(*c.*) Tenants in Common.

In a suit in the nature of a common-law action for trespass on property held in common, or for its use and occupation, all tenants in common or coparceners should be joined as plaintiffs. *Porter* vs. *Bleiler*, 17 Barb., 149; *Rice* vs. *Hallenbeck*, 19 Barb., 664; and a remainderman in fee may so sue for an injury to the inheritance, notwithstanding an intervening life estate, *Van Deusen* vs. *Young*, 29 Barb., 9. So also as to a claim for a breach of covenant on a contract for sale to joint owners, made before a conveyance to them. *Atwood* vs. *Norton*, 27 Barb., 638.

But one of several heirs may maintain a separate action for his proportionate part of rents, accrued under a lease executed by the intestate. *Jones* vs. *Felch*, 3 Bosw., 63. So also as to a sum awarded to heirs, as such, on taking of lands for a public improvement. *Van Wart* vs. *Price*, 14 Abb., 4, note.

Devisees in remainder may maintain a joint action against the executor of a tenant for life, for rents collected by him, due after the termination of the life interest. *Marshall* vs. *Moseley*, 21 N. Y., 280.

A similar rule to the above holds good as to the ownership of chattels held in common; where the action is in the nature of a common-law action, and the injury affects, or the claim arises out of the joint estate, all must be joined as plaintiffs. *Coster* vs. *The New York and Erie Railroad Company*, 6 Duer, 43; 3 Abb., 332; also noticed 5 Duer, 677.

But, where any of the parties so interested refuse to join in a joint suit, or where the equitable powers of the court are invoked, one or more may sue alone, the others being made defendants. *Same case.*

And, after severance of a fund originally held in common, by a proceeding binding on the trustee, each party may maintain a separate action for his ascertained share. *General Mutual Insurance Company* vs. *Benson*, 5 Duer, 168.

Pending a tenancy in common of real estate, one of such tenants is not liable to account to the others, in an action for use and occupation. *Woolever* vs. *Knapp*, 18 Barb., 265. And if he interfere with the occupation of his cotenant, or that cotenant's licensee, he will be a trespasser. *McGarrell* vs. *Murphy*, 1 Hilt., 132; *Jones* vs. *Felch*, 3 Bosw., 63. Neither can one tenant in common of personal property maintain a common-law action against another, without showing a loss, destruction, or sale by him. *Tinney* vs. *Stebbins*, 28 Barb., 290. Nor can one sue another for taking and converting his due proportion of personal property so held. *Forbes* vs. *Shattuck*, 22 Barb., 568; *Tripp* vs. *Riley*, 15 Barb., 333.

Nor have tenants in common of personal property any common-law remedy to obtain a division of it. But, in equity, one or more of them may sue for and obtain a partition, or a sale and division of the proceeds *Tinney* vs. *Stebbins* and *Tripp* vs. *Riley*, *supra.*

According to the old English rule, any one or more of several tenants in common may sue alone, in actions that savor of the realty. This rule is changed by statute as to ejectment. *Vide* 2 R. S., 341, section 11. *Porter* vs. *Blieler*, *supra.* Partition is however maintainable by one or more, and is so maintainable, although the plaintiff be out of possession. *Beebee* vs. *Griffing*, 4 Kern., 235.

As to the right of an individual Indian to maintain trespass for lands held by him separately, and not in common, *vide Blacksmith* vs. *Fellows*, 3 Seld., 401.

Joint owners of a vessel are tenants in common, and must sue jointly; but, in the case of the death of any one of them, the suit lies in or must be continued by the survivors only. *Buckman* vs. *Brett*, 22 How., 233;

13 Abb., 119. See also *Bishop* vs. *Edmiston*, 13 Abb., 346. Joint charterers are joint owners, *pro hac vice*, as respects transactions arising out of the voyage for which the vessel is chartered. *Sherman* vs. *Fream*, 30 Barb., 478. See likewise *Coster* vs. *New York and Erie Railroad Company*, 6 Duer, 43; 3 Abb., 332, noticed 5 Duer, 677; *Dennis* vs. *Kennedy*, 19 Barb., 517.

Tenants in common of a pew are seized of several interests, and a joint action cannot be maintained against in respect of their several shares of an assessment. *St. Paul's Church in Syracuse* vs. *Ford*, 34 Barb., 16.

(*d.*) PARTNERS.

Analogous to the interests of tenants in common is that of partners in property of the partnership.

In actions for the recovery of partnership property, for an injury to that property, or for a debt or liability due or belonging to the partnership, all the general partners must join as plaintiffs. A mere special partner, however, in a limited partnership formed under the statute, need not be joined either as plaintiff or defendant. *Vide* 1 R. S., 766, § 14. But if such a special partner interfere with the transaction of the general business of the firm, or otherwise violates the provisions of the statute, he will become generally liable, and may then be joined. *Vide* 1 R. S., 766, § 17; *ibid.*, 767, § 22.

Partners, as such, may maintain a joint action against an inn-keeper for loss of goods, the property of the firm, in the possession of one of its members. *Needles* vs. *Howard*, 1 E. D. Smith, 54.

A dormant partner, even though unknown to the contractor, is, since the Code, a necessary party as plaintiff, in an action brought on a contract with the partnership. *Secor* vs. *Keller*, 4 Duer, 416. But where a contract of leasing was made with two individuals contracting as such, without suspicion that they had a co-partner in the business for which the premises were leased, it was held that an unknown partner need not in such case be joined as defendant. *Hurlbut* vs. *Post*, 1 Bosw., 28. They have the right, but are not bound to sue all under such circumstances. *Brown* vs. *Birdsall*, 29 Barb., 549. So also, where the name of a dormant partner had been fraudulently concealed, an injunction to restrain a creditor from levying on partnership property was set aside. *Van Valen* vs. *Russell*, 13 Barb., 590.

Although, as a general rule, no action at law can be maintained between partners, pending their relation as such (*Koningsburgh* vs. *Launitz*, 1 E. D. Smith, 215), a contribution or express stipulation by one for the benefit of the others, may be enforced by them or by their trustee, as against a limited partner. *Robinson* vs. *McIntosh*, 3 E. D. Smith, 221.

One partner may sue another at law, for damages occasioned by a premature dissolution, in breach of the partnership articles. His remedy is not confined to an accounting in equity. *Bagley* vs. *Smith*, 6 Seld., 489; 19 How., 1.

And, after actual division of a specific fund, assented to by all, one partner may afterward maintain suit against another, for moneys collected, being part of his allotted portion. *Crosby* vs. *Nichols*, 3 Bosw., 450.

Although, pending a limited partnership, the general partners alone have power to sue and be sued, it seems, that, in a suit by a creditor for a receiver and distribution of the copartnership property, involving a virtual dissolution, the limited partner ought to be joined, as essentially a party in interest. *Schulten* vs. *Lord*, 4 E. D. Smith, 206.

In another suit arising out of the same controversy, the special partner appears to have been brought in. *Vide Lachaise* vs. *Marks*, 4 E. D. Smith, 610.

An action may be brought by one firm against another, having a mutual partner, for an ascertained balance, due in respect of mutual dealings. *Cole* vs. *Reynolds*, 18 N. Y., 74. Nor is an accounting a necessary concomitant of such a suit; though, if necessary, one may be directed. This case seems, at first sight, to overrule the doctrine held in that of *Englis* vs. *Furniss*, 4 E. D. Smith, 587; 3 Abb., 82, viz.: that such a suit is only maintainable in equity, and that it involves an investigation and settlement of the accounts. When looked into, however, the discrepancy disappears; the claim in *Cole* vs. *Reynolds*, arising upon a stated and settled account, whereas, that in *Englis* vs. *Furniss*, was of an unliquidated nature.

In an action upon a partnership debt, all the partners must be joined, and the non-joinder of any will be a valid defence. *Bridge* vs. *Payson*, 5 Sandf., 210; *Mayhew* vs. *Robinson*, 10 How., 162. And an outgoing partner has been held liable for the whole of a debt, arising out of a continued consignment of goods begun to be made to the firm while he remained a member, and wound up after his retirement. *Briggs* vs. *Briggs*, 15 N. Y., 471; affirming same case, 20 Barb., 477.

The whole of the partners in a firm were held liable for a warranty given by one of its members on the sale of firm property, in *Sweet* vs. *Bradley*, 24 Barb., 549.

One partner is liable to third persons, for injuries occasioned by the negligence of another, or of a servant employed and paid by that other exclusively, if committed in the course of the partnership business. *Cotter* vs. *Bettner*, 1 Bosw., 490.

(*e.*) Joint and Several Contractors.

The case of joint and several contractors presents, as regards the question of parties, a close analogy to that of a partnership.

In an action on a joint contract, all who joined in it should be made defendants, and if any be omitted, the objection is demurrable in its nature. *Crooke* vs. *O'Higgins*, 14 How., 154. In *Mahaney* vs. *Penman*, 4 Duer, 603, it was held that in an action on a joint judgment, the joint liability still continued.

Where the contract or instrument creates a joint and also a several liability, all parties interested may or may not be joined in the same action, at the option of the plaintiff (*vide* section 120); but that joinder in no way affects the responsibilities of the parties as between each other, which remain as they were originally fixed by their contracts. *Alfred* vs. *Watkins*, 1 C. R. (N. S.), 343; *Kelsey* vs. *Bradbury*, 21 Barb., 531; *Parker* vs. *Jackson*, 16 Barb., 33; *Brainard* vs. *Jones*, 11 How.; 569; *De Ridder* vs. *Schermerhorn*, 10 Barb., 638; *Snow* vs. *Howard*, 35 Barb., 55.

A several judgment may be rendered on a contract originally joint, on facts being shown which render the liability several in fact, as in the case of a note wrongfully signed with the firm name by one partner; and, under such circumstances, a several action may be brought. *Parker* vs. *Jackson*, 16 Barb., 33. See also, as to severance on a plea of infancy, put in by one of two joint makers of a promissory note, *Butler* vs. *Morris*, 1 Bosw., 329. This last objection is however personal, and cannot be taken by third parties. *Slocum* vs. *Hooker*, 13 Barb., 536. In *Brown* vs. *Birdsall*, 29 Barb., 549, it is held that where joint debtors reside in different states, they may be sued separately, in the states having jurisdiction of the persons or property.

The lessee of premises and the guarantee of his rent, by the same instrument, were held to be properly joined as co-defendants in the same action, under the power conferred by section 120, in *Carman* vs. *Platt*, 23 N. Y., 286.

Although different parties may be liable for the same sum of money, yet if their responsibility arises under different contracts, the liabilities are several, and they cannot be joined in the same action. So held as to a guarantee written under a promissory note. *Brewster* vs. *Silence*, 4 Seld., 207; affirming same case, 11 Barb., 144; *Allen* vs. *Fosgate*, 11 How., 218; *Glencove Mutual Insurance Company* vs. *Harrold*, 20 Barb., 298; *De Ridder* vs. *Schermerhorn*, 10 Barb., 638.

These decisions overrule *Enos* vs. *Thomas*, 4 How., 48. See likewise the indecisive cases of *Hall* vs. *Farmer*, 2 Comst., 553; *Durham* vs.

Manrow, 2 Comst., 533. See also *Brown* vs. *Curtis*, 2 Comst., 225, and note, p. 553.

So also, this liability is several in a suit by a subsequent indorser against prior indorsers to recover back money paid by him on taking up a note. *Barker* vs. *Cassidy*, 16 Barb., 177. See likewise, as to similar liability, *White* vs. *Low*, 7 Barb., 204. The liability of a purchaser of goods and guarantor of payment are also several, and incapable of joinder. *Leroy* vs. *Shaw*, 2 Duer, 626. See likewise *Spencer* vs. *Wheelock*, 11 L. O., 329. The same is the case as regards those of a lessee and of his surety. *Phalen* vs. *Dinger*, 4 E. D. Smith, 379.

Where the liability under a contract originally joint has subsequently been severed, a joint action will no longer lie. Thus, in a common-law action against surviving partners on a partnership debt, the executors of the deceased partner cannot be joined. *Higgins* vs. *Rockwell*, 2 Duer, 650; *Voorhies* vs. *Baxter*, 1 Abb., 43; *De Agreda* vs. *Mantel*, 1 Abb., 130. So held also as to joint makers of a promissory note. *Morehause* vs. *Ballow*, 16 Barb., 289.

The cases overrule the decision in *Ricart* vs. *Townsend*, 6 How., 460; but the conflict is more apparent than real, as the necessity of framing an action against all such parties jointly, on principles of equitable relief, is clearly pointed out in the opinion.

The creditor is not, however, deprived of his remedy against the executors in such cases. They are liable in equity, on an allegation that the surviving partners have been sued, and are insolvent. *Higgins* vs. *Rockwell*; *Voorhies* vs. *Baxter*; *De Agreda* vs. *Mantel*, *supra*.

Where the liability is not joint, but joint and several, the action may be brought in an equitable form against all parties in the first instance, proper allegations being made to show the liability of the representatives as above. *Parker* vs. *Jackson*, 16 Barb., 33; *De Agreda* vs. *Mantel*, 1 Abb., 130. See also, *Ricart* vs. *Townsend*, 6 How., 460. This doctrine does not, in fact, conflict with that in *Morehause* vs. *Ballow*, above cited, as in that case, no circumstances appeared to have been stated to lay ground for the interposition of the court in equity, but the action was a pure common-law action.

Carriers on a joint route, who have paid what is due to the others interested, and delivered the goods, are entitled to recover the whole freight, on their individual account, without any of the incidents of a partnership transaction. *Merrick* vs. *Gordon*, 20 N. Y., 93.

(*f.*) Joint Tortfeasors.

The liability of parties standing in this position is joint and several, and they may be either sued jointly or separately, or any one or more may be joined in the same action, at the option of the plaintiffs. See

as to power of joinder, *King* vs. *Orser*, 4 Duer, 431; *Waterbury* vs. *Westervelt*, 5 Seld., 598; *Herring* vs. *Hoppock*, 3 Duer, 20; 12 L. O., 167; *Marsh* vs. *Backus*, 16 Barb., 483. And, as to power of severance, *Cross* vs. *Sackett*, 2 Bosw., 617; 6 Abb., 247; 16 How., 62; *Mead* vs. *Mali*, 15 How., 347, reported as *Cazeaux* vs. *Mali*, 25 Barb., 578.

As to the right of a party injured by the concurrent negligence of two railway companies, to maintain an action against both, on their joint and several liability, see *Colegrove* vs. *New York and New Haven and New York and Harlem Railroad Companies*, 20 N. Y., 492.

(*g.*) PRINCIPAL AND AGENT.

The principal and not the agent is the proper party to sue, or be sued, upon a contract of which he is in fact the owner, though made in the agent's name. *Erickson* vs. *Compton*, 6 How., 471; *Union India-Rubber Company* vs. *Tomlinson*, 1 E. D. Smith, 364; *St. John* vs. *Griffith*, 13 How., 59; 2 Abb., 198; *Fish* vs. *Wood*, 4 E. D. Smith, 327; *Haight* vs. *Sahler*, 30 Barb., 218; *Stanton* vs. *Camp*, 4 Barb., 274. And if, in making such a contract, the same person act as the agent of both parties, the court will avoid the contract, on the application, or as the result of a defence put in by either. *New York Central Insurance Company* vs. *The National Protection Insurance Company*, 4 Kern., 85; reversing same case, 20 Barb., 468. See also, *Bentley* vs. *The Columbus Insurance Company of Philadelphia*, 19 Barb., 595. And even when, by the terms of a policy of insurance, the loss was expressly made payable to the agent only, it was, nevertheless, held that the principal might maintain an action on such policy. *Lane* vs. *Columbus Insurance Company*, 2 C. R., 65. Where the principal is known, he, and he alone, is liable. *Conro* vs. *Fort Henry Iron Company*, 12 Barb., 27.

A subsequent ratification by the principal, of the acts of the agent, is equivalent to an original authority. *Conro* vs. *Fort Henry Iron Company*, 12 Barb., 27; *Howard* vs. *Howard*, 11 How., 80. And this, even where the principal had originally no right to depute him. *Newton* vs. *Bronson*, 3 Kern., 587. But where an agent had, by not disclosing the name of his principal, rendered himself personally liable for goods sold and delivered to him, a subsequent recognition of his agency was held not to be available to discharge him from that liability. *Nason* vs. *Cockroft*, 3 Duer, 366. See also, *Cabre* vs. *Sturges*, 1 Hilt., 160; and *Blakeman* vs. *Mackay*, 1 Hilt., 266.

Where lands were bought in at a judicial sale, by a party assuming to act as agent for another, but having in fact no authority, it was held that a specific performance could not be compelled as against either, there being no written contract. *Hegeman* vs. *Johnson*, 35 Barb., 200.

Where an agent had sold a forged bill of exchange, without disclosing the name of his principal, he was held liable for the amount received, though, if he had passed over the moneys to that principal before demand made for reimbursement, he would have been exonerated. *Morrison* vs. *Currie*, 4 Duer, 79. Where an agent signed a lease, as agent for the owner, but without disclosing the name of such owner, it was held that either might maintain an action. *Morgan* vs. *Reed*, 7 Abb., 215. See, as to the right of an undisclosed principal to sue in such case, *Van Lien* vs. *Byrnes*, 1 Hilt., 133; but he does so, under those circumstances, subject to any equities between the defendant and the agent.

Where, in a sale of goods, the agent's credit was preferred, and his note taken in lieu of that of the principal, it was held that the latter could not afterwards be sued. *Rankin* vs. *De Forest*, 18 Barb., 143. And where agents had themselves assumed the contract, and satisfied their principal, it was held that they could sue in their own name. *White* vs. *Chouteau*, 1 E. D. Smith, 493. See same case, 10 Barb., 202.

And the agent may maintain an action in his own name, upon a note or contract, payable to him by its terms. *Considérant* vs. *Brisbane*, 22 N. Y., 389; reversing same case, 2 Bosw., 471. See also, *Reilly* vs. *Cook*, 22 How., 93.

The principal, though innocent, is liable for fraud or misconduct of the agent acting within the scope of his authority, nor need that authority be express. *Hunter* vs. *Hudson River Iron and Machine Company*, 20 Barb., 493. But not for acts of this nature, in matters beyond that scope. *New York Life Insurance and Trust Company* vs. *Beebe*, 3 Seld., 364.

Where, however, the wrong relates solely to the compensation of the agent himself, and not to the interest of the principal, the latter will not be answerable. *Condit* vs. *Baldwin*, 21 Barb., 181.

As to the general responsibility of a principal for the wrongful or negligent acts of his agent, committed within the scope of his employment, see *Thomas* vs. *Winchester*, 2 Seld., 397.

As to the nullity of stock, fraudulently issued by the agent of a public company, when acting clearly beyond the scope of his authority, *vide The Mechanics' Bank* vs. *The New York and New Haven Railroad Company*, 3 Kern., 599; 4 Duer, 570; reversing same case, 4 Duer, 480.

(*h.*) Parents, Husbands, and Masters.

The parent of an infant seduced, is, if entitled to her services, the only party who can maintain an action for such seduction. She cannot sue herself. *Hamilton* vs. *Lomax*, 26 Barb., 615; 6 Abb., 142.

But where the father is not entitled to such services, he cannot maintain the action. *Dain* vs. *Wycoff*, 3 Seld., 191. On a second trial, however, proof that the defendant procured the plaintiff's daughter to be indentured to him for the purpose of effecting her seduction, was held to be an answer to the objection, and the recovery was sustained. *Same case*, 18 N. Y., 45

Where the trunk of a minor employed upon his father's business was lost, it was held that the father could maintain an action against the carrier. *Grant* vs. *Newton*, 1 E. D. Smith, 95.

But a father cannot maintain an action for an injury to his child, unless some actual loss has accrued, or may accrue to him. *Stephenson* vs. *Hall*, 14 Barb., 222.

In a case of death of a wife by malpractice, the husband, as such, can alone maintain an action, on the ground of loss of service He cannot sue as administrator. *Lynch* vs. *Davis*, 12 How., 323.

Before the recent change in the law, it was held that, in an action for slander of the wife, where the words are actionable only by reason of special damage, the husband must sue alone. If the words were slanderous *per se*, he must be joined with the wife as plaintiff. *Klein* vs. *Hentz*, 2 Duer, 633. But where the wife, if *sole*, could not have recovered damages, the husband cannot, when suing for loss of service. *Wilson* vs. *Goit*, 17 N. Y., 442.

On the same principle, he cannot recover damages for her death, by a railway collision, where that death was instantaneous. No period intervened in which he could be said to have sustained the loss of her service or society. *Green* vs. *The Hudson River Railroad Company*, 16 How., 230; 28 Barb., 9. See also *Lucas* vs. *The New York Central Railroad Company*, 21 Barb., 245.

The husband may maintain an action for enticing away his wife, or inducing her to live apart from him, and this even against her father, but some wrongful motive must be shown. *Bennett* vs. *Smith*, 21 Barb., 439.

He may also sue for services rendered by her. *Avogadro* vs. *Bull*, 4 E. D. Smith, 384.

He may likewise maintain an action for moneys due to her, unless it appear affirmatively, that they were part of her separate estate, under the statutes of 1848 and 1849. *Crolius* vs. *Roqualina*, 3 Abb., 114. And, after her death, he may sue for arrears of rent, or for use or occupation of her real estate, during coverture. *Jones* vs. *Patterson*, 11 Barb., 572; but the marriage and death of the wife in this case were both antecedent to the statute of 1848.

The subject of the liabilities of masters, or employers, for the torts of their servants or employees, will be found fully considered, and numer-

ous decisions cited, at a subsequent stage of the present work, section 140; head—*Relation of Employer and Employee.*

(*i.*) CORPORATIONS.

Corporations incorporated by or under the provisions of any law of this state, may sue and be sued by their corporate names.

The same is the case as to foreign corporations, created by the laws of any other state or country. *Vide* 2 R. S., 457, section 1, and 459 section 15, as amended by chapter 107 of 1849, and saved by section 471 of the Code. *Vide* also section 114. See also *Mutual Benefit Life Insurance Company* vs. *Davis*, 2 Kern., 569.

To give the court jurisdiction, however, there must either be a voluntary appearance by the defendant (*vide Watson* vs. *The Cabot Bank*, 5 Sandf., 423), or the case must, where the plaintiff is non-resident, be brought within section 427 of the Code, by showing, either that the cause of action has arisen, or that the subject of the action is situated within the state.

In relation to the former, the place where a contract is to be performed is that, where, in a jurisdictional sense, the cause of action arises. *Burckle* vs. *Eckhart*, 3 Comst., 132; *Campbell* vs. *The Proprietors of the Champlain and St. Lawrence Railroad*, 18 How., 412. See also as to a bill drawn in one state and payable in another, *President, &c., of Bank of Commerce* vs. *The Rutland and Washington Railroad Company*, 10 How., 1. See, however, in relation to this last point, 17 How., 16; *The Western Bank* vs. *The City Bank of Columbus*, 7 How., 239; *Cantwell* vs. *The Dubuque Western Railroad Company*, 17 How., 16.

A foreign corporation suing another, is a non-resident plaintiff within the meaning of the section, and must bring the case within its terms. See two last cases. If not, the suit will not be maintainable. *House* vs. *Cooper*, 30 Barb., 157; 16 How., 292; *Cumberland Coal and Iron Company* vs. *Hoffman Steam Coal Company*, 30 Barb., 159.

It has been held that the plaintiff's claim, and the satisfaction which he seeks out of the property, is the subject of the action, and not the property itself, though attached; and that, accordingly, a seizure under attachment did not avail to confer jurisdiction, the plaintiff being non-resident. *Whitehead* vs. *The Buffalo and Lake Huron Railroad Company*, 18 How., 218. See also *dictum*, per Hand, J., 10 How., 8; and *Campbell* vs. *The Proprietors of the Champlain and St. Lawrence Railroad*, 18 How., 412. These decisions seem, however, to ignore the numerous cases holding that a suit of this description is more peculiarly a proceeding *in rem*. *Vide Hulbert* vs. *The Hope Mutual Insurance Company*, 4 How., 275; *Brewster* vs. *The Michigan Central*

Railroad Company, 5 How., 183; 3 C. R., 215; *Bates* vs. *The New Orleans, Jackson, and Great Northern Railroad Company*, 13 How., 516; 4 Abb., 72; *Ready* vs. *Stewart*, 1 C. R. (N. S.), 297. The recent amendment of section 134, subdivision 1, seems, too, adverse to the above strict construction.

Companies or associations, whether joint stock or private, consisting of not less than seven persons, may sue or be sued in the name of their president or treasurer for the time being, and a suit so commenced does not abate, but may be continued by or against his successors in office. Chapter 258 of 1849, amended by chapter 455 of 1851. *Vide Tibbetts* vs. *Blood*, 21 Barb., 650. See also *De Witt* vs. *Chandler*, 11 Abb., 459. But this statute does not extend to create a right of action, in a case in which the association was not itself competent to sue; *Corning* vs. *Greene*, 23 Barb., 33; or in respect of a matter of which a court of law will not take cognizance; *Austin* vs. *Searing*, 16 N. Y., 112.

It seems, however, that it is in the option of associations formed under a general law, either to sue in this form, or in the name used by them in transacting their business. *East River Bank* vs. *Judah*, 10 How., 135.

The provisions of the laws of 1849 and 1851, above referred to, do not extend to fire companies. *Masterson* vs. *Botts*, 4 Abb., 130. Nor has a board of health capacity to sue or be sued. *The People* vs. *The Supervisors of Monroe*, 18 Barb., 567; *Gardner* vs. *The Board of Health, &c.*, 6 Seld., 409; affirming same case, 4 Sandf., 153.

Nor are the supervisors of a county a body corporate, so that an action can be maintained against them for a county charge. *Brady* vs. *Supervisors of New York*, 6 Seld., 260; affirming same case, 2 Sandf., 460. See also *Chase* vs. *County of Saratoga*, 33 Barb., 603.

A town in its corporate capacity cannot sue to recover back moneys paid out of the proceeds of an illegal assessment; *Town of Gallatin* vs. *Loucks*, 21 Barb., 578; or maintain an action against supervisors for an illegality. *Town of Guilford* vs. *Cornell*, 18 Barb., 615.

A suit was held to be maintainable by the Seneca Nation of Indians suing as such, they being in effect created a corporation, by the act for their protection and improvement, passed on the 8th of May, 1848. *The Seneca Nation of Indians* vs. *Tyler*, 14 How., 109.

A religious incorporation must sue as such, and proceedings cannot be maintained in the individual names of the trustees. *The People* vs. *Fulton*, 1 Kern., 94; *Bundy* vs. *Birdsall*, 29 Barb., 31. And an action is maintainable by such a body, when incorporated, on a promise made antecedent to, but having in view such incorporation. *The Reformed Protestant Dutch Church* vs. *Brown*, 17 How., 287. A corporation is the proper defendant in a suit brought upon a contract made

in the name of an agent, but in fact for its benefit. *Conro* vs. *Port Henry Iron Company*, 12 Barb., 27.

An individual banker, carrying on business under the general banking law, cannot assume or sue in a corporate name. *Codd* vs. *Rathbone*, 19 N. Y., 37; overruling *Bank of Havana* vs. *Wickham*, 16 How., 97; 7 Abb., 134. See, however, as to an error of this nature being curable by amendment, *Bank of Havana* vs. *Magee*, 20 N. Y., 355.

An action properly commenced by a corporation does not abate, but is continuable in the corporate name after its dissolution. *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362.

An individual corporator, as such, is not a party to a suit brought by or against a corporation. *Pack* vs. *The Mayor of New York*, 3 Comst., 489. This seems to overrule *Place* vs. *Butternuts Woollen and Cotton Manufacturing Company*, 28 Barb., 503. Nor can an individual inhabitant maintain an action to restrain or avoid the act of a municipal corporation, not affecting his private interest, as distinct from that of other inhabitants. *Roosevelt* vs. *Draper*, 23 N. Y., 318. Nor, it has been held, is a municipal corporation liable for money collected and wrongfully withheld by one of its officers. *Onderdonk* vs. *City of Brooklyn*, 31 Barb., 505.

It is competent for a corporation, as representing the stockholders, to institute a suit in its corporate name, for the purpose of removing a cloud in their title, occasioned by the wrongful issue of spurious certificates by one of its officers. *New York and New Haven Railroad Company* vs. *Schuyler*, 17 N. Y., 592; 7 Abb., 41; reversing same case, 1 Abb., 417.

In *Shoe and Leather Bank* vs. *Thompson*, 23 How., 253, it was held that a corporation might maintain an action of libel, in respect of words used affecting its credit as such.

In a suit by an individual stockholder against officers, complaining generally of a fraudulent overissue of stock, and appropriation of corporate funds, but not making out a case of individual injury, it was held that the company was a necessary party. *Wells* vs. *Jewett*, 11 How., 242; *Bell* vs. *Mali*, 11 How., 254. Where individual injury is alleged, the cause of action becomes several, and may be severally asserted. See cases noticed in next section.

And the company may be joined as a co-defendant, in an action to establish the plaintiff's right to stolen scrip, *Wells* vs. *Smith*, 7 Abb., 261; or in an equitable proceeding to charge individual stockholders, and praying a discovery of their names and residences, with a view to make them parties. *Bogardus* vs. *Rosendale Manufacturing Company*, 3 Seld., 147.

The corporation, not the contractor, is the proper party against whom

relief should be sought by an individual owner assessed for an improvement, and aggrieved by such work not being done according to contract. *McCafferty* vs. *McCabe*, 13 How., 275; 4 Abb., 57.

The questions which have arisen as to the liability of municipal corporations for the wrongful acts of their contractors or agents, and when, and when not, such liability will accrue, will be found considered hereafter, section 140, *Relation of Employer and Employee.*

An agent of a corporation cannot be sued by individual stockholders for alleged misapplication of corporate funds. To sustain such a complaint, there must be an averment that the corporation itself has refused to bring an action. *Vanderbilt* vs. *Garrison*, 5 Duer, 689; 3 Abb., 361.

An action upon the official bond of a constable of the city of New York, in respect of his wrongful act, must be prosecuted in the name of the corporation, nor need the party for whose benefit the proceeding is taken be joined. *Mayor of New York* vs. *Brett*, 2 Hilt., 560. See also, as to a similar bond given to the people, *People* vs. *Norton*, 5 Seld., 176, there cited.

(*j.*) Directors and Stockholders.

Directors and stockholders in public companies for manufacturing, mining, mechanical, or chemical purposes, are, by statutory provision, individually liable to creditors of any such companies; the latter to the full amount of their stock until fully paid; the former, generally, in the event of any false representation or breach of trust on their part. Ch. 40 of 1848.

And the liability of directors or officers of joint stock companies, or associations, domestic or foreign, is not merely statutory, but general; and, under it, any one or more of its directors or officers may be held responsible for misstatement made, or fraud committed, in which they participate, or to which they are privy by their acts or omissions, and that, either jointly or individually, at the option of the parties, or any one of the parties injured; and those parties may sue, either jointly or severally. *Vide Cazeaux* vs. *Mali*, 25 Barb., 578; *Mead* vs. *Mali*, 15 How., 347; *Cross* vs. *Sackett*, 2 Bosw., 617; 16 How., 62; 6 Abb., 247; *Wells* vs. *Jewett*, 11 How., 242; *Bell* vs. *Mali.*, 11 How., 254; *Garrison* vs. *Howe*, 17 N. Y., 458; *Cumberland Coal and Iron Company* vs. *Sherman*, 30 Barb., 553; *Therasson* vs. *McSpeddon*, 2 Hilt., 1; *Perkins* vs. *Church*, 31 Barb., 84. Nor in such an action need the company itself be joined. See last case.

It is competent to an individual stockholder to sue the company of which he is a member, and also its officers, for the purpose of establishing his title to the stock held by him. *Wells* vs. *Smith*, 7 Abb., 261.

The liability of individuals composing an unincorporated association,

is unlimited. They stand, in fact, on the footing of ordinary partners, and are responsible as such. *Wells* vs. *Gates*, 18 Barb., 554; *Dennis* vs. *Kennedy*, 19 Barb., 517.

The liability of a stockholder, when sued by a creditor, is individual as regards both parties, and no others need be joined. *Abbott* vs. *Aspinwall*, 26 Barb., 202. See also *Perkins* vs. *Church*, 31 Barb., 84, above cited.

But a stockholder so sued, is not liable for debts of the company antecedent to his becoming such, by the issue of his stock certificate; nor will his having previously given his note for stock to be issued on its payment, antedate that liability. *Tracy* vs. *Yates*, 18 Barb., 152. Nor is a trustee or director who has neglected to report, liable for a debt incurred by the company, after his ceasing to hold office. *The Quarry Company* vs. *Bliss*, 10 Abb., 211.

And proof by a stockholder, of having already paid debts to the full amount of his stock, will be a complete defence. *Garrison* vs. *Howe*, 17 N. Y., 458. And it would seem that he may himself institute a suit for an account and distribution.

A stockholder, sued individually for enforcement of a judgment obtained against the company of which he is a member, is only liable to one suit at a time; nor can a second be maintained against him, until the first is determined, and an execution returned unsatisfied in whole or in part. Laws of 1853, ch. 153, p. 283.

(*k.*) States and Governments.

A foreign state or government may sue in its federative name. *Republic of Mexico* vs. *Arrangois*, 11 How., 1; affirmed, 5 Duer, 634; 11 How., 576.

It cannot be sued for the purpose of enforcing any remedy against it; but, in a controversy affecting others, it may, at the outset of the action, be made a party defendant, to give it an opportunity to appear and take part in the controversy, if it judge right to do so. *Vide Manning* vs. *The State of Nicaragua*, 14 How., 517. But it may consent to be sued on such terms as may be just. *People of State of Michigan* vs. *Phœnix Bank of New York*, 4 Bosw., 363.

Nor can the state of New York be sued by an individual, except as authorized by statute. *Kiersted* vs. *The People*, 1 Abb., 385.

In an action for intrusion into office, the individual claiming that office must be joined as a co-plaintiff with the people. *People* vs. *Ryder*, 16 Barb., 370; affirmed, 2 Kern., 433; *The People* vs. *Walker*, 23 Barb., 304.

The people were held to be properly made plaintiffs in a suit to com-

pel the trustees of a bank to contribute to the safety-fund for the benefit of all claimants. *The People* vs. *Walker*, 21 Barb., 630.

And, in a suit for a matter affecting the whole community, the attorney-general is a necessary defendant. *Davis* vs. *The Mayor of New York*, 2 Duer, 663. The same officer is also the proper party to sue for a public injury. *Korff* vs. *Green*, 16 How., 140; 7 Abb., 108, note. See *Roosevelt* vs. *Draper*, 16 How., 137; 7 Abb., 108; and opinion of Harris, J., in same case, 7 Abb., 124. See subsequent affirmance in same case, *Roosevelt* vs. *Draper*, 23 N. Y., 318. See likewise as to an injunction to prevent the misuser of its authority by a municipal corporation, in matters not falling within the scope of its legislative functions, *People* vs. *The Mayor of New York*, 9 Abb., 253; *Same* vs. *Same*, 32 Barb., 102. See, however, *People* vs. *Law*, 22 How., 109.

And an action on the official bond of a public officer, in respect of his misconduct, will be properly brought in the name of the people. *People* vs. *Norton*, 5 Seld., 176.

(*l.*) Assignee in Contract.

It will have been seen that, under section 111, the assignee and not the assignor of a chose in action, is henceforth the proper party to be joined as plaintiff, in all cases.

To be available, however, the assignment must be antecedent to the action; if executed subsequently to its commencement, it will not sustain the complaint. *Garrigue* vs. *Loescher*, 3 Bosw., 578.

An assignment of this nature is valid, and transfers the right to sue, though made without sufficient, or without any consideration, or if even a mere gift. See *Clark* vs. *Downing*, 1 E. D. Smith, 406; *Beach* vs. *Raymond*, 2 E. D. Smith, 496; *St. John* vs. *American Mutual Life Insurance Company*, 3 Kern., 31; *Mills* vs. *Fox*, 4 E. D. Smith, 220; *Vogel* vs. *Badcock*, 1 Abb., 176; *Burtnett* vs. *Gwynne*, 2 Abb., 79; *Richardson* vs. *Mead*, 27 Barb., 178; *Arthur* vs. *Brooks*, 14 Barb., 533; *Eastern Plank Road Company* vs. *Vaughan*, 4 Kern., 546 (555). But if clearly colorable, it might be impeached. *Burtnett* vs. *Gwynne*, *supra*.

And when a written contract is made upon its face for the benefit of a third party, such party may sue on it without the form of an assignment. *Eastern Plank Road Company* vs. *Vaughan*, *supra*.

Any contract upon which an action might be maintained by the executors of the contracting party, is legally assignable, and may be sued on by the assignee. *Sears* vs. *Conover*, 34 Barb., 330.

A complete title to a debt due from a third person passes by an assignment, though notice be not given to the debtor. *Richardson* vs. *Ainsworth*, 20 How., 521.

And when a judgment is paid wholly or in part by one not bound by it, the taking of an assignment is unequivocal evidence on his part of an intention not to satisfy it. The assignment is valid, and the judgment remains unextinguished. *Harbeck* vs. *Vanderbilt*, 20 N. Y., 395. But such an assignment does not carry with it any collateral and independent remedies, in respect of fraud, which might be asserted by the assignor. *Borst* vs. *Baldwin*, 30 Barb., 180.

No title to sue will of course pass by an assignment incomplete in itself, for want of the concurrence of a necessary party. *Mills* vs. *Pearson*, 2 Hilt., 16.

An assignment by parol may avail, but, to be valid, it must be complete and for sufficient consideration, and all control over the subject-matter must be surrendered. *Rupp* vs. *Blanchard*, 34 Barb., 627.

It is not now necessary to inquire whether an assignment passes the legal title. The assignee, if he have the whole interest, may sue in his own name, whether his title be legal or equitable. *Hastings* vs. *McKinley*, 1 E. D. Smith, 273.

But if the assignee's complaint negative his own title, it will be bad on demurrer. *Palmer* vs. *Smedley*, 28 Barb., 468; 6 Abb., 205; *Nelson* vs. *Eaton*, 15 How., 305; 7 Abb., 305.

Permission to revive was refused to a party claiming as assignee of the executor of a deceased party, in *Rogers* vs. *Adriance*, 22 How., 97. The doctrine of privity, it was believed, had never been carried so far.

A guarantee is assignable, and the assignee must sue in his own name. *Small* vs. *Sloan*, 1 Bosw., 352.

An assignee of a chose in action entitled to the money due is, in all cases, the proper party to sue. *Combs* vs. *Bateman*, 10 Barb., 573.

An assignment, for valuable consideration, of a mere expectancy, is good in equity, and takes effect when that expectancy is brought into existence. And, where a person having a debt due to him, assigns parts of it to different persons in succession, a suit is maintainable by any one of them, to collect his part of the demand. *Field* vs. *The Mayor of New York*, 2 Seld., 179. And such an assignment of a share in an unsettled estate avails to pass an interest, then unknown to the assignor. *Couch* vs. *Delaplaine*, 2 Comst., 397. But, in a suit by an assignee of part of an entire demand actually due, all the other part assignees who remain unpaid should be made parties. *Cook* vs. *The Genesee Mutual Insurance Company*, 8 How., 514.

Mere delivery, without endorsement or assignment, of a non-negotiable note for the contingent payment of money, is sufficient transfer to give the transferee a right to sue. *Loftus* vs. *Clark*, 1 Hilt., 310.

A redelivery or surrender of the assignment by the assignee to the

assignor, accepted by the latter, divests the former of his title. *Ball* vs. *Larkin*, 3 E. D. Smith, 555.

A conditional agreement between the assignor and assignee to share the debt, if collected, does not make the former a necessary party, where the assignment is absolute on its face. *Durgin* vs. *Ireland*, 4 Kern., 322.

But in *Lewando* vs. *Dunham*, 1 Hilton, 114, where an assignment was made to one party, another being entitled to share in the proceeds, it was held that both should have been joined.

A mere lien on property, retained by the assignor, is not assignable. *Wing* vs. *Griffin*, 1 E. D. Smith, 162. Neither is a mere inchoate right of dower. *Moore* vs. *The Mayor of New York*, 4 Seld., 110. Nor is a claim on a policy on which loss, if any, is made payable to the mortgagee, assignable by the mortgagor. *Ripley* vs. *The Astor Insurance Company*, 17 How., 444.

A claim to recover back money paid on a bet, is assignable. *Meech* vs. *Stoner*, 19 N. Y., 26; overruling *Weyburn* vs. *White*, 22 Barb., 82. See, also, *Hendrickson* vs. *Beers*, 6 Bosw., 639.

A balance due on an unsettled account is assignable, and the assignee may sue in his own name. *Allen* vs. *Smith*, 16 N. Y., 415.

Sheriff's fees actually earned, are assignable, but not those to be earned thereafter. *Birkbeck* vs. *Stafford*, 23 How., 236; 14 Abb., 285.

Where a partner assigned all his interest in the partnership property, held, that a debt due from himself to the firm did not pass. *Van Scoter* vs. *Lefferts*, 11 Barb., 140.

The owner of property, and his assignee for the benefit of creditors, were held to be properly joined as coplaintiffs, in a suit to have a prior judgment against the former cancelled. *Monroe* vs. *Delavan*, 26 Barb., 16.

An assignee for creditors cannot delegate his trust, and an assignment by him to a third party to collect will be void, unless executed by every creditor. *Small* vs. *Ludlow*, 1 Hilt., 189.

An action will be properly brought in the name of a trustee for creditors, so long as the assignment to him remains in force, though, if attacked, it may be voidable. *Ogden* vs. *Prentiss*, 33 Barb., 160; and cases cited, p. 163.

An assignee in trust for creditors does not stand in the position of a purchaser, but merely takes the rights of his assignor, and cannot sue, where the latter would be barred. *Van Heusen* vs. *Radcliff*, 17 N.Y., 580. See, also, *Maas* vs. *Goodman*, 2 Hilt., 275.

Such an assignee is not primarily liable for rent, where the lease is not specially assigned to him. He is entitled to an election, either to

take or abandon the lease, within a reasonable time. *Bagley* vs. *Freeman*, 1 Hilton, 196; *Journeay* vs. *Brackley*, 1 Hilt., 447.

An action for rent, payable under a covenant, lies in favor of the assignee of the lessor against the assignee of the lessee. *Main* vs. *Feathers*, 21 Barb., 646; *Main* vs. *Davis*, 32 Barb., 461.

And such an assignee may maintain ejectment for its non-payment, where the assignment to him was made prior to the disabling statute—chapter 396 of 1860, p. 675. *Main* vs. *Green*, 32 Barb., 448; *Same case*, 33 Barb., 136.

An action for breach of a covenant running with the land, is properly brought by an assignee or sub-assignee of the covenantee, owning the land at the time the breach was committed. *Beach* vs. *Barons*, 13 Barb., 305.

An assignee, *pendente lite*, need not be made a party, and, if he omits to seek to be brought in, he will be bound by the decree. *Cleaveland* vs. *Boerum*, 23 Barb., 201; affirmed, 27 Barb., 252; 3 Abb., 294. See, also, *Emmet* vs. *Bowen*, 23 How., 300.

An assignment of a satisfied claim is null, and confers no interest whatever. *Cochran* vs. *Sherman*, 5 Duer, 13. So, also, is an assignment by officers of a company, of its choses in action, made without authority of the directors. *Hoyt* vs. *Thompson*, 1 Seld., 320.

An assignee of a claim for which an extension and the acceptance of notes for the amount have been fraudulently obtained, has all the rights of an assignor, and may sue on the original consideration, surrendering the notes. *French* vs. *White*, 5 Duer, 254.

An assignment by a defendant of a judgment in replevin, confers a right upon the assignee to sue upon the undertakings given on the taking of the property, in his own name. *Bowdoin* vs. *Coleman*, 6 Duer, 182; 3 Abb., 431.

The benefit of a contract to make an annual payment to two parties, or the survivor, if demanded, is assignable by that survivor. *Prindle* vs. *Carruthers*, 15 N. Y., 425. *Vide* note, p. 430.

The assignee of a policy on the assignor's own life, may recover on the death of such assignor, without reference to the amount of consideration paid by him. *St. John* vs. *The American Mutual Life Insurance Company*, 3 Kern., 31.

Nor is it material that the assignee of a valid life insurance has himself no interest in the life insured. *Valton* vs. *National Loan Fund Life Assurance Company*, 20 N. Y., 32 (38).

A claim on a policy after loss is absolute, and assignable, without the consent of the insurers, notwithstanding the usual prohibitory clause. The restriction is upon assignment of the risk, not on a transfer of the debt, when arisen. *Mellen* vs. *The Hamilton Fire Insurance Company*,

17 N. Y., 609; 5 Duer, 101; *Goit* vs. *The National Protection Insurance Company*, 25 Barb., 189.

A restricted view as to the power of an equitable assignee to sue in his own name upon a common-law cause of action, is taken by Selden, J., in *The Merchants' Mutual Insurance Company of Buffalo* vs. *Eaton*, 11 L. O., 140; 5 Duer, 101. There must, to sustain an action in that form, be an assignment in fact; a mere equity or contract for an assignment *in futuro* is not sufficient. In such a case the court will still permit an action in the name of the legal, for the benefit of the equitable owner, and will protect the latter's interest.

A claim of stockholders against a company, to be refunded the amount of subscriptions paid in by them for a purpose which has failed, arises *ex contractu*, and is assignable. *Peckham* vs. *Smith*, 9 How., 436.

Where an assignment of a claim in blank is delivered to a purchaser, he may fill in another name, and the substituted party will be an assignee, within the meaning of the Code. An account may be assigned by parol, and a mere delivery with intent to transfer is sufficient. *Waldron* vs. *Baker*, 4 E. D. Smith, 440.

As to assignment of claim for value of property wrongfully taken, or damages arising out of a wrongful act, see the next subdivision.

As to the assignee of a chose in action, holding it, when assigned, subject to all equities existent at the time of the assignment, as expressly provided by section 112, see *Maas* vs. *Goodman*, 2 Hilt., 275, and cases there cited; *McCready* vs. *Rumsey*, 21 How., 271; *Mechanics' Bank* vs. *New York and New Haven Railroad Company*, 3 Kern., 599 (629).

But this does not confer any such right upon a creditor whose set-off has accrued subsequent to the assignment. *Ogden* vs. *Prentiss*, 33 Barb., 160.

When the claim of the plaintiff is assigned absolutely *pendente lite*, the court, on motion of the defendant, may, it has been held, order the complaint to be dismissed, unless the assignee be duly substituted of record. *Sherman* vs. *Coman*, 22 How., 517.

See, however, *per contra*, *Emmet* vs. *Bowen*, 23 How., 300, holding that, under such circumstances, the suit should, under section 121, be continued in the name of the original plaintiff, unless the transferee applies to be substituted.

(*m.*) Assignee in Tort.

The phraseology of section 111 has given rise to considerable discussion as to what may, or may not, be considered a thing in action not arising out of contract, coming within the prohibition which it contains,

and a liberal view as to its interpretation has, on the whole, been taken by the courts.

The distinction may be broadly drawn thus: Where the right of action is for a personal injury, or for personal damage, unconnected with the possession of or right to property, the claim is personal, and, so long as it remains unliquidated, is not assignable. Any right of action in respect of a chattel wrongfully taken, lost, or detained, or for the value of that chattel, including that to recover damages for its conversion, though technically sounding in tort, and also any cause of action arising from the non-performance of a contract, are, on the contrary, all of them assignable, and the assignee may sue in his own name, notwithstanding the provision alluded to.

A claim for unliquidated damages in respect of a breach of a contract for employment, was held assignable, and to be properly prosecuted in the name of the assignee, in *Monahan* vs. *Story*, 2 E. D. Smith, 393. So also for breach of covenant by a landlord, to allow certain privileges. *Munson* vs. *Riley*, *ibid.*, 130. So likewise on breach of a special contract for delivery of merchandise. *Dana* vs. *Fiedler*, 1 E. D. Smith, 463; affirmed, 2 Kern., 40.

The purchaser of personal property in the wrongful possession of a third party, may, after a demand, maintain in his own name an action in the nature of trover for its illegal detention. *McGuin* vs. *Worden*, 3 E. D. Smith, 355; *Hall* vs. *Robinson*, 2 Comst., 293; *Kellogg* vs. *Church*, 3 C. R., 53; *Cass* vs. *The New York and New Haven Railroad Company*, 1 E. D. Smith, 522; *Robinson* vs. *Weeks*, 1 C. R. (N. S.), 311; 6 How., 161; *Van Hassell* vs. *Borden*, 1 Hilt., 128. And such a right of action will pass by a general assignment for creditors. *McKie* vs. *Judd*, 2 Kern., 622; *Andrews* vs. *Durant*, 18 N. Y., 496; *Whittaker* vs. *Merrill*, 30 Barb., 389. These cases overrule *Thurman* vs. *Wells*, 18 Barb., 500. But a previous demand is, in such a case, essential. *Howell* vs. *Kroose*, 4 E. D. Smith, 357; 2 Abb., 167; *Sherman* vs. *Elder*, 1 Hilt., 178. And, if the defendant has parted with the chattel before the assignment, no action will lie against him. *Duell* vs. *Cudlipp*, 1 Hilt., 166; *Nash* vs. *Fredericks*, 12 Abb., 147.

A claim against an innkeeper for money stolen from his guest, is assignable. *Stanton* vs. *Leland*, 4 E. D. Smith, 88.

A claim for damages for goods lost by a common carrier, is assignable. The test, in such cases, is laid down thus: In the event of the death of the original claimant, would the cause of action pass to his executors as assets, or, would it die with his person? In the former case, the claim is assignable; in the latter, not. *Freeman* vs. *Newton*, 3 E. D. Smith, 246. See *People* vs. *Tioga Common Pleas*, 19 Wend., 73. The same rule is laid down by Paige, J. (*obiter*), in *Hoyt* vs.

Thompson, 1 Seld., 320 (347), in the following terms: "All choses in action, embracing demands which are considered as matters of property or estate, are now assignable, either at law or in equity. Nothing is excluded but mere personal torts which die with the person." See as to the same test, *Zabriskie* vs. *Smith*, 3 Kern., 322; *Butler* vs. *The New York and Erie Railroad Company*, 22 Barb., 110.

A cause of action against a common carrier for negligence in not delivering goods, is also held assignable, in *Smith* vs. *The New York and New Haven Railroad Company*, 16 How., 277; 28 Barb., 605; *Waldron* vs. *Willard*, 17 N. Y., 466; *Foy* vs. *The Troy and Boston Railroad Company*, 24 Barb., 382. These cases are founded on the doctrine laid down in *McKie* vs. *Judd*, and overrule *Thurman* vs. *Wells*, above cited.

A claim for damages to personal property is, on the same principles, assignable. *Butler* vs. *The New York and Erie Railroad Company*, 22 Barb., 110.

A factor, responsible for goods consigned to him, may maintain an action for their conversion. *Gorum* vs. *Carey*, 1 Abb., 285; and so may a forwarding merchant, who has made advances on goods consigned to him for transport to the ultimate consignees. *Fitzhugh* vs. *Wiman*, 5 Seld., 559; or a consignee for sale who has made advances. *Adams* vs. *Bissell*, 28 Barb., 382.

Although a cause of action for damages for a mere fraud may not be assignable, yet a claim for reimbursement of moneys so obtained is so, and may be sued in the name of the assignee. *Sheldon* vs. *Wood*, 2 Bosw., 267.

So likewise as to a claim for reimbursement of moneys lent, on refusal by the borrower to indorse a note agreed to be taken in lieu of a former one surrendered. *Westcott* vs. *Keeler*, 4 Bosw., 564.

As to the assignment of a judgment recovered on a cause of action sounding in *tort*, see *King* vs. *Kirby*, 28 Barb., 49.

An owner of goods may maintain trover for their detention, though under contract to sell to a third person, provided he still retains the right to their possession. *Minzeskeimer* vs. *Heine*, 4 E. D. Smith, 65.

The interest of one of the next of kin of a party killed by a wrongful act, in damages to be recovered under the statute of 1847, is capable of assignment. *Quin* vs. *Moore*, 15 N. Y., 432. See also other cases below cited.

Proceeding from the consideration of causes of action arising out of a wrong, which are assignable, to those which are not, the rule of "*Actio personalis moritur cum personâ*," affords, as above stated, the true test.

An action for damages for a false representation of the solvency of a vendee of merchandise, falls within the exception in section 111, and is not

assignable. *Zabriskie* vs. *Smith*, 3 Kern., 322; *Hyslop* vs. *Randall*, 11 How., 97; 4 Duer, 660. So also as to an action to set aside a judgment and agreement, on the ground of fraud. *Borst* vs. *Baldwin*, 17 How., 285; 8 Abb., 351; 30 Barb., 180.

An action for damages for injuries to the property, rights, or interests of another, as distinguished from mere personal torts, survives to or against the representatives of both parties (2 R. S., 448, § 1, 2); and in *Haight* vs. *Hoyt*, 19 N. Y., 464 this right was held to extend to an action against the vendor of land, for fraudulent representations as to an incumbrance.

A right of action to cancel a contract on the ground of usury, is merely personal, and incapable of assignment. *Boughton* vs. *Smith*, 26 Barb., 635.

And such an action is still maintainable by the mortgagor, notwithstanding an assignment by him of the fee of the mortgaged premises to a trustee for creditors. *Strong* vs. *Strickland*, 32 Barb., 284.

So likewise, the right to set aside a deed on the ground of fraud, is personal, and incapable of assignment. *McMahon* vs. *Allen*, 34 Barb., 56; 12 Abb., 275.

Nor is a right of action for damages for a mere personal tort assignable, as for injury from a collision; *Hodgman* vs. *Western Railroad Corporation*, 7 How., 492; *Purple* vs. *The Hudson River Railroad Company*, 1 Abb., 33; 4 Duer, 74; or, for slander; *Nash* vs. *Hamilton*, 3 Abb., 35. See also principle generally stated in *McKie* vs. *Judd*, 2 Kern., 622 (625); *Butler* vs. *The New York and Erie Railroad Company*, 22 Barb., 110 (112); *Robinson* vs. *Wells*, 6 How., 161 (164); 1 C. R. (N. S.); 311 (312).

But, in an action under the statute by the representatives of a person killed by accident, the share of one of the next of kin is assignable. *Quin* vs. *Moore*, 15 N. Y., 432. Of course such a cause of action cannot fall under the rule above noticed, as it does not arise until after, and as the consequence of, the death of the person injured.

In *Norton* vs. *Wiswall*, 14 How., 42, it was held that, as regards the defendant in such a case, the action is personal, and, if he dies during the litigation, does not survive as against his representatives. In *Doedt* vs. *Wiswall*, 15 How., 128, the contrary conclusion is come to, and it was held that the representatives were liable; and this decision, having been affirmed at general term (*vide* p. 145), necessarily overrules that in *Norton* vs. *Wiswall*. The same conclusion is repeated by the general term of the same district in *Yertore* vs. *Wiswall*, 16 How., 8, on the ground that the suit is in fact brought for the enforcement of a statutory right of property.

An action for a wrongful entry in lands is personal, and does not survive or continue. See *dicta* in *Moseley* vs. *The Albany Northern Rail-*

road Company, 14 How., 71 (74); *Putnam* vs. *Van Buren*, 7 How., 31 (32). Nor does a right of entry for breach of a condition subsequent, pass by assignment or conveyance of the premises held subject to the condition. *Nicoll* vs. *New York and Erie Railroad Company*, 2 Kern., 121.

§ 33. *Representatives and Trustees.*

By section 111, a right to sue in their own names, without joinder of those ultimately interested in the result, is given to the following parties, entitled "*En autre droit:*"

1. Executors or administrators.
2. Trustees of an express trust.
3. Persons expressly authorized by statute.

It is proposed to consider these three classes severally in their order.

(1.) Executors or Administrators.

An executor or administrator may sue on a note made or indorsed to him, either as administrator, or in his own right. *Bright* vs. *Currie*, 5 Sandf., 433; 10 L. O., 104; *Merritt* vs. *Seaman*, 2 Seld., 168; *Eagle* vs. *Fox*, 8 Abb., 40; 28 Barb., 473.

An administrator may sue in trover, for conversion during the intestate's lifetime. *Sheldon* vs. *Hoy*, 11 How., 11.

The personal representatives of a deceased lessee for lives, have an estate in the land, and, being entitled to possession, may maintain ejectment. *Mosher* vs. *Yost*, 33 Barb., 277.

A personal representative cannot maintain an action for rents, not actually due at the time of the decease of his testator or intestate. They belong to the heir, as incident to the reversion. *Fay* vs. *Halloran*, 35 Barb., 295.

An administrator *ad colligendum* is competent to sue for and recover personal estate of the decedent, until his authority is superseded; and so is an administrator *de bonis non*, when appointed. *McMahon* vs. *Allen*, 4 E. D. Smith, 319.

An executor may sue his co-executor for payment of a debt he owes to the estate. *Wurts* vs. *Jenkins*, 11 Barb., 546. A person named as executor, but who has not qualified, may also bring suit against his co-executor, to establish a right against the estate. *Hunter* vs. *Hunter*, 19 Barb., 631.

The administrator of a *feme covert* cannot sue for injury to her in her lifetime. The right of action is vested in the husband only, as such. *Lynch* vs. *Davis*, 12 How., 323.

An action under the statute is maintainable by the administrator of a party killed by an accident, in any case in which the injured party him-

self could have prosecuted, and may be brought by the administrator of an infant. *Oldfield* vs. *The New York and Harlem Railroad Company*, 3 E. D. Smith, 103; affirmed, 4 Kern., 310; *Quin* vs. *Moore*, 15 N. Y., 432. The fact that the deceased left a widow, or next of kin, is, however, essential to a recovery, and therefore must be averred. *Safford* vs. *Drew*, 3 Duer, 627; 12 L. O., 150; *Green* vs. *The Hudson River Railroad Company*, 31 Barb., 260; 16 How., 263; *Lucas* vs. *The New York Central Railroad Company*, 21 Barb., 245. But it is not necessary to aver that the deceased left both. *Oldfield* vs. *The New York and Harlem Railroad Company*, 4 Kern., 310. Nor is it necessary to aver that such widow or next of kin were dependent upon the deceased for their support. The action is in the nature of one for injury to property, for the benefit of any parties interested in either capacity. *Dickens* vs. *The New York Central Railroad Company*, 28 Barb., 41.

In *Beach* vs. *The Bay State Company*, 27 Barb., 248; 16 How., 1; 6 Abb., 415, it is laid down that, where jurisdiction has been otherwise acquired, this form of action is maintainable in respect of death occasioned by an accident occurring out of the state. In *Vandeventer* vs. *The New York and New Haven Railroad Company*, 27 Barb., 244; 6 Abb., 239, the direct contrary of this proposition is maintained. *Beach* vs. *The Bay State Company*, has since been reversed (18 How., 335); 30 Barb., 433; and in *Whitford* vs. *The Panama Railroad Company*, 3 Bosw., 67, it is also maintained that, under these circumstances, the courts have no jurisdiction.

The following decisions may be noted with reference to actions against representatives:—

Such an action, when brought against an executor for wrongful payment of a legacy, is properly brought against him only, without joinder of the wrongful recipient. *Gleason* vs. *Thayer*, 24 Barb., 82. But, in an action against him to compel payment of a disputed bequest, all parties whose rights may be affected by the decision should be joined. *Trustees of the Theological Seminary of Auburn* vs. *Kellogg*, 16 N. Y., 83.

In actions brought by or against executors, it is not necessary to join those as parties to whom letters testamentary have not been issued, and who have not qualified. Chap. 149 of 1838; 2 R. S., 133, § 3. See *Brownson* vs. *Gifford*, 8 How., 389 (396). *Moore* vs. *Willett*, 2 Hilt. 522. But all who have qualified must be joined. *Scranton* vs. *Farmers' and Mechanics' Bank of Rochester*, 33 Barb., 527.

In respect to the joinder of the executors of a deceased partner, or joint and several contractors, see under preceding clauses of this section.

A cause of action for an injury to the property, rights or interests of another, as distinguished from a mere personal tort, survives to and

against the representatives of both parties. 2 R. S., 448, § 1, 2. See *Haight* vs. *Hoyt*, 19 N. Y., 464.

A foreign administratrix, having brought property of the intestate to this state, is suable here in respect of it. *Gulick* vs. *Gulick*, 33 Barb., 92; 21 How., 22.

2. Trustees of Express Trust.

The exact extent and meaning of this term, as employed in the section now under consideration, has given rise to much discussion, especially previous to the explanatory amendment of 1851.

The following have been held to be trustees within the meaning of the section, and are therefore competent to sue in their own names:

A mercantile factor, contracting in his own name, on behalf of his principal. *Grinnell* vs. *Schmidt*, 2 Sandf., 706; 3 C. R., 19; 8 L. O., 197.

An agent, contracting as agent, without disclosing the name of his principal, *Morgan* vs. *Reid*, 7 Abb., 215; but, in this case, it is competent for the principal himself to sue at his election, *Vide Erickson* vs. *Compton*, 6 How., 471, and other cases before cited in last section under head of *Principal and Agent.*

An auctioneer selling goods in his own name. *Bogart* vs. *O'Regan*, 1 E. D. Smith, 590; *Minturn* vs. *Main*, 3 Seld., 220.

The managing owner of a vessel, both generally, and as regards the equitable interest of the intended purchaser of a share. *Ward* vs. *Whitney*, 3 Sandf., 399 (403); affirmed, 4 Seld., 442.

A contractor for the benefit of third parties, as in the case of a theatrical agent, entitled to transfer the services of an engaged company, and claiming payment on their behalf. *Rowland* vs. *Phalen*, 1 Bosw., 43.

The outgoing trustees of an association, suing upon a promissory note made payable, by name, to them or to their successors. *Davis* vs. *Garr*, 2 Seld., 124.

An agent for a foreign principal, suing upon a note taken in his own name. *Considérant* vs. *Brisbane*, 22 N. Y., 389.

The general agent of a foreign incorporated association, authorized to sue as such. *Habicht* vs. *Pemberton*, 4 Sandf., 657.

The officer of a foreign bank similarly authorized. *Myers* vs. *Machado*, 6 Duer, 678; 14 How., 149; 6 Abb., 198.

An officer of a foreign government, authorized by statute to sue for government property in his own name. *Peel* vs. *Elliott*, 16 How., 483; 7 Abb., 433.

An ambassador or public officer representing such a government. *Vide The Republic of Mexico* vs. *Arrangois*, 11 How., 1 (4, per Hoffman, J.); 5 Duer, 634.

An assignee of a policy of life insurance, in trust for the widow and children of the deceased. *St. John* vs. *The American Mutual Life Insurance Company*, 2 Duer, 419; 12 L. O., 265; affirmed, 3 Kern., 31.

A trustee for creditors. *Mellen* vs. *The Hamilton Fire Insurance Company*, 5 Duer, 101; affirmed, 17 N. Y., 609; *Lewis* vs. *Graham*, 4 Abb., 106. And this, whether his trust is general, or only special, for himself and other individual creditors. *Fletcher* vs. *Derrickson*, 3 Bosw., 181. And, where his trust is general, it is sufficient to join him only as defendant, in a suit to set aside the assignment. *Bank of British North America* vs. *Suydam*, 6 How., 379; 1 C. R. (N. S.), 325; *Scudder* vs. *Voorhis*, 5 Sandf., 271. He represents his *cestui que trusts* under these circumstances.

And it is competent for such a trustee to sue individually, as holder of a promissory note, part of the trust estate, if he so elect. *Butterfield* vs. *Macomber*, 22 How., 150.

A trustee of this nature may sue, though the assignment under which he claims be voidable, if impeached. *Ogden* vs. *Prentiss*, 33 Barb., 160. See also other cases cited in last section.

It has been also held that a trustee, suing or being sued in partition, represents *cestui que trusts* not then in being, and that they will be bound by the decree. *Mead* vs. *Mitchell*, 5 Abb., 92.

A widow, guardian in socage, has been held to be the proper plaintiff in a suit for rents due to infant heirs, or for use and occupation of their land. *Sylvester* vs. *Ralston*, 31 Barb., 286.

The president or treasurer of an incorporated association, consisting of not less than seven persons, may sue as such, pursuant to statute. *Tibbetts* vs. *Blood*, 21 Barb., 650.

The nominal proprietor of an individual bank may also sue, as trustee, without joining his co-proprietors. *Burbank* vs. *Beach*, 15 Barb., 326.

A suit may be brought in the name of the sheriff, for the benefit of one of his deputies. *Stillwell* vs. *Hurlbert*, 18 N. Y., 374.

The deputy himself cannot maintain such an action. *Terwilliger* vs. *Wheeler*, 35 Barb., 620.

A suit for the benefit of others may be brought in the name of the people, as trustees of an express trust, in any case where a bond is taken to them, for the benefit of individuals. So held, as to the bond of a trustee substituted by order of the Court of Chancery. *The People* vs. *Norton*, 5 Seld., 176. (See generally *Bos* vs. *Seaman*, 2. C. R., 1.) Or on an administration bond merely directed to be prosecuted. *The People* vs. *Laws*, 3 Abb., 450; affirmed, 4 Abb., 292. But otherwise, when such a bond has been actually assigned. *Baggott* vs. *Boulger*, 2 Duer, 160; and see this subject, before discussed, under section 32.

And the people were held to be properly made plaintiffs, in a suit to compel the trustees of a bank to contribute to the safety-fund. *The People* vs. *Walker*, 21 Barb., 630.

In a suit for a public injury, the attorney-general, as representing the whole community, is the proper party to sue. *Korff* vs. *Green*, 16 How., 140; 7 Abb., 108, note; *Roosevelt* vs. *Draper*, 16 How., 137; 7 Abb., 108, and opinion of Harris, J., in same case, 7 Abb., 124. See likewise affirmance, *Roosevelt* vs. *Draper*, 23 N. Y., 318. See also *People* vs. *Mayor of New York*, 19 How., 155; 10 Abb., 144; *People* vs. *Albany and Vermont Railroad Company*, 19 How., 523; 11 Abb., 136.

The same officer is also the proper plaintiff, in a suit to compel the due administration of a public charity. *Female Association of New York* vs. *Beekman*, 21 Barb., 565.

The mayor and corporation, when obligees on a constable's bond, are the proper plaintiffs, in a suit brought upon it for the benefit of a party aggrieved. *Mayor, &c., of New York* vs. *Doody*, 4 Abb., 127.

In a suit against a third party in respect of trust property, the trustee is, in all cases, the proper plaintiff. *Female Association of New York* vs. *Beekman*, 21 Barb., 565; and the only proper defendant in a suit by a third party brought in respect of trust property. *Keteltas* vs. *Penfold*, 4 E. D. Smith, 122.

One trustee cannot sue another, while he remains such, for a breach of trust. The *cestui que trust* is the proper plaintiff in such cases. *Trustees of Methodist Episcopal Church in Pultney* vs. *Stewart*, 27 Barb., 553; *Female Association of New York* vs. *Beekman*, 21 Barb., 565.

A partner cannot sue as trustee for his copartners. *Secor* vs. *Keller*, 4 Duer, 416.

The committee of a lunatic has been held to stand in the character of trustee, and to be entitled to sue, to set aside a warrant of attorney executed by the lunatic, while such. *Person* vs. *Warren*, 14 Barb., 488. See also *Griswold* vs. *Miller*, 15 Barb., 520.

In relation to the power of trustees in insolvency, to sue as such, *vide* 2 R. S., 41, § 7.

The title of a foreign assignee in bankruptcy to sue in respect of property in this state, was refused to be recognized in *Mosselman* vs. *Caen*, 34 Barb., 66; 21 How., 248

This doctrine is, however, unsustainable, in cases where there exists no conflict between foreign and domestic creditors. The right of a party standing in the position of a foreign receiver or assignee, to sue as such, seems to be clearly established. See *Hoyt* vs. *Thompson*, 1 Seld., 320 (341); *Runk* vs. *St. John*, 29 Barb., 585.

3. Persons authorized by Statute.

(*a.*) *Committees.*

By 2 R. S., 53, section 7, and section 2 of chapter 112 of 1845, receivers and committees of lunatics and habitual drunkards, duly appointed, may sue in their own names for any debt, claim, or demand transferred to them, or to the possession and control of which they are entitled, as such; and, by section 134 of the Code, subdivision 3, provision is made for the service of process upon them in a suit against a person, judicially declared of unsound mind.

The committee of an habitual drunkard may sue as such, in his own name, on a note given to the party whom he represents (*Davis* vs. *Carpenter*, 12 How., 287); but the declarations of that party, prior to his being declared such, are admissible in evidence.

The committee, as trustee of an express trust, may sue to set aside a warrant of attorney, or deed, executed by the lunatic while such. *Person* vs. *Warren*, 14 Barb., 488; *Griswold* vs. *Miller*, 15 Barb., 520. See, likewise, as to a motion to set aside a judgment unfairly obtained against him, *Demelt* vs. *Leonard*, 19 How., 140; 11 Abb., 252.

But, by the appointment of a committee, the lunatic loses none of his rights; and all suits concerning his property, must still be brought in his own name, except those in which the committee is authorized to sue by statute. *McKillip* vs. *McKillip*, 8 Barb., 552.

Nor can the committee enforce or adopt the lunatic's contract made during lunacy. *Fitzhugh* vs. *Wilcox*, 12 Barb., 235.

To sue a lunatic after appointment of a committee, without leave of the court, is a contempt; and, on application, proceedings may be restrained; but a judgment so obtained, will not be *ipso facto* void, and will not be set aside, where no real defence is shown. *Sternbergh* vs. *Schoolcraft*, 2 Barb., 153. Nor can an action be maintained by the committee to recover the value of property sold, under execution issued on a judgment so obtained. *Crippen* vs. *Culver*, 13 Barb., 424.

As to the power of the guardian or committee of an infant lunatic to apply to the court for the appointment of a guardian *ad litem*, in a suit for partition, to which such infant lunatic is a party, *Vide Rogers* vs. *McLean*, 11 Abb., 440; reversing *same case*, 31 Barb., 304; 10 Abb., 306.

(*b.*) *Public Officers.*

The authority of the attorney-general to sue in respect of an injury done, or a liability incurred to the public, and of the mayor and corporation in respect of a constable's bond, in their characters of trustees of an express trust, has been already considered, and the cases cited.

The following officers are expressly authorized to sue in their own names, with the addition of their name of office, showing, by proper averment, that they do not sue individually: Commissioners of Highways. *Gould* vs. *Glass*, 19 Barb., 179; *Fowler* vs. *Mott*, 19 Barb., 204. The Master Warden of the port of New York, in a suit for a penalty under the statute of 1830. *The People* vs. *Deming*, 13 How., 441; 1 Hilt., 271. The Comptroller, in a suit to foreclose a mortgage, assigned to him by a bank, to secure redemption of its notes. *Flagg* vs. *Munger*, 2 Kern., 483. Overseer of the Poor, in a suit under a filiation bond, for payment for support of a bastard child. *Hoagland* vs. *Hudson*, 8 How., 343. The Board of Commissioners of Excise, in an action for a penalty under the liquor law. *The Board of Commissioners of Excise of Saratoga County* vs. *Doherty*, 16 How., 46. And the names of the individual commissioners should not be inserted. *Pomroy* vs. *Sperry*, 16 How., 211; *Hall* vs. *Benson*, 18 How., 302. In an action against the Board of Supervisors, it is in like manner erroneous to name the individuals. *Hill* vs. *Board of Supervisors of Livingston County*, 2 Kern., 52 (63), per Allen, J. See, also, *Wild* vs. *Supervisors of Columbia County*, 9 How., 315.

A suit may be continued by a public officer, after the expiration of his office, until his successor be duly substituted. *Manchester* vs. *Harrington*, 6 Seld., 164.

(*c.*) *Officers of the Court.*

A sheriff may sue as such in his own name, or in the name of the defendant, to recover property in the hands of a third party, levied upon by him under an attachment (Code, section 232); and may also prosecute bonds taken by him in the course of the proceedings under that remedy, section 237, subdivision 4.

Receivers may sue or be sued in their own names, in respect of property comprised within the limits of their receivership; but, before a receiver can sue or defend, the leave of the court should be obtained.

Special authority to sue is conferred upon receivers in supplementary proceedings, by the Code, section 299; see, likewise, rule 92 of the Supreme Court; and also on receivers or trustees of insolvent or dissolved corporations, nominated by the court, by 2 R. S., 464, section 41, and 2 R. S., 469, section 68. See also chapter 71 of 1852, in connection with 2 R. S., 463, section 36; and likewise chapter 224 of 1854, and chapter 348 of 1858.

The same power is given to trustees in cases of insolvency. 2 R. S., 41, section 7.

As to the right of the sequestrator of an incorporated company to sue as such, see *Brinton* vs. *Wood*, 19 How., 162.

§ 34. *Husband and Wife.*

Though inherently simple, considerable difficulty has arisen in the working of section 114, partly from the nature of the subject itself, and partly from the changes from time to time made by the legislature.

The question as to the necessity of the wife, when suing, being represented by a next friend, was much discussed, during the period between the original enactment of the Code and the amendment of 1851, prescribing that course. It was decided that she might sue without one, in a suit for limited divorce, in *Tippel* vs. *Tippel*, 4 How., 346; 3 C. R., 40; *Newman* vs. *Newman*, 3 C. R., 183; *Shore* vs. *Shore*, 2 Sandf., 715; 8 L. O., 166 (reported as *Anon.*, 3 C. R., 18). See also *White* vs. *White*, 5 Barb., 474; 4 How., 102. It was held, on the contrary, that she could not so sue, in *Coit* vs. *Coit*, 4 How., 232; 2 C. R., 94; affirmed, 6 How., 53; 3 C. R., 23, and *Forrest* vs. *Forrest*, 3 C. R., 254. The amendment of 1851 set the question at rest, in favor of the latter view.

The necessity of her being represented by a next friend, in cases where she sued or was sued alone, between 1851 and 1857, was clear on the face of the enactment itself, and is maintained in *Willis* vs. *Underhill*, 6 How., 396; *Heller* vs. *Heller*, 6 How., 194; 1 C. R. (N. S.), 309; *Meldora* vs. *Meldora*, 4 Sandf., 721; *Henderson* vs. *Easton*, 8 How., 201; *Towner* vs. *Towner*, 7 How., 387 (in which case it was also held, that no regular order for his appointment was necessary). See also *Thomas* vs. *Thomas*, 18 Barb., 149; 12 L. O., 274; *Phillips* vs. *Burr*, 4 Duer, 113; *Bergman* vs. *Howell*, 3 Abb., 329, 330.

But, even under the Code of 1851, it was not necessary that a next friend should be appointed for the wife, when her husband was joined with her as co-plaintiff. *Woods* vs. *Thompson*, 11 How., 184.

Since the amendment of 1857, the appointment of a next friend for the wife is dispensed with in every case. *Goodall* vs. *McAdam*, 14 How., 385.

Whatever might have been the doubts as to whether a married woman might or might not appear by attorney, whilst it was necessary that she should be represented by a next friend, there seems no doubt but that, since 1857, it is competent for her to do so; and such was probably the case before. *Vide* 2 R. S., 276, section 11. See also *Phillips* vs. *Burr*, 4 Duer, 113 (114, 115); *Bergman* vs. *Howell*, 3 Abb., 130 (131).

In a suit not concerning her separate property, it is not even necessary that a guardian should be appointed for the wife, if an infant. Her husband represents her. *Cook* vs. *Rawdon*, 6 How., 233; 1 C. R. (N. S.), 382; *Hulbert* vs. *Newell*, 4 How., 93.

(*a.*) JOINDER AS PLAINTIFFS.

The question as to whether, in a suit concerning the wife's separate property, the husband may or may not be joined with her as co-plaintiff, has given rise to much difference of opinion.

It is clear, by the words of the statute itself, that she may, if she chooses, sue alone, without joining her husband. In *Brownson* vs. *Gifford*, 8 How., 389, it was laid down, that to make the husband co-plaintiff with the wife in a suit for partition of her separate estate, was a misjoinder.

In *Howland* vs. *The Fort Edward Paper Mill Company*, 8 How., 505, it was held that the non-joinder of the husband, as plaintiff, in a suit for a note, part of the wife's separate estate, was no ground of demurrer. See also, *Spies* vs. *The Accessory Transit Company*, 5 Duer, 662. In *Sherman* vs. *Burnham*, 6 Barb., 403, it is decided that the husband cannot be joined as co-plaintiff with the wife, in a suit by her against the trustees of her separate estate. And in *Smith* vs. *Kearney*, 9 How., 466, that, in a suit to recover her separate property, her husband cannot even act as her next friend, or be joined as co-plaintiff. Nor can he sue with her, in a suit for the conversion of her separate property. *Ackley* vs. *Tarbox*, 29 Barb., 512.

In *Van Buren* vs. *Cockburn*, 2 C. R., 63, it was held, on the contrary, to be optional with a married woman, whether the action in such a case should be in her own name, as sole plaintiff, or in the joint names of herself and her husband. The same conclusion is supported in *Woods* vs. *Thompson*, 11 How., 184; and *Rusher* vs. *Morris*, 9 How., 266. And in *Ingraham* vs. *Baldwin*, 12 Barb., 9, it was decided that, in ejectment for the wife's estate, the husband was properly joined as plaintiff, as tenant by the courtesy initiate. This judgment is affirmed, in *same case*, 5 Seld., 45.; but the opinion in the court above does not touch on this particular point. In *Howland* vs. *The Fort Edward Paper Mill Company*, 8 How., 505, it was also considered that, in a suit concerning a note, part of the wife's separate estate, the husband ought to be joined, either as plaintiff or defendant.

It is impossible entirely to reconcile these decisions on all points.

It seems clear, however, from all, that the non-joinder of the husband is no ground of demurrer. It is competent for the wife, if she so elect, to sue alone. The better course will, perhaps, be for her to do so, and the weight of authority seems to incline in that direction. As to her power to put in a separate answer, when defendant, see *Harley* vs. *Ritter*, 9 Abb., 400.

But, if there exists any interest in the husband in the matter in controversy, it seems equally clear that he ought to be joined in all cases.

If such interest be coincident with, or derivative from that of the wife, several of the above cases, and *Ingraham* vs. *Baldwin*, in particular, authorize his being joined as co-plaintiff; but if it be in any wise diverse from, or capable of being brought into conflict with hers, to make him a defendant will be the proper course.

The propriety of so joining the husband is laid down in *Howland* vs. *The Fort Edward Paper Mill Company*, and *Sherman* vs. *Burnham*, above cited. If he claims any interest in the subject, or if a complete determination of the controversy cannot be made without him, he must be made a defendant. *Hillman* vs. *Hillman*, 14 How., 456.

In a suit for partition of the husband's property, the wife, as inchoate doweress, should be joined as co-plaintiff. *Ripple* vs. *Gilborn*, 8 How., 456. This agrees with the line of reasoning in *Ingraham* vs. *Baldwin*, above referred to. In an action for rent of the wife's estate, under a lease executed by both, both were held to be properly joined as plaintiffs. *Jacques* vs. *Short*, 20 Barb., 269. In *Avogadro* vs. *Bull*, 4 E. D. Smith, 384, it was considered, *obiter*, that on a contract for the wife's services, it was optional for the husband either to sue alone, or to join her as co-plaintiff. In *Dunderdale* vs. *Grymes*, 16 How., 195, it was held, on the contrary, that where the cause of action, though on a contract made in terms with the wife, was, in effect, the property of the husband, or arose on trespass on property not distinctly alleged to be the wife's separate estate, it was a misjoinder to associate her with him as co-plaintiff, and this is a direct decision on the point.

When husband and wife sue jointly in ejectment, they must recover jointly or not at all. An act on the part of the husband alone, debarring himself only, will be fatal to the joint action. *Barton* vs. *Draper*, 5 Duer, 130. And so also, in tort brought by both, as plaintiffs. Several judgments cannot be rendered in respect of the same injury. *Dunderdale* vs. *Grymes*, 16 How., 195.

In an action for words spoken of the wife, which are slanderous *per se*, both must be joined as plaintiffs. When the words are actionable only by reason of special damage, the husband may sue alone. *Klein* vs. *Hentz*, 2 Duer, 633; *Williams* vs. *Holdredge*, 22 Barb., 396. See, on this subject, *Wilson* vs. *Goit*, 17 N. Y., 442.

Since the statute of 1860, chapter 90, p. 157, section 7, an action for assault and battery committed upon the wife is maintainable by her alone, and the husband cannot be joined as a co-plaintiff. *Mann* vs. *Marsh*, 35 Barb., 68; 21 How., 372. See also, *Webber* vs. *Moritz*, 11 Abb., 113.

In the following cases, the right of the wife to sue alone, in suits concerning her separate property, clear indeed upon the face of the statute itself, is established by decision.

In ejectments for ouster from part of her separate estate. *Darby* vs. *Callaghan*, 16 N. Y., 71. For fraudulent representations, inducing a sale of such estate for a worthless consideration. *Newbery* vs. *Garland*, 31 Barb., 121.

For recovery of her separate chattels. *Spies* vs. *Accessory Transit Company*, 5 Duer, 662; *Ackley* vs. *Tarbox*, 29 Barb., 512. For damage thereto. *Roberts* vs. *Carlton*, 18 How., 416.

On a note, part of her separate property. *Howland* vs. *Fort Edward Paper Mill Company*, 8 How., 505; *Smart* vs. *Comstock*, 24 Barb., 411. Or on a note indorsed and delivered to her, and not proceeding from her husband. *Dillage* vs. *Parks*, 31 Barb., 132. For a loan made by her to a firm of which her husband was a member. *Devin* vs. *Devin*, 17 How., 514. And, see generally, *Willis* vs. *Underhill*, 6 How., 396.

But it is equally clear, on the face of the section itself, that, in all cases in which the wife is not authorized by statute to sue or be sued separately, her husband must be joined with her.

And, where the wife had ostensibly paid over money, acting, in fact, as the mere agent of the husband, it was held that a suit for its repayment would lie in his name only, and could not be brought in hers. *Brower* vs. *Vandenburgh*, 31 Barb., 648.

(*b.*) JOINDER AS DEFENDANTS.

In an action of foreclosure for a mortgage of the wife's separate estate, in which the husband had joined, it was held that both were properly made defendants. *Conde* vs. *Shepard*, 4 How., 75; 2 C. R., 58. And, in a suit for foreclosure on the husband's mortgage for purchase money, the wife, though not dowable as against the mortgage, must be joined, as interested in the equity of redemption. *Mills* vs. *Van Voorhies*, 20 N. Y., 412; 10 Abb., 152.

The husband will, it has been held, be properly joined as defendant, in a suit in which he is or may be claimed to be personally liable, though the direct object be to charge the wife's separate estate. *Smith* vs. *Scribner*, 12 How., 501; *Phillips* vs. *Hagadorn*, 12 How., 17; *Colvin* vs. *Currier*, 22 Barb., 371 (386); *Goelet* vs. *Gori*, 31 Barb., 314. And it was held, that though a married woman might sue, she could not be sued alone, in matters concerning her separate property. *Sexton* vs. *Fleet*, 2 Hilt., 477; 15 How., 106; 6 Abb., 8. See, however, *Palen* vs. *Lent*, 5 Bosw., 713, holding that an attempt to unite in the same complaint, a personal demand against the husband, and a claim to change the wife's separate property, was a misjoinder, though otherwise he might have been made a party.

And, under chapter 576 of 1853, p. 1057, an action for the ante-

nuptial debts of the wife might be brought against both, though only her separate property was bound.

But, since the statute of 1860, the wife may be sued alone in such matters, section 7.

And it will be no longer necessary to make the husband a party, unless special relief is sought against him. *Vide Taylor* vs. *Glenny*, 22 How., 240.

Where, in an action brought on the joint bond of husband and wife, the complaint prayed judgment against the wife's estate only, without showing that the debt was incurred for the benefit of that estate, it was held bad upon demurrer. *Goodall* vs. *McAdam*, 14 How., 385. See also *Yale* vs. *Dederer*, 18 N. Y., 265; 17 How., 165; reversing 21 Barb., 286. Likewise, *same case*, 22 N. Y., 450; 20 How., 242; reversing 31 Barb., 525; 19 How., 146.

In an action for a tort committed by the wife, it is proper to join both, though the husband was not present or assisting. *Matthews* vs. *Festel*, 2 E. D. Smith, 90. But before trover can be maintained, for goods wrongfully taken, under such circumstances, a demand made upon the husband must be proved. *Gurney* vs. *Kenny*, 2 E. D. Smith, 182.

In an action for necessaries furnished to the wife during coverture, it is not proper to join her as defendant. Her husband alone is liable. *Main* vs. *Stephens*, 4 E. D. Smith, 86.

If, in an action properly brought against both husband and wife, it appear upon the trial that a case is made out against one only, separate relief may be given by the judgment. *Marquat* vs. *Marquat*, 2 Kern., 336; reversing *same case*, 7 How., 417. Or a separate judgment may be entered on a tort proved against one, but not against the other. *Wagner* vs. *Bill*, 19 Barb., 321.

And, where husband and wife, sued in the same action, have separate interests, she must verify her answer separately. *Youngs* vs. *Seely*, 12 How., 395.

Where, however, she was a mere nominal party, it was held, that on service of process on the husband only, he might, and was bound to put in a joint appearance and answer. *Eckerson* vs. *Vollmer*, 11 How., 42.

An action is maintainable against both husband and wife jointly, for debts of the latter, contracted before marriage; but the execution on any judgment therein is only to issue against, and such judgment only avails to bind the separate estate of the wife, and not that of the husband. Any husband acquiring any portion of his wife's separate property, is liable for such debts, but only to the extent of the property so acquired. Laws of 1853, ch. 576, p. 1057.

In *Berley* vs. *Rampacher*, 5 Duer, 183, it is held, that this statute is incapable of being construed so as to give it a retrospective effect, and

that a personal judgment should properly be entered against both defendants, in an action for the wife's debt, where the marriage and the debt were both contracted before its passage. This overrules *Foote* vs. *Morris*, 12 L. O., 61, holding the contrary conclusion.

(*c.*) *Sundry Decisions.*

It would be incompatible with the plan and objects of the present work to enter into any full detail as to the law of husband and wife, or to pretend to cite all the various decisions bearing upon the changes in that law, effected by the different statutes passed since 1848, under which the old common-law rights of the husband are abolished, and all property acquired by the wife is now held by her as her separate estate. It may not, however, be inapplicable to notice some few of those decisions, which have a bearing, more or less direct, upon the subject now under consideration.

The acts having this operation are as follows: chapter 200 of 1848; chapter 375 of 1849, p. 528; chapter 90 of 1860, p. 157; chapter 172 of 1862, p. 343. A radical change is also made in the whole system by the amendments in sections 274 and 287 of the Code, under which a personal judgment may now be taken against a married woman, in the same manner as against other persons, but to be levied and collected out of her separate estate, and not otherwise.

These last amendments seem in particular to have effected a substantial abolition of the former distinctions between a *feme covert* and a *feme sole*, as regards the assertion of legal remedies by or against her.

By chapter 576 of 1853, p. 1057, a remedy was also given against the wife's separate estate, in respect of her debts contracted before marriage, and the husband exonerated from personal liability, except where he shall have acquired property of the wife, to the extent of that property.

By section 2 of the act of 1848, its operation was sought to be rendered retrospective. This portion of it has, however, been held to be clearly unconstitutional, and that its operation and that of the amended statutes extends only to marriages contracted since the former year, and to no other. See *Westervelt* vs. *Gregg*, 2 Kern., 202; *Wright* vs. *Saddler*, 20 N. Y., 320; *Rider* vs. *Hulse*, 33 Barb., 264; *Snyder* vs. *Snyder*, 3 Barb., 621; *White* vs. *White*, 5 Barb., 474; 4 How., 102; *Holmes* vs. *Holmes*, 4 Barb., 295; *Hurd* vs. *Cass*, 9 Barb., 366; *Smith* vs. *Colvin*, 17 Barb., 157. By these decisions, *Sleight* vs. *Read*, 9 How., 278; affirmed, 18 Barb., 159, is clearly, so far, overruled.

But by the last cited case, and by *Blood* vs. *Humphrey*, 17 Barb., 660, it is held, that the section in question is not unconstitutional, but

is, on the contrary, still operative, so far as regards property acquired by a wife, after the passage of the statute of 1848, though her marriage was antecedent to that statute; and this holding does not seem to be impeached by that in *Westervelt* vs. *Gregg*, above referred to.

The statutes in question do not operate to take away the husband's rights to administer to, and to take as his own, the property of the deceased wife, where she dies intestate. Her right to dispose of her property is personal only, and, if not exercised by her deed or will, that right is exhausted, and the former law resumes its operation. *Slumway* vs. *Cooper*, 16 Barb., 556; *Vallance* vs. *Bausch*, 28 Barb., 633; 17 How., 243; 8 Abb., 368; *McCosker* vs. *Golding*, 1 Bradf., 64. See likewise, *Westervelt* vs. *Gregg*, above cited; and *Ransom* vs. *Nichols*, 22 N. Y., 110, finally settling the question.

Considerable controversy arose, prior to the statute of 1860, as to whether tenancy by the courtesy was or was not abolished by the previous enactments. The affirmative is maintained in *Billings* vs. *Baker*, 28 Barb., 343; 15 How., 525; 6 Abb., 213. See also head-note to *Thurber* vs. *Townsend*, 22 N. Y., 517. The negative is asserted in *Hurd* vs. *Cass*, 9 Barb., 366; *Clark* vs. *Clark*, 24 Barb., 581; *Vallance* vs. *Bausch*, 28 Barb., 633 (642); 17 How., 243; 8 Abb., 368; *Smith* vs. *Colvin*, 17 Barb., 157.

Provision was made for the rights of a surviving husband by the statute of 1860, sections 10 and 11. But, inasmuch as by the statute of 1862, section 2, these very sections are repealed, the conflict of authority upon the subject seems to be revived.

The acts of 1860 and 1862, above referred to, have effected a complete revolution in regard to the rights and liabilities of a *feme covert*, and the mode of their enforcement, respectively.

By section 1 of the former, not merely is the possession of her separate property, and of such as may devolve upon her, secured to her absolutely, without interference on the part of her husband, or his creditors; but she is also entitled to the same rights in any which she may acquire by her trade, business, labor, or services, carried on or performed on her sole and separate account. Full powers to carry such trade, business, &c., on are given, and full protection with regard to her earnings insured to her by section 2. Whilst under section 8, a more than implied power is given to her, to enter into necessary contracts for such purposes, whilst the husband is, on the other hand, exonerated from any liability in respect to such contracts.

And not merely so, but, under section 7, a married woman may now sue and be sued in the same manner as a *feme sole*, in all matters relating to her property, person, or character; whilst, by the last amendments in sections 274 and 287, of the Code, and section 5, of the act of

1862, the former difficulties in the way of entering up judgment, and issuing execution against her property, are removed.

These radical and sweeping changes neutralize almost entirely the difficulties that were felt upon the subject, whilst it remained under the operation of the statutes of 1848 and 1849, and render it unnecessary to insert more than a cursory notice of most of the decisions made, pending that operation.

Those decisions established conclusively the principle that, pending the operation of those statutes, the incapacity of the wife to make a strictly personal contract still subsisted, and that there existed no power in the courts to render a personal judgment against her. See *Chapman* vs. *Lemmon*, 11 How., 235; *Erwin* vs. *Downs*, 15 N. Y., 575; *Wotkyns* vs. *Abrahams*, 14 How., 191; *Phillips* vs. *Hagadorn*, 12 How., 17; *Cobine* vs. *St. John*, 12 How., 333; *Coon* vs. *Brooks*, 21 Barb., 546; *Williams* vs. *Carroll*, 2 Hilt., 438; *Morgan* vs. *Andriot*, 2 Hilt., 431; 18 How., 271; *Andriot* vs. *Lawrence*, 33 Barb., 142; *Sexton* vs. *Fleet*, 2 Hilt., 477; 15 How., 106; 6 Abb., 8; *Switzer* vs. *Valentine*, 4 Duer, 96; 10 How., 109. See also *Rouillier* vs. *Wernicke*, 3 E. D. Smith, 310; *Yale* vs. *Dederer*, 18 N. Y., 265; 17 How., 165; reversing *same case*, 21 Barb., 286; *Same case*, 22 N. Y., 450; 20 How., 242; reversing *same*, 31 Barb., 525; 19 How., 146; *Barton* vs. *Beer*, 21 How., 309; 35 Barb., 78. And the principle was even extended to the case of a new promise by a widow, to pay a debt incurred during coverture, *Goulding* vs. *Davison*, 28 Barb., 438; *Watkins* vs. *Halstead*, 2 Sandf., 311.

The above class of cases clearly overruled, *pro tanto*, *Walker* vs. *Swayzee*, 3 Abb., 136, and *Sexton* vs. *Fleet*, 2 Hilt., 477; 15 How., 106; 6 Abb., 8.

It was likewise held under those statutes, that the wife could not carry on a separate business without the husband's assent, and that, in such case, or in any case in which he was interested in the profits, property thus acquired by her was liable for his debts. See *Freeman* vs. *Orser*, 5 Duer, 476; *Sherman* vs. *Elder*, 1 Hilt., 178; *Same case*, 1 Hilt., 476; *Marsh* vs. *Hoppock*, 3 Bosw., 478; *Switzer* vs. *Valentine*, 4 Duer, 96; 10 How., 109; *Bass* vs. *Bean*, 16 How., 93; *Cobine* vs. *St. John*, 12 How., 333; *Lovett* vs. *Robinson*, 7 How., 105; *Gates* vs. *Brower*, 5 Seld., 205; *Glann* vs. *Younglove*, 27 Barb., 480; *Cropsey* vs. *McKinney*, 30 Barb., 47.

But, where the husband did nothing for the wife's support, her rights were maintained, in *Burger* vs. *White*, 2 Bosw., 92, and *Van Ellen* vs. *Carrier*, 29 Barb., 644. See also *Cheeseborough* vs. *House*, 5 Duer, 125.

And debts of the wife, of this nature, were held enforceable as against the husband, in *Smith* vs. *Silliman*, 11 How., 368; *Switzer* vs. *Valentine*, 4 Duer, 96; 10 How., 109; *Cropsey* vs. *McKinney*, 30 Barb., 47

(57); *Lovett* vs. *Robinson*, 7 How., 105; *Gates* vs. *Brower*, 5 Seld., 205; *Ogden* vs. *Prentice*, 33 Barb., 160.

And, although the statute of 1860 exonerates the husband from liability for the wife's debts in such a case, he still remains liable for a penalty incurred in and about her separate business. *Commissioners of Excise* vs. *Keller*, 20 How., 280.

But in a suit upon a note signed by the wife only, in respect of a joint business carried on by her and the husband, the latter was held not to be liable. *Palen* vs. *Lent*, 5 Bosw., 713. So also where he joined in a mortgage upon the wife's separate property, merely to perfect the title. *Moore* vs. *Moore*, 21 How., 211.

But under the previous, as under the present statute, it was always competent for the wife to bind her separate estate, by a contract executed by her, knowingly, and with that express and declared intention, or in a matter from which benefit resulted to the property itself; and a debt incurred by her, from which such a benefit directly accrued, was, in like manner, held enforceable. Only, prior to the amendments in the Code of the present year (1862), such a charge or liability could only be enforced by a proceeding *in rem*, and not as a personal debt of the wife. See *Cheeseborough* vs. *House*, 5 Duer, 125; *Firemen's Insurance Company of Albany* vs. *Bay*, 4 Barb., 407; affirmed, 4 Comst., 9; *Hauptman* vs. *Catlin*, 20 N. Y., 247; affirming *same case*, 3 E. D. Smith, 666; 4 Abb., 472. See also previous decision, 1 E. D. Smith, 729; *Berry* vs. *Wiesse*, 2 E. D. Smith, 662, note; *Dickerman* vs. *Abrahams*, 21 Barb., 551; *Colvin* vs. *Currier*, 22 Barb., 371; *In re the Reciprocity Bank*, 17 How., 323. See also *same case*, 22 N. Y., 1.

In *Yale* vs. *Dederer*, above cited, it has been twice laid down by the Court of Appeals, that the note of a married woman, given as surety for her husband's debt, is not enforceable against her estate, and that even a parol expression of her intention to charge her property with the amount will not suffice. In order to effect such a charge, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself. See second decision, 22 N. Y., 450; 20 How., 242. See this same view anticipated, in *Bass* vs. *Bean*, 16 How., 93; and followed in *Owen* vs. *Cawley*, 22 How., 10; 13 Abb., 13, and *Andriot* vs. *Lawrence*, 33 Barb., 142. The last decision in *Yale* vs. *Dederer*, clearly overrules the view taken in *Francis* vs. *Ross*, 17 How., 561.

A debt expressly agreed to be paid out of the separate estate, and incurred by the wife for her own benefit, was held so enforceable, in *Chapman* vs. *Lemmon*, 11 How., 235. See also, as to her express obligation, *Arnold* vs. *Ringold*, 16 How., 158; *Smith* vs. *Scribner*, 12 How., 501.

A specific appropriation of property by the wife, for payment of the debt of the husband, was held revocable by her at any time, notwithstanding that an advance had been made upon the faith of it. *Isaacs* vs. *Gorham*, 1 Hilt., 479.

Since the statute of 1860, the following decisions have been made with respect to the rights and liabilities of parties under it.

The liability of a *feme covert* in respect of goods purchased by her for the purposes of her separate business, was held to be identical with that of a *feme sole*, both as regards the liability itself and the mode of its enforcement, and this, even though she was not originally liable, the goods having been purchased before the statute, but, after its passage, had given a fresh note in renewal. *Barton* vs. *Beer*, 35 Barb., 78; 21 How., 309; *Young* vs. *Gori*, 13 Abb., 13, note.

The same is the case where she is sued upon a contract or liability, by which a direct benefit has accrued to her or to her property. *Taylor* vs. *Glenny*, 22 How., 240.

But she cannot now, any more than formerly, bind herself, by a contract from which no benefit has proceeded to her. *Andriot* vs. *Lawrence*, 33 Barb., 142.

And as regards contracts wholly independent of her separate property, the former disabilities of a *feme covert* remain in full force, and are wholly unaffected by the recent legislation. See *Neville* vs. *Neville*. 22 How., 500.

The rights of a mortgagee in good faith, of the wife's separate property, are fully maintained in *Tallman* vs. *Hawxhurst*, 4 Duer, 221.

The marriage of a female mortgagee with the mortgagor does not merge the security, but it is still enforceable by her during coverture. *Power* vs. *Lester*, 23 N. Y., 527; affirming *same case*, 17 How., 413.

The statutes in question do not affect property held by the wife jointly with the husband, as to which the law obtains as it did before. *Goelet* vs. *Gori*, 31 Barb., 314.

A wife cannot be treated as agent of the husband, merely by virtue of the relation between them. Her act will not bind him unless performed in his name. *Livingston* vs. *Sloessel*, 3 Bosw., 19; *Galusha* vs. *Hitchcock*, 29 Barb., 193.

A married woman, suing in equity, is bound to do equity. *Elmore* vs. *Thomas*, 7 Abb., 70. See also, as to an infant, *Darvin* vs. *Hatfield*, 4 Sandf., 468. And the court will relieve against a fraud committed by her. *Mount* vs. *Morton*, 20 Barb., 123. Or indirectly, as by refusing to open her default. *Genet* vs. *Dusenbery*, 2 Duer, 679; 11 L. O., 355.

It is held in *Winans* vs. *Peebles*, 31 Barb., 371, that her conveyance to her husband is valid in equity, if not at law. The contrary proposition is maintained in *White* vs. *Wager*, 32 Barb., 250.

§ 35. *Infants.*

It will be seen that, under section 115, an infant can only sue or be sued by his guardian, being in substance the same rule as prevailed before the Code, in relation to infant defendants. The previous practice, as to infant plaintiffs, is changed, and an infant can no longer appear, as previously, by his next friend, with the exceptions below noticed. A guardian must be appointed in all cases. *Hoftailing* vs. *Teal*, 11 How., 188. A judgment taken against an infant defendant, without appointing a guardian *ad litem*, was, on similar grounds, set aside in *Kellogg* vs. *Klock*, 2 C. R., 28.

But in special statutory proceedings, the natural guardian of an infant may appear and present a petition as its next friend, without special appointment by the court. *Matter of Mary Jane Whitlock*, 32 Barb., 48; 19 How., 380; 10 Abb., 316.

But, in such a proceeding, the interests of other infants, not made parties to it, will not be bound, and the proceeding, as regards them, will be void. *Horsepool* vs. *Davis*, 6 Bosw., 581.

The section in question, and that immediately succeeding, go on to provide the made in which the guardian, representing the infant, shall be appointed. This branch of the subject will be treated of in a subsequent chapter, in connection with the commencement of an action. The present observations will be confined to a citation of the decisions affecting the rights or liabilities of infants, strictly considered, without reference to the mode in which their representative, in an action relating to such rights or liabilities, is chosen or authorized.

A suit commenced by an infant, without the appointment of a guardian, is wholly irregular. Where, therefore, the complaint had been verified and the summons issued, as of a date previous to the order appointing a guardian *ad litem*, the service, though made the same day as the order, was set aside. *Hill* vs. *Thacter*, 3 How., 407; 2 C. R., 3.

The same is the case as regards a suit in partition, commenced by an infant plaintiff, under the special statute of 1852, chapter 277. The authority of the court must be obtained, and the next friend by whom, in this class of cases, the infant is still represented, must be regularly appointed and must give security. *Clark* vs. *Clark*, 21 How., 479.

There is, however, one exception to the rule, that an infant must be so represented, and that is in the case of an infant *feme covert*, in an action which does not concern her separate property, and to which, therefore, she is merely a formal party. In such case, her husband represents her, and no special appointment of a guardian will be necessary.

Cook vs. *Rawdon*, 6 How., 233; 1 C. R. (N. S.), 382; *Hulbert* vs. *Newell*, 4 How., 93; *Eckerson* vs. *Vollmer*, 11 How., 42.

An infant, previous to the Code, might join, by his next friend, in an action for use and occupation of lands of which he was tenant in common, without regard to the fact that he had a general guardian. *Porter* vs. *Bleiler*, 17 Barb., 149. There can be no question but that the same rule holds good under that measure, and that even when such is the case, a guardian *ad litem* must be appointed. See section 116, subdivision 1.

As a general rule, an infant is wholly incapable, *durante minoritate*, of making any contract or doing any act to his own prejudice, and has full liberty of disaffirmance, either then, or on his coming of age.

He must, however, do equity in such a case, and will not be allowed to disaffirm his executed contract, without restoring the consideration, and making good any deterioration occasioned by his use of the subject-matter. *Bartholomew* vs. *Finnemore*, 17 Barb., 428. And in such a case, not only will this be so, but the burden of proof of fraud, if alleged, will rest upon the infant so suing. *Gray* vs. *Lessington*, 2 Bosw., 257.

And when, after coming of age, he brings an action to set aside a deed executed by him during his minority, he must make an entry, or otherwise openly disapprove his previous act, before he can maintain such action. *Voorhies* vs. *Voorhies*, 24 Barb., 150.

His contracts are, however, valid until avoided by him, and his mere subsequent conveyance will not have that effect. *Palmer* vs. *Miller*, 25 Barb., 399; *Voorhies* vs. *Voorhies*, *supra*; *Dominick* vs. *Michael*, 4 Sandf., 374. His infancy is a personal privilege, of which he only can avail himself, and, in an action on a contract in which he has joined, he must still be made a defendant. *Slocum* vs. *Hooker*, 13 Barb., 536; reversing *same case*, 12 Barb., 563; 6 How., 167; 10 L. O., 49. See also, as to his privilege being personal, and his contracts voidable only, and not void, *Jones* vs. *Butler*, 30 Barb., 641; 20 How., 189; *Fox* vs. *Heath*, 21 How., 384.

His ratification, after coming of age, validates his deed, executed whilst a minor, as of the date of its original delivery, and affects all intermediate conveyances or sales, except for a new and valuable consideration. *Palmer* vs. *Miller*, *supra*.

So also his promise to pay his note after coming of age will revive and ratify it, and his liability will be complete, though such ratification has been made upon a special contract, provided he fail in performance of the terms of that contract. *Taft* vs. *Sergeant*, 18 Barb., 320.

But, to enable the creditor to avail himself of such new promise, it must possess the elements of a new contract, of which the old debt supplies the consideration. A bare acknowledgment will not be sufficient.

Hodges vs. *Hunt*., 22 Barb., 150; *Watkins* vs. *Stevens*, 4 Barb., 168 (175).

A general promise will, however, be sufficient to charge him, though the amount be not specified. *Ackerman* vs. *Runyon*, 1 Hilt., 169.

And, where a submission to arbitration had been made during his minority, and the amount awarded had been paid at the time to his guardian, and received by himself on coming of age, it was held that such a receipt was an affirmance of the submission, and a bar to a renewal of the claim. *Jones* vs. *Phœnix Bank*, 4 Seld., 228. It seems too, that an omission to enforce the claim with due diligence, after the attainment of his majority, would have the same effect. See *same case*, p. 236, and *Delano* vs. *Blake*, 11 Wend., 85, there cited.

But, as a general rule, an infant, or his guardian representing him, can neither give a consent nor make a submission. A submission without action, under section 372, of a controversy in which infants were interested, was, accordingly, held void in *Fisher* vs. *Stilson*, 9 Abb., 33.

An infant, when plaintiff, is as much bound and as little privileged as an adult, and, in such a case, affirmative relief will be granted to the defendant where entitled to it. *Darrin* vs. *Hatfield*, 4 Sandf., 468. See affirmance, Selden's notes, 30th Dec., 1852, p. 36. But, on this particular point the appellate court did not pass. See analogous decision, as to liability of a *feme covert*, *Elmore* vs. *Thomas*, 7 Abb., 70.

And, where an infant was interested in an estate liable for taxes, a sale of a sufficient portion was ordered, under chapter 327 of the laws of 1855, on the petition of the other parties interested. *Norsworthy* vs. *Bergh*, 16 How., 315.

An infant cannot be estopped from pleading his infancy under any circumstances, not even by his own declarations that he was of age at the time he made a contract. *Brown* vs. *McCune*, 4 Sandf., 224.

But, in the event of an unexpected defence of this nature being put in, the court may allow the plaintiff to discontinue against him without costs, even at the trial. *Butler* vs. *Morris*, 1 Bosw., 329. See *Slocum* vs. *Hooker*, 13 Barb., 536 (541).

It follows from the general rule as to the incapacity of an infant to contract, before stated, that an action for breach of his promise of marriage cannot be maintained. *Hamilton* vs. *Lomax*, 26 Barb., 615; 6 Abb., 142.

But in an action against him for a wrong, he has no such privilege. In a suit for conversion of, or injury to property, he stands in the same position as an adult, and his infancy is no defence. *Fish* vs. *Ferris*, 5 Duer, 49; *Conkling* vs. *Thompson*, 29 Barb., 218.

An infant is equally bound as an adult by his voluntary appearance. Where therefore a guardian *ad litem*, had been regularly appointed on

the petition of the infant defendant himself, he was held to be regularly brought into court, though not served with the summons. *Varian* vs. *Stevens*, 2 Duer, 635.

See also, as to the power of a guardian to represent minors in a partition suit, *Althause* vs. *Rudde*, 3 Bosw., 410. Also, as to the extent to which an infant lunatic will be bound by the appearance of a proper person as his guardian *ad litem*. *Rogers* vs. *McLean*, 11 Abb., 440; reversing *same case*, 31 Barb., 304; 10 Abb., 306.

When in court, the rights of an infant will be protected, whether objection be taken on his part or not. The court is equally bound to notice a defect, if any. *Fleet* vs. *Dorland*, 11 How., 489.

As to the extent to which an infant will be bound by a settlement made on her marriage, *vide Wetmore* vs. *Kissam*, 3 Bosw., 321. *Jones* vs. *Butler*, 20 How., 189; 30 Barb., 641.

As to the extent of liability of a parent for necessaries furnished to his infant child, see *Poock* vs. *Miller*, 1 Hilt., 108.

Where the shares of infants in an intestate's estate had been paid over to their general guardian, an action to recover their proportion of the deficiency, after foreclosure of the intestate's mortgage, was held to be properly brought against them. *Merchants' Insurance Company* vs. *Hinman*, 34 Barb., 410; 13 Abb., 110.

§ 36. *Joinder of Plaintiffs.*

The rule, as laid down in section 117, that all parties having an interest in the subject of the action, or in the relief demanded, may be joined as plaintiffs, is of general application, and, although permissively worded, is, in cases where the action is for the assertion of a joint and not of a several interest, substantially imperative, subject only to the qualification in section 119, authorizing any party proper to be joined as plaintiff, to be made a defendant, if his consent cannot be obtained.

The rule is the same now in all cases, whether the subject-matter of the action be legal or equitable in its nature. *Loomis* vs. *Brown*, 16 Barb., 325. It was accordingly held that, in an action on an injunction bond, all the obligees might be joined as plaintiffs, notwithstanding a difference in the nature and amount of their claims.

Where the action was brought by one of the harbor masters of New York, for an accounting in respect of fees received by the defendant, and belonging to all, it was held that all should have been joined. *Dean* vs. *Chamberlin*, 6 Duer, 691.

In a suit by a devisee, for specific performance of the testator's contract, for sale of lands, the executor of the deceased was held to be a necessary party, and that he should have been joined as plaintiff. *Adams* vs. *Green*, 34 Barb., 176.

Where, in an action brought by an assignee, it was proved that another person was entitled to share in the proceeds, it was held that both were necessary parties. *Lewando* vs. *Dunham*, 1 Hilt., 114.

In an action upon an undertaking, all the promisees, or those who represent them, should be joined. *Bowdoin* vs. *Colman*, 6 Duer, 182; 3 Abb., 341.

And, unless they are so numerous, as to fall within the purview of that part of section 119 which authorizes a suit by one of a numerous class, for the benefit of the whole, all should appear, by their individual and real names. *Kirk* vs. *Young*, 2 Abb., 453.

A several action cannot be maintained by one or more of several owners of a vessel, for recovery of their individual shares. All must be joined, either as plaintiffs, or as defendants, if recusant; and, in the latter case, the suit must be brought as in equity. *Coster* vs. *The New York and Erie Railroad Company*, 6 Duer, 43; 3 Abb., 332; noticed, 5 Duer, 677. See also, *Dennis* vs. *Kennedy*, 19 Barb., 517. See likewise, *Bucknam* vs. *Brett*, 22 How., 233; 13 Abb., 119; 35 Barb., 596; *Bishop* vs. *Edmiston*, 13 Abb., 346. So also as to charterers, who are joint owners *pro hac vice*. *Sherman* vs. *Fream*, 30 Barb., 478.

In an action by one of the harbor masters of the port of New York, for his share of fees collected by another, being the property of the whole, it was held that all should be joined. *Dean* vs. *Chamberlin*, 6 Duer, 691.

Owners of different tenements affected by the same nuisance, were held to be properly joined as co-plaintiffs in a suit for an injunction. *Peck* vs. *Elder*, 3 Sandf., 126. So, also, as to owners of different lots entitled to the benefit of the same covenant. *Brouwer* vs. *Jones*, 23 Barb., 153.

Different creditors in the same interest, were held to be properly joined as co-plaintiffs, in a suit to enforce payment of their debts against the property of a corporation which had made a lease, amounting to an invalid assignment of its property. *Conro* vs. *Fort Henry Iron Company*, 12 Barb., 27.

In *Gere* vs. *Dibble*, 17 How., 31, it was held that several judgment creditors were properly joined as co-plaintiffs, in an action in the nature of a creditor's bill, and to set aside a mortgage, as fraudulent.

But, though they may be so joined in an action of this nature, when the relief sought is of an equitable description, they cannot thus unite in an action at law, or take several judgments for damages, in a suit brought by way of a creditor's bill, where no equitable property is discovered. *Sage* vs. *Mosher*, 28 Barb., 287. Nor can one of the creditors under a trust deed, sue the assignee for breach of trust, severally. *Bishop* vs. *Houghton*, 1 E. D. Smith, 566.

A simple contract creditor cannot maintain a several action of this nature, to reach property of an insolvent firm. He cannot so sue, except for the benefit of his class. *La Chaise* vs. *Lord*, 10 How., 461; 1 Abb., 213; 4 E. D. Smith, 612 (n.)

But a judgment creditor, entitled to an equitable lien, need not sue for his class, but may maintain a several action. *Tallmadge* vs. *Sill*, 21 Barb., 34; *Greene* vs. *Breck*, 32 Barb., 73; reversing *same case*, 10 Abb., 42.

Assignor and assignee of real estate, were held to be properly joined as co-plaintiffs, in a suit to cancel a judgment prior to the assignment. *Monroe* vs. *Delavan*, 26 Barb., 16.

The claimant to an office is properly joined with the attorney-general, as co-plaintiff. See *People* vs. *Ryder*, 16 Barb., 370; affirmed, 2 Kern., 433; and *The People* vs. *Walker*, 23 Barb., 304; before cited under the head of public officers.

But, where the interests of parties are several, they cannot properly be joined as co-plaintiffs. Thus held, with reference to the commissioners of two towns, suing together for a penalty for encroachment on a highway running between them. *Bradley* vs. *Blair*, 17 Barb., 480. So also, as to parties contributing to an illegal bet, and suing to recover it back, one contributor cannot sue for the whole fund. *Ruckman* vs. *Pitcher*, 13 Barb., 556. So, likewise, a joint action for libel cannot be maintained by several members of an association, not being partners, nor having a community of pecuniary interest. *Giraud* vs. *Beach*, 3 E. D. Smith, 337. Or by parties claiming to recover on ejectment, under different titles, for different interests. *People* vs. *Mayor of New York*, 10 Abb., 111.

On the same principle, a complaint containing separate counts, in the name of separate plaintiffs, was held to be bad, on demurrer for misjoinder, in *St. John* vs. *Pierce*, 22 Barb., 362.

In partition, a *feme covert* entitled to a share, as of her separate estate, may, and ought to sue alone, without joining her husband. *Brownson* vs. *Gifford*, 8 How., 389. But, where the share is her husband's, she should be joined as a co-plaintiff. *Ripple* vs. *Gilborn*, 8 How., 456.

And it has been held that a tenant-in-common of a vested remainder may sue for partition, though his right to possession be postponed during the continuance of a life estate; and this, whether that intervening estate is held as an entirety, or in common: so held by four judges of the Court of Appeals. *Blakeley* vs. *Calder*, 17 N. Y., 617 (629); 13 How., 476; but the majority not being prepared to adopt that conclusion, the decision was placed on another ground.

To maintain ejectment, the plaintiff must be out of possession. *Taylor* vs. *Crane*, 15 How., 358. A married woman may maintain it for her

separate estate, without joining her husband. *Darby* vs. *Callayhan*, 16 N. Y., 71. But where the husband is tenant by the courtesy initiate, it seems he may be joined with her. *Ingraham* vs. *Baldwin*, 12 Barb., 9; affirmed generally, but this particular point not noticed in the opinion, 5 Seld., 45.

In a suit by a mortgagor on a policy payable to the mortgagee, the latter should be joined as plaintiff, or sue in his own name, or it should be shown that his debt has been discharged. *Ennis* vs. *The Harmony Fire Insurance Company*, 3 Bosw., 516.

A stockholder induced to purchase stock by false representations of the directors of a company, may sue individually. *Cazeaux* vs. *Mali*, 25 Barb., 578; 15 How., 347.

Parties aggrieved in their private rights by the act of a public body, cannot maintain an action for the general injury to the public. They can only sue as regards their individual interest. See cases cited in next section.

§ 37. *Suit by One of a Class.*

The provision of section 119, that, where the question is one of common or general interest, or where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, is the next subject that offers itself for consideration. It falls here in its natural order, as one which, though couched in general terms, is more peculiarly applicable to the case of plaintiffs than to that of defendants in an action.

The mere number of parties interested does not, of necessity, bring the case within the provisions of this section. So held, and a demurrer to the complaint allowed, in a case where one of an association of thirty-five persons had assumed to sue on behalf of the whole of the members. *Kirk* vs. *Young*, 2 Abb., 453.

The following have been held entitled to sue on behalf of themselves and their class, under the provisions of this section:

Simple contract creditors of an insolvent firm. *La Chaise* vs. *Lord*, 4 E. D. Smith, 612, note; 10 How., 461; 1 Abb., 213. One or more creditors of an insolvent corporation. *Conro* vs. *Port Henry Iron Company*, 12 Barb., 27 (58). One or more creditors suing an assignee for their benefit, in respect of a breach of trust committed by him, and to compel an account. *Bishop* vs. *Houghton*, 1 E. D. Smith, 566. Creditors seeking to impeach a trust assignment as void in part only. *Cox* vs. *Platt*, 19 How, 121; 32 Barb., 126.

A judgment-creditor has, on the contrary, his option to sue by way of creditor's bill, either in his own name individually, or on behalf of

his class. *Hammond* vs. *Hudson River Iron and Machine Company*, 20 Barb., 378. See also *Tallmadge* vs. *Sill*, 21 Barb., 34; *Greene* vs. *Brick*, 32 Barb., 73; reversing *same case*, 10 Abb., 42.

To enable a member of an incorporated association to sue in this form, he must show, not merely that his associates are numerous, but that the nature of their common interest is such as to enable them, if brought before the court, to sue in their own right, or in their own names. *Habicht* vs. *Pemberton*, 4 Sandf., 657.

An action is maintainable by a member of such an association, on behalf of his class, the complaint being properly framed. And it may be brought, as under the old practice, for the benefit of the whole, or of those interested who shall come in and contribute to the expenses. *Dennis* vs. *Kennedy*, 19 Barb., 517.

The power so given to sue, is given from necessity, and to prevent a failure of justice. The interest represented must therefore be of a common, and not of a several nature, or the suit will not be admissible. So held, and a demurrer sustained to a bill filed by one of numerous parties claiming to be aggrieved by an assessment made by a municipal corporation, and seeking to avoid such assessment, and to restrain its collection. *Bouton* vs. *The City of Brooklyn*, 15 Barb., 375; affirming *same case*, 7 How., 198.

So a party cannot be made defendant as representing a class, where the interests of the individuals composing that class are diverse, and their obligations and the rights of the plaintiff against them are not common to all. *Reid* vs. *The Evergreens*, 21 How., 319.

But where an action was brought by the trustee of a company for instructions, it was held that all its creditors need not be joined, where they were numerous and unknown to the plaintiff. *Coe* vs. *Beckwith*, 31 Barb., 339; 19 How., 398; 10 Abb., 296.

In *Shepard* vs. *Wood*, 13 How., 47, and *Wood* vs. *Draper*, 24 Barb., 187, it was held, that an individual tax-payer might maintain an action on behalf of himself and his class, to restrain the collection of a tax illegally imposed, but not individually. The same principle, *i. e.*, that an individual tax-payer may, in this form, and acting on behalf of the common interest, restrain the performance of a public act, alleged to be illegal, has been maintained in a number of cases, as follows: viz.: *Adriance* vs. *The Mayor of New York*, 1 Barb., 19; *Brower* vs. *The same*, 3 Barb., 254; *Christopher* vs. *The same*, 13 Barb., 567; *Milhau* vs. *Sharp*, 15 Barb., 193; *Same case*, 17 Barb., 435; *Stuyvesant* vs. *Pearsall*, 15 Barb., 244; *De Baum* vs. *The Mayor of New York*, 16 Barb., 392; *Wetmore* vs. *Story*, 22 Barb., 414; 3 Abb., 262; *Roosevelt* vs *Draper*, 12 How., 469; reversed, 16 How., 137; 7 Abb. 108. See also *Davis* vs. *The Mayor of New York*, 1 Duer, 451. This last case

is, however, reversed, 4 Kern., 506—and the whole of this class of cases is disapproved by the Court of Appeals, and the rule laid down, that under such circumstances, an individual, or individuals, cannot sue merely as representing the common interest, and without showing a private injury; and that such a proceeding, if void, can only be redressed at the suit of the state, or of some officer authorized to act on behalf of the public. *Doolittle* vs. *The Supervisors of Broome County*, 18 N. Y., 155; 16 How, 512. See also *Warwick* vs. *The Mayor of New York*, 16 How., 357; 7 Abb., 265; *Smith* vs. *The Metropolitan Gas Light Company*, 12 How., 187; and *Arkenburgh* vs. *The Mayor of New York*, 23 Barb., 360. See likewise the same principles laid down with reference to redress of an alleged public wrong, not violating private rights of property, *Smith* vs. *Lockwood*, 13 Barb., 209; 10 L. O., 232. A private person can, however, bring such an action, provided the question involves some peculiar damage to his individual interests. In such a case he may maintain an injunction to restrain that damage; and so far, but no farther, part of the cases above referred to, are approved. *Doolittle* vs. *The Supervisors of Broome County*, 18 N. Y., 155 (163); 16 How., 512; *Davis* vs. *The Mayor of New York*, 4 Kern., 506. See also *Wetmore* vs. *Story*, 22 Barb., 414; 3 Abb., 262, above cited; *Davis* vs. *The Mayor of New York*, 2 Duer, 663; *Roosevelt* vs. *Draper*, 7 Abb., 108; 16 How., 137.

Nor can an individual maintain an action for the specific performance of a public duty imposed for the public benefit. *Getty* vs. *The Hudson River Railroad Company*, 21 Barb., 617.

And, in a village or place where there is no municipal corporation to represent the public, an individual may sue on behalf of himself and others similarly interested, to restrain the perversion of land dedicated to public uses from the legitimate purposes of that dedication. *Cady* vs. *Conger*, 19 N. Y., 256.

In *McKenzie* vs. *L'Amoureux*, 11 Barb. 516, it was held that when the question is one of common or general interest, one or more may sue for the benefit of that interest, without showing that the parties are numerous, or that it will be impracticable to bring them all before the court. The wording of the section is disjunctive, and the latter provision includes indiscriminately all actions, whether they involve questions of common interest or not. A part of the specific legatees under a will were accordingly held to be entitled to maintain a suit on behalf of all, for an accounting and a sale of the real estate, against the executor, and the legatees and devisees of the residue.

A suit for an injunction cannot be maintained by one only of several parties interested in the same subject-matter. He must make all parties or sue on their behalf. *Smith* vs. *Lockwood*, 1 C. R. (N. S.), 319; 10

L. O., 12. See subsequent decision, allowing demurrer in that particular case, 13 Barb., 209; 10 L. O., 232, above referred to.

An action brought by a shareholder against directors of a company, for fraudulent representations, by which he was induced to purchase stock, is of an individual nature, and is maintainable without joining or suing on behalf of the other stockholders. *Cazeaux* vs. *Mali*, 25 Barb., 578; 15 How., 347. Where, however, the fraudulent representations were not distinctly charged, or alleged to have been made to the plaintiff, and the complaint merely charged the directors with misconduct, diminishing the value of the plaintiff's shares; it was held, that the action was in the common interest of all the stockholders, and should have been brought accordingly. *Wells* vs. *Jewett*, 11 How., 242; *Bell* vs. *Mali*, 11 How., 255.

§ 38. *Joinder of Defendants.*

The law as to the joinder of defendants, is laid down by sections 118, 119, and 120, as above cited; the two former declaring the rule so far as it is optional, the latter as it is imperative.

The rule so laid down is, in its general features, substantially the same as that of the former Court of Chancery, and may be shortly stated as follows:—the plaintiff has his option of bringing in all parties in any wise interested in, or necessary to a complete settlement of the controversy brought before the court; but, when that controversy relates to a joint interest, or where its complete determination cannot be had without the presence of others, not originally joined, all persons claiming such interest, or necessary to that determination, must be joined, either as plaintiffs or defendants. By section 122, the distinction is clearly pointed out between those cases in which the court may, and those in which it cannot proceed without the joinder of specific parties, or classes of parties.

It is proposed to consider in the present section the decisions bearing upon this rule, in the following order:

1st. To cite the authorities of general applicability, bearing on the question of necessary parties.

2d. Those as to the propriety of joining parties, or classes of parties, generally considered.

3d. To consider the rule in question, as applicable to specific controversies.

The bringing in of necessary parties, omitted in the first instance, will be treated of in the next succeeding section.

(*a.*) 1. NECESSARY DEFENDANTS.

Where all proper parties are not before it, the court may refuse to interfere. Thus, an assignment was refused to be reformed upon the answer of the defendants, when all interested under it had not been made parties. *Smith* vs. *Howard*, 20 How., 151. A decree for division of sale-moneys was reversed, some of the heirs interested not being before the court. *Valentine* vs. *Wetherill*, 31 Barb., 655. All claimants to a fund in the hands of a foreign administratrix, were also held proper to be joined in *Gulick* vs. *Gulick*, 33 Barb., 92; 21 How., 22. Where an accounting is sought, all parties interested must also be brought in. *Lewis* vs. *Varnum*, 12 Abb., 305. See also *Wade* vs. *Rusher*, 4 Bosw., 537.

In a suit to recover a contingent legacy, payable in a certain event, out of the residue bequeathed to a third party, it was held that the representatives of the residuary legatee were necessary parties, the claim tending to take away or to reduce the fund bequeathed for their benefit. *Trustees of the Theological Society of Auburn* vs. *Kellogg*, 16 N. Y., 83. See also, in court below, 18 Barb., 360, holding that all interested in the fund, whether in a representative or individual capacity, were necessary to be brought in. And a residuary legatee who brings an action for his share in the fund, must join all the others interested in the residue, and also the heir, where that legacy is a charge upon real estate. *Tonnelle* vs. *Hall*, 3 Abb., 205.

In a suit by one only of several parties whose different properties were affected by the same mechanics' lien, for an apportionment, and to clear his title, it was held that he should have joined the other parties so affected, and relief was denied. *Paine* vs. *Bonney*, 4 E. D. Smith, 734. See, as to who are owners, on such a proceeding, *McMahon* vs. *Tenth Ward School Officers*, 12 Abb., 129.

In an action by one of three co-defendants, to set aside a judgment entered against all, it was held, though their general assignee was made a party, that the others should have been joined. *Bowers* vs. *Tallmadge*, 16 How., 325.

On a bill filed by a receiver, appointed by the court, against the trustee of a judgment-debtor, in order to reach that debtor's equitable interest in a trust fund, the debtor himself was decided to be a necessary party. *Vanderpool* vs. *Van Valkenburgh*, 2 Seld., 190. See also *Shaver* vs. *Brainard*, 29 Barb., 25. Where a life-interest in a fund left for the support of the testator's daughter, was sought to be reached on supplementary proceedings, it was held that the question as to how much was necessary for her support, could only be decided in an action to which

she and her trustee should be made parties. *Genet* vs. *Foster*, 18 How., 50.

In an action to carry out a trust deed, or against a trustee for breach of trust, all the *cestui que trusts* are necessary parties. *Colgrove* vs. *Tallmadge*, 6 Bosw., 289; *Bishop* vs. *Houghton*, 1 E. D. Smith, 566; *Bank of British North America* vs. *Suydam*, 6 How., 379; 1 C. R. (N. S.), 325. See, likewise, *Johnson* vs. *Snyder*, below cited. But in one brought to set aside a trust deed, the reverse is the case. The assignee then represents the creditors, and they need not be joined. *Bank of British North America* vs. *Suydam*, above cited; *Russell* vs. *Lasher*, 4 Barb., 232; *Wheeler* vs. *Wheedon*, 9 How., 293; *Scudder* vs. *Voorhis*, 5 Sandf., 271. Where the suit was of a mixed nature, and the plaintiff, suing for creditors, sought both to set aside an assignment, and also to remove one of the trustees, it was held that the relief demanded in the latter clause, made the judgment-debtor a necessary party defendant, though otherwise he need not have been joined. *Wallace* vs. *Eaton*, 5 How., 99.

The fraudulent vendee of goods and his assignee for creditors are united in interest, and may be joined as co-defendants in replevin, in the same action. *Nichols* vs. *Michael*, 23 N. Y., 264.

In an action for the charter-money of a vessel, persons who had advanced money for repairs in a foreign port, and claimed a lien on the freight, were held to be necessary parties. *Sturtevant* vs. *Brewer*, 4 Bosw., 628.

In an action by one partner against another for an accounting, assignees of the balance due, and also creditors entitled to be paid in priority to the plaintiff, were held to be necessary parties. *Johnson* vs. *Snyder*, 8 How., 498. See also *same case*, 7 How., 395.

Creditors of a mutual insurance company, affected by a decision in a suit brought against the company and its receiver only, by which decision the latter was restrained from making an assessment and collecting funds applicable to debts of their peculiar class, were held to be necessary parties, and brought in as such, on motion, in *Hubbard* vs. *Eames*, 22 Barb., 597.

The plaintiff on execution was in like manner brought in as a defendant, in an action of replevin brought against a constable for seizing property in the possession of a third party, on execution against that party. *Conklin* vs. *Bishop*, 3 Duer, 646.

The omission to join all the members of a partnership in a suit for moneys collected, or for a debt contracted by the firm, is a good defence. *Wooster* vs. *Chamberlin*, 28 Barb., 602; *Sweet* vs. *Tuttle*, 4 Kern., 465; *Bridge* vs. *Payson*, 5 Sandf., 210. In a suit against a partnership, all acting partners are, but dormant partners are not, necessary parties.

And in an equitable action against joint contractors, if it appear on the trial that any of them have not appeared, or been served with process, the trial cannot proceed. *Powell* vs. *Finch*, 5 Duer, 666. All persons who have joined in a contract should be made parties in an action on that contract. *Crooke* vs. *O'Higgins*, 14 How., 154. And the same rule holds good, of course, as to joint tenants, or tenants in common of real estate, where the debt or injury sued for is the property of, or is common to all.

The assignee of a mortgage, though out of the state, was held to be, as of course, a necessary defendant, in a suit brought against the debtor and mortgagor only, seeking to set aside that very assignment. *Gray* vs. *Schenck*, 4 Comst., 460.

A foreign assignee of one of two parties who had exchanged notes, was held to be a necessary party to a controversy to determine the mutual equities, as regarded such exchange and the collection of collaterals. *Nantucket Pacific Bank* vs. *Stebbins*, 6 Duer, 341.

In an action for damages, and to restrain waste brought by a vendor of real estate, pending an uncompleted contract for sale, the vendee is a necessary party. *Kidd* vs. *Dennison*, 6 Barb., 9.

The attorney-general was considered a necessary party as plaintiff or defendant, in a suit involving the public interest, in the following cases: *State of New York* vs. *The Mayor of New York*, 3 Duer, 119; *Davis* vs. *The Mayor of New York*, 2 Duer, 663. *Vide* 1 R. S., 179.

In an action where relief is sought, on the ground of the abuse of power by a municipal body, that body, and the persons whose action is impeached, are necessary parties. *People* vs. *Law*, 34 Barb., 494. But where the action sought to be impeached is that of the legislature, the corporation, it was held, need not be joined. *People* vs. *Mayor of New York*, 20 How., 144.

In a suit by a stockholder against directors of a company, when the complaint merely alleges acts of misconduct, and does not distinctly charge misrepresentations made to the plaintiff himself; it was held that the other stockholders, and also the company itself, were necessary parties. *Wells* vs. *Jewett*, 11 How., 242; *Bell* vs. *Mali*, 11 How., 255; but otherwise, where the complaint alleges misrepresentation, directly inducing the plaintiff to purchase stock or shares, in which latter case his right of action is several, and enforceable against individual directors severally. *Cazeaux* vs. *Mali*, 25 Barb., 578; 15 How., 347.

Parties jointly interested in the subject-matter, refusing to join as plaintiffs, must be brought in as defendants. *Coster* vs. *New York and Erie Railroad Company*, 6 Duer, 43; 3 Abb., 332; noticed 5 Duer, 677.

But, in such a case, the reason of their non-joinder as plaintiffs should

be specifically alleged. *Young* vs. *New York and Liverpool Steamship Company*, 10 Abb., 229.

The grantor of an estate with warranty, and who had, on the sale, represented an unsatisfied mortgage to be invalid, was held to be not only a proper but a necessary party to a suit, brought by his grantee against the mortgagee, to have such mortgage satisfied. *Wandle* vs. *Turney*, 5 Duer, 661.

In relation to the necessary parties in a suit for interpleader, see *Willets* vs. *Finlay*, 11 How., 468.

In an action for nuisance erected on lands transferred to another, both the erector of the nuisance and the transferee of the lands, are to be named co-defendants. *Vide* 2 R. S., 332, § 2.

In an action in the nature of a creditor's bill to reach equitable assets, and also to declare a conveyance by the judgment-debtor fraudulent, it was held that a subsequent grantee of the premises in question, before the commencement of the action, was a necessary party. *Sage* vs. *Mosher*, 28 Barb., 287.

As to the effect of an omission to omit joining all creditors holding liens, in an action to set aside a trust deed as fraudulent, and as to the extent to which a creditor so omitted may gain priority on a future sale, see *The Chatauque County Bank* vs. *Risley*, 19 N. Y., 369.

The old rule, that a defendant pleading misjoinder of necessary parties, must give the plaintiff a better writ, and name the parties he requires to be joined, is maintained in *Fowler* vs. *Kennedy*, 2 Abb., 347.

(*b.*) Proper Defendants.

It is, of course, in the nature of an axiom, that all parties necessary are proper to be made defendants, and, therefore, it is needless to do more than to draw the reader's attention to the last division, and to the cases there cited, as being, of necessity, equally applicable to the present.

It is competent for the plaintiff to introduce any persons as defendants, for his protection against any technical claims which they might set up. *Hull* vs. *Smith*, 8 How., 281. Of course, he does so at the risk of having to pay their costs, should they turn out to have been improperly joined. See *Hammersley* vs. *Hammersley*, 7 L. O., 127. And it may be taken as a general rule, that a defendant, properly joined, cannot take objection to the joinder of others with him, whether properly or improperly brought in. Excess of parties is no objection in his mouth, but only in the mouth of the superfluous party himself. See hereafter, under the head of *Demurrer;* see also *Brownson* vs. *Gifford*, 8 How., 389.

It is not proper to join the agent as defendant, where the principal is known (*Conro* vs. *Port Henry Iron Company*, 12 Barb., 27), unless, of course, the agent be personally interested or liable.

In an action against a trustee, by one of several parties entitled to a common fund, all interested must, as a general rule, be made parties; but not so, when the interests of those parties have been severed, by a proceeding binding on such trustee. When this has been done, each party may sue severally. *The General Mutual Insurance Company* vs. *Benson*, 5 Duer, 168.

Purchasers of different parcels of land, under sales made by an agent in violation of his authority, cannot be joined as co-defendants, in one suit to compel a surrender of their contracts. The causes of action are several, and every purchaser must be separately sued; but the agent may be properly joined as a defendant in each suit. *Lexington and Big Sandy Railroad Company* vs. *Goodman*, 25 Barb., 469; 5 Abb., 493; 15 How., 85. So, likewise, as to grantees under several conveyances by a judgment-debtor, in fraud of creditors. *Reed* vs. *Stryker*, 6 Abb., 109.

But this principle is controverted, and it is held that, in an action to set aside various liens on a debtor's property for fraud, all such lien-holders may be joined in the same action, the cause of action arising out of the fraud of the debtor being single. *Morton* vs. *Weil*, 33 Barb., 30; 11 Abb., 421; *Newbould* vs. *Warren*, 14 Abb., 80.

In an action by a public company, as representing the shareholders in general, against numerous holders of stock fraudulently issued, to cancel such stock, and remove the cloud upon the general title, it was held no misjoinder to unite all such holders in the same action. *New York and New Haven Railroad Company* vs. *Schuyler*, 17 N. Y., 592; 7 Abb., 41; reversing *same case*, 1 Abb., 417.

Where the plaintiff was injured by the concurrent negligence of two companies, it was held (Woodruff, J., dissenting), that both might be joined as co-defendants in the same proceeding. *Colegrove* vs. *Harlem and New Haven Railroad Company*, 6 Duer, 382; affirmed, 20 N. Y., 492

And, as a general rule, the liability of joint tortfeasors is either joint or several, at the option of the plaintiff, and he may sue accordingly. *Vide Cazeaux* vs. *Mali*, 25 Barb., 578; 15 How., 347. See, as to joinder of master in action for tort of servant, *Montfort* vs. *Hughes*, 3 E. D. Smith, 591. And as to the application of the rule of *respondeat superior* in such cases, see heretofore, section 32, under the head of *Masters, &c.*, and cases there cited.

In an action for a partnership debt, the representatives of a deceased partner cannot properly be joined, unless inability to pay, on the part of the survivor, be alleged on the face of the complaint. *Voorhis* vs.

Childs' Executor, 17 N. Y., 354; *Higgins* vs. *Rockwell*, 2 Duer, 650; *Morehouse* vs. *Ballou*, 16 Barb., 289; *Voorhies* vs. *Baxter*, 1 Abb., 43; 18 Barb., 592. (See also *Pinckney* vs. *Wallace*, 1 Abb., 82.) The above clearly overrule *Ricart* vs. *Townsend*, 6 How., 460.

Where, however, the demand is several, or joint and several, this rule does not obtain, and the representatives of a deceased contractor may be joined with the survivor; and, in *Parker* vs. *Jackson*, 16 Barb., 33, this rule was even applied to the case of a note signed first by a partnership firm, and subsequently by one of the partners individually.

The wrongful recipient of a legacy is not a necessary party, in a suit by the legatee against the executor to compel its payment. *Gleason* vs. *Thayer*, 24 Barb., 82.

In a suit to set aside an assignment, the assignee represents the creditors interested, and they need not be personally joined. See *Bank of British North America* vs. *Suydam*, *Russell* vs. *Lasher*, and *Wheeler* vs. *Wheedon*, cited in preceding division of this section.

A judgment-debtor, and his fraudulent assignee, charged with obstructing the creditor in his remedy on execution, were held to be properly made co-defendants in a creditor's bill. *Hammond* vs. *Hudson River Iron and Machine Company*, 20 Barb., 378. See also *Nichols* vs. *Michael*, 23 N. Y., 264.

A judgment against all the individuals, seventy-five in number, composing a private association, was affirmed as properly taken, in an action founded on the contract of their managers, in *Wells* vs. *Gates*, 18 Barb., 554.

As long as the personalty of a deceased debtor remains unexhausted, his executor or administrator is the proper party to be sued, before distribution; but, afterwards, the assets may be pursued in the hands of next of kin, or legatees.

But, after the exhaustion of such personal estate, the real estate may be resorted to, first in the hands of the executor, and afterwards in those of the heir, and, failing, in those of the devisee of such real estate.

In *Stewart* vs. *Kissam*, 11 Barb., 271, the priorities of the parties sued in the above capacities are distinctly laid down, and it was held, 1st. That before a creditor can sue legatees, he must show that no assets have been delivered to or remain with the next of kin. 2d. That before the heirs can be sued, the insufficiency of the personal estate in the hands of the executors, next of kin, and legatees, must be shown; and that a suit at law against those parties is a necessary preliminary to the right to sue the heirs; and, 3d. That before devisees can be resorted to, the insufficiency and the exhaustion of all remedies against the prior parties must in like manner be shown. It was also held, that it makes no difference that the same persons are entitled to the whole estate,

real and personal, the statute requiring the creditor in all cases to seek satisfaction from the latter, before he resorts to the former, in the hands of the heirs.

In the same case it was held that the heirs, under such circumstances, must all be sued jointly, whether in law or in equity, and also that the heirs and personal representatives cannot be joined in the same suit. This last conclusion seems, however, to be no longer law, since the subsequent passage of the Code. In *Kellogg* vs. *Olmsted*, 6 How., 487, it was in like manner held that, under the statute of 1837 (Laws of 1837, p. 537, § 73), the heirs of an intestate must be sued jointly, and cannot be so separately, for a debt against the intestate; but that such liability does not make them liable as joint debtors, within the purview of the statutory provisions in relation to the taking of judgment against parties standing in that capacity, and not served with process. In *Roe* vs. *Swezey*, 10 Barb., 247, the same conclusions as were come to in *Stewart* vs. *Kissam* with respect to the prerequisites to a suit against heirs under these circumstances, are maintained; and it was held that such a suit could not be brought, within the three years' limitation prescribed by the statute, under any circumstances.

In a suit against a partnership, the acting partners are all necessary parties. The reverse is, however, the case as regards limited or dormant partners, under the provisions of part II. R. S., chapter IV., title I.; 1 R. S., 763 to 768.

An action must be brought against a lunatic, idiot, or habitual drunkard, in his own name, the process being served, as specially provided by section 134. The leave of the court must, however, be previously obtained on petition, in all cases where the party has been judicially declared to be such, according to the old practice. *Soverhill* vs. *Dickson*, 5 How., 109; *Hall* vs. *Taylor*, 8 How., 428. The inquisition in such a case is conclusive evidence of incapacity, and evidence to rebut it cannot be given. *Wadsworth* vs. *Sherman*, 14 Barb., 169; affirmed, 4 Seld., 388.

In chapter 385 of the Laws of 1836, special provision is made with reference to the parties to be made defendants in actions against associations owning vessels, &c., and a plaintiff is not bound to make persons parties, who have not acquired and duly registered their interest, as thereby provided, at least thirty days before suit brought.

In *Cook* vs. *Genesee Mutual Insurance Company*, 8 How., 514, it was held that assignees of portions of an entire demand, who had not received their shares, were proper parties in a suit instituted by another, standing in the same capacity; but that it would not be necessary to join others who had received their proportions.

In an action to set aside a mortgage as usurious, both the assignor

and assignee of that mortgage are proper defendants. *Niles* vs. *Randall*, 2 C. R., 31. N. B.—The head-note is incorrect.

Parties liable for the same debt, under different contracts or instruments, cannot be joined as co-defendants in the same action. See heretofore, under the head of *Joint and Several Contractors.*

In interpleader, in respect of a fund due to an insolvent bank, it was held that the proper parties to be joined were the receiver of such bank on the one hand, and on the other, attaching creditors, and the sheriff who had attached for them; but that the general creditors of the bank, being represented by the receiver, need not be joined. *Willetts* vs. *Finlay*, 11 How., 468.

Though a judgment of interpleader directs a suit between A and B by name, all parties who claim an interest in the property, or whose presence is necessary to a complete determination of the controversy, may properly be brought in. *Leavitt* vs. *Fisher*, 4 Duer, 1.

Although a party to a controversy be nominally joined as a defendant, he does not actually become so, unless, and until process in the action is duly served upon him. *East River Bank* vs. *Cutting*, 1 Bosw., 636; *Robinson* vs. *Frost*, 14 Barb., 536.

In a suit for specific performance of a contract to convey several lots, part of a larger tract, the whole of which was subject to a prior mortgage, it was held improper to join the prior mortgagee as defendant, in anticipation of proceedings he might thereafter take, and to secure the plaintiff's possible equities in that contingency. *Chapman* vs. *West*, 10 How., 367; affirmed, 17 N. Y., 125.

It is not necessary to join arbitrators as parties in an action to set aside their award as invalid, on grounds not imputing any wrong. *Knowlton* vs. *Mickles*, 29 Barb., 465.

A mere trustee, who had actually conveyed the property in question over to his *cestui que trust*, was held not to be a proper party to a suit to set aside the transaction, as against the latter. *Spicer* vs. *Hunter*, 14 Abb., 4.

In an action against parties holding property of a defendant levied upon under attachments, it was held that the suit was properly brought by one of the attaching creditors; that other creditors holding attachments against the same fund were properly joined as defendants; that the sheriff was not a proper party, the claimants to the fund being all represented; nor was the judgment-debtor, against whom the attachment was levied, he having no interest in that fund, or right to contest the lien of the plaintiffs. *Skinner* vs. *Stewart*, 13 Abb., 442.

(*c.*) DEFENDANTS IN SPECIFIC CASES.

Foreclosure.—In foreclosure, every person interested in the *corpus*

of the estate, and every junior incumbrancer, whether on mortgage, or as a creditor on a judgment docketed in the same county, must be made a party, or the suit will be incomplete, and the title obtained under the decree defective. See *Brainard* vs. *Cooper*, 6 Seld., 356. So, also, where a party interested in the mortgage itself is not joined. *Peck* vs. *Mallams*, 6 Seld., 509. See also, as to the neglect to join a second mortgagee, *Walsh* vs. *Rutgers Fire Insurance Company*, 13 Abb., 33. And in the event of a sale under such a foreclosure, the original mortgagee merely acquires the equity of redemption as against the second incumbrancers omitted to be joined, and, in a subsequent foreclosure by the latter, he will be a proper defendant. *Same case.*

If the plaintiff, however, makes unnecessary parties, he does so at his peril. *Case* vs. *Price*, 17 How., 348; 9 Abb., 111.

The rights of a party claiming adversely, and prior to the mortgage, cannot properly be litigated in an ordinary suit for foreclosure; and, if he object, the suit should be dismissed against him. *Corning* vs. *Smith*, 2 Seld., 82. See, also, *Lewis* vs. *Smith*, 11 Barb., 152; 7 L. O., 292; affirmed, 5 Seld., 502; 12 L. O., 193; and generally, *Hancock* vs. *Hancock*, 22 N. Y., 568.

The wife of the mortgagor, or of any subsequent grantee of the equity of redemption, is a necessary party in all cases; and this, whether the mortgage was executed before or after her marriage. And, even when she has actually joined in a mortgage, containing the usual power of sale, or where the mortgage, being for unpaid purchase money, is free from her dower, as between her and the mortgagee (under 1 R. S., 740, § 5), she must be equally joined as a party, on account of the right to redeem, and of the interest in the surplus, both of which she still retains. *Denton* vs. *Nanny*, 8 Barb., 618; *Wheeler* vs. *Morris*, 2 Bosw., 524; *Vartie* vs. *Underwood*, 18 Barb., 561; *Mills* vs. *Van Voorhis*, 23 Barb., 125; reversed, but not on this point, which is, on the contrary, established, 20 N. Y., 412; 10 Abb., 152; *Blydenburgh* vs. *Northrop*, 13 How., 289; *Brownson* vs. *Gifford*, 8 How., 389 (396); *Pinckney* vs. *Wallace*, 1 Abb., 82; and, where she has not joined in the mortgage, even if she be actually made a party in another capacity, or as merely claiming some interest, she will not be barred. To bind her in such a case, she must be distinctly made a party, as claiming or being entitled to claim her dower, and be charged by specific allegation as such. Her rights are paramount, and will not otherwise be barred. *Lewis* vs. *Smith*, 11 Barb. 152; affirmed, 5 Seld., 502; 12 L. O., 193; and if she objects the suit cannot proceed against her, but *her* rights must be determined in a separate proceeding.

In foreclosure of a mortgage of the wife's estate, it may still be prudent to make the husband a party, until the question as to the abolition

or non-abolition of his rights as tenant by the courtesy, is finally and definitively settled (see above, section 34, and cases there cited); and where, as is usual, he has joined in the bond or mortgage, he is, of course, not merely a proper but a necessary party. *Vide Conde* vs. *Shepard*, 4 How., 75; 2 C. R., 58.

Under the last amendment (1862), the filing of a notice of *lis pendens* is of itself a commencement of the action; and a grantee of the equity of redemption, whose deed is not recorded until after such filing, will not be a necessary party, but will be bound by the decree, though such deed have been previously executed—section 132. Between 1858 and 1862, the filing of such notice had the same effect, provided the summons was simultaneously or had been previously served; and if filed before service, such effect was attributed to it from the date of such service, if subsequently made. See *Earle* vs. *Barnard*, 22 How., 437; *Farmers' Loan and Trust Company* vs. *Dickson*, 17 How., 477; 9 Abb., 61. Prior to 1858, he was held to be a necessary party under such circumstances. See *Hall* vs. *Nelson*, 23 Barb., 88; 14 How., 32; *Griswold* vs. *Fowler*, 6 Abb., 113.

The plaintiff, though at liberty to do so, is not bound to join a mere contractor for the purchase of the equity of redemption. *Crooke* vs. *O'Higgins*, 14 How., 154.

Any parties liable for the deficiency, may also be joined; but, where the payment of the mortgage had been assumed by a subsequent grantee, as between him and the mortgagor, it was held that, although such grantee thereby became a necessary party, the mortgagor was not. *Drury* vs. *Clark*, 16 How., 424. See also *Van Nest* vs. *Latson*, 19 Barb., 604; *Stebbins* vs. *Hall*, 29 Barb., 524.

Where a deed is made absolutely to trustees without restriction, they are necessary parties, but, where such deed is made in trust for a corporation, the corporation, and not the trustees, should be joined. *Case* vs. *Price*, 17 How., 348; 9 Abb., 111. The same rule would, of course, hold good in any case where the trustee holds a mere nominal estate, and the real title is in the *cestui que trust*.

A decree regularly obtained, in a suit against the mortgagor and his grantee, was refused to be opened, to let in a claim, founded upon a deed executed between such mortgagor and such grantee, after decree but before sale; although such deed declared that the original deed to the grantee, though absolute on its face, was in fact a mortgage, and that the general assignee of the mortgagor, before suit brought, was accordingly entitled to an equity of redemption. *Griswold* vs. *Fowler*, 6 Abb., 113.

Where the owner of a mortgage had first assigned it to specific trustees, as security for an indebtedness, and afterwards executed a general assignment to trustees for creditors, it was held that the latter were

necessary parties to a foreclosure brought by the former. *Bard* vs. *Poole*, 2 Kern., 495.

An assignee or purchaser *pendente lite*, is not a necessary party, and if he does not himself seek to be brought in as a party, he will be concluded by the decree, and this rule includes an assignee in bankruptcy or insolvency. *Cleveland* vs. *Boerum*, 3 Abb., 294; 23 Barb., 201; affirmed, 27 Barb., 252.

The rules as to the parties in a suit for foreclosure of a mechanics' lien, are, in many respects, analogous to those in an ordinary foreclosure. All parties necessary to enable the court to do complete justice in the premises, should be joined, or may be brought in. Prior lien-holders are not necessary parties, unless the plaintiff claims a higher equity. Where the plaintiff is a sub-contractor, and claims for money due from the contractor, and there is any difference between them as to the amount due, the latter is a proper party, and may be brought in. *Sullivan* vs. *Decker*, 1 E. D. Smith, 699; 12 L. O., 109; *Lowber* vs. *Childs*, 2 E. D. Smith, 577; 1 Abb., 415. But the non-joinder is not ground of demurrer. *Foster* vs. *Skidmore*, 1 E. D. Smith, 719. Nor is it necessary for the plaintiff to make either prior or subsequent lien-holders, parties to his proceeding, unless they apply, or he wishes to contest the validity or superior equity of the former. *Kaylor* vs. *O'Conner*, 1 E. D. Smith, 672. But though such is the case in the first instance, at the outset of the suit, the Court of Common Pleas exercises a very liberal discretion in these matters, as to the subsequent bringing in of any parties having an interest in the controversy, on that interest becoming apparent. See the above cases, *passim*.

(*d.*) Partition.

In partition, every person directly or indirectly interested in the *corpus* of the estate itself, must be a party, including the wives of parties living, in respect of their inchoate right to dower. *Vide Brownson* vs. *Gifford*, 8 How., 389 (396).

An executor or a trustee, who has not qualified, need not be brought in.

Incumbrancers are not necessary parties, though it may sometimes be expedient to make them so, in order to a sale of the property, or to bind them by the decree, or to settle priorities among the parties, where any of them claim a charge as against the others. *Bogardus* vs. *Parker*, 7 How., 305. If done, however, this will be at the risk of costs. See *Hammersley* vs. *Hammersley*, 7 L. O., 127, unless it be done, as there, at the request of the other parties.

The including superfluous parties will not, under ordinary circum-

stances, constitute a demurrable objection. *Brownson* vs. *Gifford*, 8 How., 389.

A judgment-creditor of one of the parties interested, cannot claim to be brought in, for the purpose of enforcement of his lien. *Waring* vs. *Waring*, 3 Abb., 246.

Partition may be maintained of a derivative estate carved out of the fee, as in the instance of a grant of minerals, with right to enter for the purpose of working them. The owner of the fee itself, who is the common source of title, is not a necessary party in such case. *Canfield* vs. *Ford*, 28 Barb., 336; 16 How., 473.

Where the trustee of an undivided share, and all *cestui que trusts* in being, were brought in, it was held that *cestui que trusts* not then *in esse*, were bound by the decree. The trustee represented them. *Mead* vs. *Mitchell*, 5 Abb., 92; affirmed, 17 N. Y., 210.

In partition, unknown defendants may be brought in, in the same manner as in other cases. *Allen* vs. *Allen*, 11 How., 277.

(*e.*) EJECTMENT.

The rule as to the joinder of defendants in this action is still substantially the same as that declared in the Revised Statutes. 2 R. S., 304, § 4.

If the premises are actually occupied by a tenant, that tenant is the proper defendant.

A mere party in charge, under the orders of others, is not however an actual occupant of the premises, in such a sense as that the action can be brought against him. *People* vs. *Ambrecht*, 11 Abb., 97.

If not occupied, the action may then be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.

But, to maintain ejectment at all, the plaintiff himself must be actually out of possession. *Taylor* vs. *Crane*, 15 How., 358.

Where, therefore, there is an actual occupant of the premises, he must be joined as defendant in all cases. The only question is, as to whether other parties, also claiming an interest adverse to the plaintiff, can or cannot be joined with him, so as to insure a complete determination of the controversy, under section 118 of the Code, or otherwise.

Under the Revised Statutes this was allowed to a certain extent—see 2 R. S., 341, section 17, which provides that, in ejectment brought against a tenant, "the landlord of such tenant, and also any person having any privity of estate or interest with such tenant, or with such landlord, in the premises in question, or in any part thereof, may be made defendant with such tenant, in case he shall appear, or may at his election appear without such tenant; and, in the latter case, the court may order stay of execution on any judgment against the tenant."

That this rule is not abolished by the Code is decided in *Godfrey* vs. *Townsend*, 8 How., 398.

The question then arises, as to whether, under the Code, it is or is not competent for a plaintiff to anticipate this action on the part of the landlord, or of any other person having any privity of estate or interest with him or with the tenant, and to make such parties original defendants, instead of perfecting a judgment against the tenant alone, subject to be stayed on the appearance of any such party.

This seems to be settled in the affirmative, as will appear by the cases below cited.

The tenant in possession, though only for a year, is, as has been said before, a necessary party in all cases. *Ellicott* vs. *Mosier*, 11 Barb., 574; affirmed, 3 Seld., 201.

In ejectment for dower, brought before admeasurement, he is the only proper party, but, after admeasurement, the tenant of the freehold may then be joined. 3 Seld., 208.

In *Fosgate* vs. *The Herkimer Manufacturing and Hydraulic Company*, 12 Barb., 352, it was held that, where some of the defendants were not in actual possession, but claimed an interest in the controversy adverse to the plaintiff (the others being tenants in possession under them), the former were properly made defendants under section 118, in order to a complete determination of the controversy; and this decision is affirmed, 2 Kern., 580. It is true that, in both cases, the ruling is primarily based on the ground that the objection of misjoinder, if tenable, had been waived, by being omitted to be set up in the answer (*vide* 2 Kern., 584, 585); but in the opinion, Crippen, J., says, "I see no good reason why the landlord may not be made defendant in the first place with the tenant," citing section 118 (2 Kern., 583); and the rule that all persons necessary to a complete determination of the controversy may now be joined (under section 118), is positively laid down in *Waldorph* vs. *Bortle*, 4 How., 358. *Van Buren* vs. *Cockburn*, 14 Barb., 118, simply decides, that a person not in possession is not a necessary, but expressly disclaims deciding the question as to whether, if claiming an interest, he may not be a proper party.

The strict view of the question is, however, taken in *Palen* vs. *Reynolds*, 22 How., 353, in which it is laid down that, although the landlord may, if he wishes, appear and defend, he cannot be joined as a defendant without his consent.

In *The Champlain and St. Lawrence Railroad Co.* vs. *Valentine*, 19 Barb., 484, it was held that a recovery could not be had against the landlord, sued jointly with the tenant, on the ground that there was no proof that he had entered or withheld the premises, or committed any wrong against the plaintiff; but this ruling is based upon the evidence

given, and not upon any technical objection, as to his having been made a party in the first instance. The enjoyment of a mere easement on land, without exclusion of the public, is not a sufficient occupancy or act of ownership, whereon to ground ejectment, at the suit of the owner of the soil. *Redfield* vs. *Utica and Syracuse Railroad Company*, 25 Barb., 54.

Nor can parties be sued in ejectment, who are not, and never have been, in possession, or exercised acts of ownership, since the acquisition of the plaintiff's interest. *Van Horne* vs. *Everson*, 13 Barb., 526.

In *The People* vs. *The Mayor of New York*, 28 Barb., 240; 17 How., 56; 8 Abb., 7, it is laid down (*obiter*) that, in an action brought by the people against numerous lessees of the corporation, the corporation was not properly joined as a co-defendant; but the decisions cited scarcely bear out the rule as contended for, and one of them (*Fosgate* vs. *Herkimer Manufacturing Company*) is distinctly overruled by the subsequent decision in the same case, above referred to.

Ejectment is not maintainable, in the same action, against different purchasers, claiming under different grants. *Voorhies* vs. *Voorhies*, 24 Barb., 150.

But the plaintiff may proceed jointly against several tenants, renting different apartments in the same house, on the ground, that their possession of the lot, on which the house stood, was joint. *Pearce* vs. *Colden*, 8 Barb., 522.

When the action is against several defendants, and it appears on the trial that their holdings of distinct parcels are in severalty, the plaintiff may be compelled to elect against which he will proceed, and a verdict is, therefore, to be rendered for the others. 2 R. S., 306, § 27. But where the complaint alleged and the answer admitted a joint possession, it was held that the defendants' rights in this respect were waived by such a decision; and that the judge properly, under such circumstances, decided that the plaintiff could not be compelled to elect, though several occupations were proved. *Fosgate* vs. *The Herkimer Manufacturing and Hydraulic Company*, 2 Kern., 580; affirming 12 Barb., 352, above cited.

An action commenced against a person in possession or in receipt of the profits of the premises, is not to be barred or delayed by reason of any alienation by such person, either before or after its commencement. 2 R. S., 342, § 18.

(*f.*) Unknown Defendants.

The Code makes the following express provision upon this subject:

§ 175. (150.) When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any

name; and, when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

It is not allowable for the plaintiff to use a fictitious name at his discretion, but only when he is ignorant of the true one. *Crandall* vs. *Beach*, 7 How., 271. See as to use of a name, under this section. *Pindar* vs. *Black*, 4 How., 95; 2 C. R., 53.

There should be some designation, showing who is intended. If so, service by publication against unknown parties, designated to the best of the plaintiff's ability, will be good. *Allen* vs. *Allen*, 11 How., 277.

It is competent for a party seeking to charge stockholders of a private corporation, to file a bill against the company, and such stockholders as are known to him, praying a discovery as to the name and residences of the others. *Bogardus* vs. *The Rosendale Manufacturing Company*, 3 Seld., 147.

A summons cannot be set aside on the ground of a misnomer, where the plaintiff was ignorant of the true name of the defendant. *Miller* vs. *Stettiner*, 22 How., 518.

(*g.*) Privileged Defendants.

Ambassadors, Consuls, &c.—Foreign ambassadors and their servants possess an absolute privilege of exemption from suit in the state courts; and this privilege extends to ambassadors from one foreign sovereign state to another. *Holbrook* vs. *Henderson*, 4 Sandf., 619.

A consul, or vice-consul, possesses a similar privilege, though, so long as he does not assert it, the courts are not absolutely disqualified from entertaining the action. It is, however, competent for him to assert that privilege at any juncture during the proceedings, however late it may be. Nor will the fact that he is impleaded with a citizen upon a joint contract, avail to give jurisdiction. *Valarino* vs. *Thompson*, 3 Seld., 576; affirming *same case*, 3 C. R., 143; *Taaks* vs. *Schmidt*, 19 How., 413. See also *Davis* vs. *Packard*, 7 Peters, 276. *In re Aycinena*, 1 Sandf., 690; *Griffin* vs. *Dominguez*, 2 Duer, 656; 11 L. O., 285; *Republic of Mexico* vs. *Arrangois*, 11 How., 1; affirmed, p. 576, and 5 Duer, 634. See also as to cases sounding in tort, *Hernandez* vs. *Carnobeli*, 4 Duer, 642; 10 How., 433. The above cases unquestionably overrule *Flynn* vs. *Stoughton*, 5 Barb., 115.

It has been held that the subsequent revocation of the *exequatur* of a foreign consul will cure the defect, and that the court will acquire jurisdiction from such time; *Rock River Bank* vs. *Hoffman*, 22 How., 250; 14 Abb.,72; but this case stands reversed, on the ground that, the court being without jurisdiction when the action was commenced, it cannot be conferred by any subsequent occurrence. *Naylor* vs. *Hoffman*, 22 How., 510.

An ambassador from the United States to a foreign country has, it has been held, no privilege of the above nature. *Mechanics' Bank* vs. *Webb*, 21 How., 450; 14 Abb., 72, note.

A member of the legislature is not privileged from suit, but only from arrest or imprisonment in that suit, when pending.

§ 39. *Abatement.—Bringing in of Defendants.*

The remedies provided by section 121, in the event of the abatement of a suit, will be treated of hereafter, in connection with the subject of revivor and supplemental pleading.

The subject of the bringing in of defendants under the facilities afforded by the first clause of section 122, above cited, divides itself naturally into two branches: 1st, the bringing in of additional parties, when the necessity becomes apparent at the hearing, or during the regular progress of an action, either on the motion of one of the parties to that action, or on the suggestion of the court, under the first sentence; and 2d, the bringing in of such parties, on their own special application, with a view to the protection of their interests, irrespective of those of the original parties, under the second sentence of that clause.

(*a.*) Bringing in, in Regular Course of Action.

It will be unnecessary to cite again in this, a large number of the decisions referred to in the three next preceding sections. It will be sufficient to say that, when any person interested in a controversy appears to the parties, or is declared by the court, to be either a necessary or a proper defendant, the joinder of such person will follow, as a matter of course. Those sections, and the decisions there cited, should therefore be considered as closely connected with, and in effect constituting part of the present.

Where it was made apparent that the rights of the original parties could not be determined as between themselves, until the claim of a third person was liquidated, the plaintiff was compelled to amend, by bringing such party in, though a resident of another state. *Sturtevant* vs. *Brewer*, 17 How., 571; 9 Abb., 414; affirmed, 4 Bosw., 628.

The mere obtaining an order to bring in additional parties, will be wholly nugatory, unless such parties are regularly served with process. *Akin* vs. *The Albany Northern Railroad Company*, 14 How., 337.

The receiver of an insolvent corporation was ordered to be substituted as defendant, instead of the corporation itself, in *Fuller* vs. *The Webster Fire Insurance Company*, 12 How., 293.

The right of the defendant to claim that an additional party be brought in, will be altogether waived, if he does not set it up as a de-

fence, or if, after an adverse decision on demurrer, he submits, and pleads to the merits. *Freeman* vs. *Newton*, 3 E. D. Smith, 246.

The right to make a motion to amend the complaint, by making an additional defendant, may be waived by undue delay; as by proceeding to trial and taking no step, except as the result of the defendant's motion to dismiss the complaint. *McMahon* vs. *Harrison*, 12 How., 39. Nor can the same defendant, if not originally liable, be again brought in by supplemental bill, with a view to make him liable in another capacity. *Same case.* See likewise *Peck* vs. *Ward*, 3 Duer, 647.

Nor will the court order new parties to be brought in, against the will of the plaintiff, unless their presence is necessary to the determination of the action. *Sawyer* vs. *Chambers*, 11 Abb., 110.

(*b.*) Bringing in, on Application of Third Party.

Relief of this nature has been granted in the following cases, on application of the party seeking to be joined.

By bringing in the judgment-creditor, in a suit against a constable, for levying on property in the possession of the judgment-debtor, but claimed by a third party. *Conklin* vs. *Bishop*, 3 Duer, 646.

By bringing in an assignee, *pendente lite*, of part of the subject-matter of the controversy. *McGown* vs. *Leavenworth*, 2 E. D. Smith, 24; 3 C. R., 151.

Or by bringing in an assignee in bankruptcy or insolvency.

But this can only be done on his own application. *Cleveland* vs. *Boerum*, 3 Abb., 294; 23 Barb., 201; affirmed, 27 Barb., 252. And if, where the action is *in rem*, he does not interfere, but suffers it to proceed in his absence, he will be bound by the judgment. *Same case.*

In *Fraser* vs. *Greenhill*, 3 C. R., 172, it was held that, where an attachment has been issued against a debtor's property, under the Code, any other creditors of that debtor may not only be proper parties to the suit, but may apply to the court for the purpose of being brought in as such.

In *Judd* vs. *Young*, however, 7 How., 79, a similar application, by subsequent creditors claiming an interest in surplus moneys under a prior foreclosure, was refused, on the ground that the provisions of section 122, under which the application was made, were confined to actions for the recovery of specific real or personal property, and to them alone; and this seems to be the sounder view, for it would indeed be a great hardship to a creditor, to have his proceedings embarrassed by the presence of persons who are entire strangers to the main subject of the suit, and whose only claim can be in respect of a surplus, which cannot arise until after the satisfaction of his debt, and in which he has therefore no interest whatever.

In *Carswell* vs. *Neville*, 12 How., 445, though the application was similar to that in *Fraser* vs. *Greenhill*, the question was not passed upon, relief being denied upon another ground.

The conclusion in *Judd* vs. *Young* is supported by *Tallman* vs. *Hollister*, 9 How., 508, denying an application for similar relief, though on a right admitted to be clear, and holding that such right must be asserted in a separate proceeding. See also *Sherman* vs. *Partridge*, 4 Duer, 646 (651); 1 Abb., 256; 11 How., 154; *Wilson* vs. *Duncan*, 11 Abb., 3; reversing *same case*, 8 Abb., 354.

A judgment-creditor cannot seek to be brought in as a party to a suit for partition. *Waring* vs. *Waring*, 3 Abb., 246.

An application of this nature will be too late, if delayed until after the entry of judgment. *Carswell* vs. *Neville*, 12 How., 445.

And where, by being brought in, in a mechanics' lien case, on his own application, the contractor occasioned additional costs, which, as between the sub-contractor and the owner only, would not have accrued, he was personally charged with them. *Eagleson* vs. *Clark*, 2 E. D. Smith, 644; 2 Abb., 364.

This remedy is confined to the cases specified. Where, therefore, an outgoing partner applied to be brought in as party to a suit for an account of partnership assets, in which he claimed an interest, his motion was denied. It was not an action "for the recovery of personal property," within the meaning of the section. *Dayton* vs. *Wilkes*, 5 Bosw., 655.

Analogous to the case of a third party applying to be let in, is that of a person nominally made a defendant, but not actually served with process. In such a case, where the plaintiff had filed a notice of *lis pendens*, but omitted to proceed further, the proceedings were set aside, on motion of one of the defendants. *Lyle* vs. *Smith*, 13 How., 104.

The parent of a married infant, against whom a divorce had been obtained, was held to have no standing in court for the purpose of making an application as *amicus curiæ*, alleging collusion, and asking to have the judgment opened; but, though her application was denied, a reference was directed by the court, of its own motion. *E. B.* vs. *C. B.*, 8 Abb., 44; 28 Barb., 299.

The rule that, on a proper application, sureties may be let in to defend, in the place of their principal, even after judgment, is laid down in *Jewett* vs. *Crane*, 13 Abb., 97; 35 Barb., 208.

§ 40. *Interpleader.*

The practice and forms upon an application for this purpose, will be considered in a subsequent portion of the work. The present obser-

vations being simply confined to the right to this remedy, and to the cases bearing on that right.

The power so conferred, does not interfere with the right of a person standing in a similar position, to maintain a separate suit for an interpleader, according to the former practice in Chancery upon that subject. See cases below cited. Such a proceeding is, of course, his only remedy, when he wishes to be discharged of his responsibility before action brought by either of the claimants, and he has his option afterwards. But if, where in his power to obtain relief under this provision, he should vexatiously institute a separate proceeding, he might possibly be charged with the additional costs thereby occasioned.

In relation to an application under section 122, it will be observed that the powers of the court are entirely discretionary, and that the relief so asked, can only be asked as a matter of favor, and not of right; and that those powers only extend to actions *ex contractu*, or for the recovery of specific real or personal property.

The party applying must prove entire good faith on his part, and entire absence of collusion with the party proposed to be substituted in his place; and he must also place the subject-matter of controversy within the control of the court, entirely and without reserve. Under these circumstances, and under these only, can the application be made; and a failure in any one of these requisites will, of course, be fatal to it, and would probably involve the payment of costs. If it succeed, however, the applicant obtains a complete release from the controversy and its consequences, and the substituted party takes his place in all respects.

Of course, this remedy is entirely inapplicable to cases where the party seeking it retains any claim or interest whatever in the subject-matter of the controversy, or is in reality directly liable; as in the case of an advertised reward claimed by several, or in those where he has otherwise given occasion for that controversy by his own acts. It is simply and solely intended to meet the case of a mere depositary, or holder of that subject-matter, in an official, ministerial, or fiduciary capacity, either original, or attaching by implication, under occurrences accruing subsequent to its original coming into his possession.

A party into whose hands money or goods may have come in the ordinary course of business, for safe custody, and to be thereafter accounted for to the proper owners, may also become entitled to this remedy; and it would seem, from some of the English cases, that the existence of a mere lien upon such goods, for charges in respect of such custody, which lien does not in its nature attach specially on either of the claimants, and involves no assertion of ownership in any part thereof, will not be a bar to such an application; though any claim of actual owner-

ship, or litigation in respect thereof, in any part of such deposit, however small, will be held to be so.

A purchaser of land, unable to pay his purchase-money to one or other of two parties claiming title to the estate contracted to be sold, has been held in England to be a proper subject for this species of relief.

Any dealing with either of the parties, calculated to alter their interest in the subject-matter in question, or to give either of those parties an independent right against the depositary, the taking of any indemnity from either, or any illegality in the original transaction, out of which the deposit arose, will, of course, do away with the *bona fides* of the application, and form an effectual bar to it, as showing collusion. The reverse, however, seems to be the case with regard to a mere demand of indemnity, prior to the action, when not complied with.

The following recent decisions bear upon the subject:

This remedy has been granted in the following cases—

To a defendant who held, as administrator, a promissory note, the title to which was disputed by two parties. *Van Buskirk* vs. *Roy*, 8 How., 425.

To a bank, in relation to a balance, the right to which was contested by an assignee, and also by a creditor of the depositor, and his receiver under supplementary proceedings. *Fletcher* vs. *The Troy Savings Bank*, 14 How., 383.

Interpleader, under analogous circumstances, was granted in a suit for that purpose, in the following cases: *Beck* vs. *Stephani*, 9 How., 193; *Willetts* vs. *Finlay*, 11 How., 468; *Mayor of New York* vs. *Flagg*, 6 Abb., 296; *Winfield* vs. *Bacon*, 24 Barb., 154.

It was allowed in a controversy concerning rent, in *Seaman* vs. *Wright*, 12 Abb., 304. The stakeholder is entitled to his costs as against the unsuccessful party, and may retain them out of the fund. *Willetts* vs. *Waite*, 13 How., 34; *Miller* vs. *De Peyster*, 1 Abb., 234.

Where there is any other contest between the plaintiff and the defendant, than simply that of ownership of the goods claimed by a third party, the motion cannot be granted. When the action is for a debt arising on the sale of goods, the purchaser cannot require his vendor to interplead, with a third party claiming title to the goods themselves. *Sherman* vs. *Partridge*, 4 Duer, 646; 11 How., 154; 1 Abb., 256. If the defendant denies, or the plaintiff claims, a liability beyond the mere admission of the office of stakeholder, interpleader cannot be had. *Patterson* vs. *Perry*, 14 How., 505; 6 Duer, 686.

It will not be granted, where there is any diversity between the rights of the parties alleged to claim the fund. Nor, when one of such claimants does not appear upon the motion, and satisfy the court as to their willingness to be made defendants, and his pecuniary responsibility for costs;

especially so, where such claimant is a non-resident. Nor will any condition be imposed upon the original defendants, beyond making a deposit in court of the amount in question. The proceedings are designed to be simple and summary; and unless it be reasonably apparent that the change can work no prejudice to the plaintiff, relief must be sought in a different way. *Lund* vs. *Seamen's Bank for Savings*, 20 How., 461; affirmed, 23 How., 258.

Interpleader was denied, in a case where the sum in question was deposited with the original defendants, as a loan, and its title was disputed between the original depositors, and parties claiming under attachments against them. *Wilson* vs. *Duncan*, 11 Abb., 3; reversing *same case*, 8 Abb., 354.

A common carrier who has received goods, as the property of one party, cannot interplead, on their being claimed by another. *McGaw* vs. *Adams*, 14 How., 461.

There can be no interpleader for a portion of an entire fund, the claim to which is partly admitted and partly denied. Before the court can make the order, it must appear that the discharge from liability will be total. *Bender* vs. *Sherwood*, 15 How., 258.

And the fund in dispute must be ascertained, with sufficient certainty to enable it to be brought into court, unless the parties can agree to fix the amount. *Willets* vs. *Finlay*, 11 How., 468.

Nor will interpleader lie, when the demands of the different claimants are not for the same debt, or remain unliquidated. It was accordingly declared inadmissible in proceedings on a mechanic's lien, where the owner sought to be discharged, on payment of the sum admitted by him to be due to the plaintiff and other sub-contractors. *Chamberlain* vs. *O'Connor*, 1 E. D. Smith, 665; 8 How., 45.

The strict rules as to interpleader are not, however, applicable to a proceeding by a corporation, bringing suit against numerous holders of stock, alleged to be fraudulently issued, with a view to the cancellation of the certificates of such as should prove to be so. *New York and New Haven Railroad Company* vs. *Schuyler*, 17 N. Y., 592; 7 Abb., 41; reversing *same case*, 1 Abb., 417.

An order of this nature is appealable. *Wilson* vs. *Duncan*, 11 Abb., 3; and the final determination, on a reference under it, is reviewable in the Court of Appeals. *Kirby* vs. *Fitzpatrick*, 18 N. Y., 484.

CHAPTER II.

LIMITATION OF ACTIONS.

§ 41. *Statutory Provisions.*

(*a.*) Provisions of Title II., Part II., of the Code.

The following are the provisions of the Code upon this subject, forming title II., part II., of that measure. They have come down from its original passage with comparatively little mutation, their nature being that of a consolidation and re-enactment of the former law upon the same subject.

TITLE II.

Of the Time of commencing Civil Actions.

Chapter I. Actions in general.
II. Actions for the recovery of Real Property.
III. Actions, other than for the recovery of Real Property.
IV. General Provisions.

Chapter I.

Of the Time of commencing Actions in general.

§ 73. (66.) The provisions contained in the chapter of the Revised Statutes, entitled "Of actions and the times of commencing them," are repealed, and the provisions of this title are substituted in their stead. This title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.

This section as it stands dates from 1849. The amendment from 1848 was, however, formal, rather than substantial in its nature.

§ 74. (67.) Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section 73. But the objection that the action was not commenced within the time limited, can only be taken by answer.

Less comprehensive in 1848. Fixed as it stands in 1849, except the last provision, as to the mode of taking the objection, which was added in 1851.

Chapter II.

The Time of commencing Actions for the Recovery of Real Property.

The whole of this chapter, in its present form, dates from the amendment in 1849, and has come down wholly unaltered.

The same object was attained in the Code of 1848, by retaining in force the previous provisions of the Revised Statutes upon the same subject. *Vide* 2 R. S., 293 to 295, inclusive.

§ 75. The people of this State will not sue any person for, or in respect to, any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless,

1. Such right or title shall have accrued within forty years before any action or other proceeding for the same shall be commenced; or unless,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of forty years.

§ 76. No action shall be brought for, or in respect to, real property, by any person claiming by virtue of letters patent, or grants from the people of this state, unless the same might have been commenced by the people as herein specified, in case such patent or grant had not been issued or made.

§ 77. When letters patent or grants of real property shall have been issued or made by the people of this State, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title; in such case an action for the recovery of the premises so conveyed, may be brought, either by the people of this State, or by any subsequent patentee or grantee of the same premises, his heirs or assigns, within twenty years after such determination was made, but not after that period.

§ 78. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of such action.

§ 79. No cause of action or defence to an action founded upon the title to real property, or to rents or services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question, within twenty years before the committing of the act in respect to which such action is prosecuted or defence made.

§ 80. No entry upon real estate shall be deemed sufficient, or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry, descended or accrued.

§ 81. In every action for the recovery of real property, or the possession

thereof, the person establishing a legal title to the premises, shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person, shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for twenty years before the commencement of such action.

§ 82. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included shall be deemed to have been held adversely, except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

§ 83. For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;

2. Where it has been protected by a substantial enclosure;

3. Where, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant;

4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 84. Where it shall appear that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

§ 85. For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases, only:

1. Where it has been protected by a substantial enclosure;

2. Where it has been usually cultivated or improved.

§ 86. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termina-

tion of the tenancy; or, where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent; notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

§ 87. The right of a person to the possession of any real property, shall not be impaired or affected by a descent being cast, in consequence of the death of a person in possession of such property.

§ 88. If a person entitled to commence any action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either,

1. Within the age of twenty-one years, or,
2. Insane, or,
3. Imprisoned on a criminal charge, or in execution, upon conviction of a criminal offence, for a term less than for life, or,
4. A married woman;

The time during which such disability shall continue, shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defence; but such action may be commenced, or entry or defence made, after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defence made after that period.

Chapter III.

The Time of commencing Actions, other than for the Recovery of Real Property.

§ 89. (69.) The periods prescribed in section seventy-four, for the commencement of actions, other than for the recovery of real property, shall be as follows:

§ 90. (70.) Within twenty years:

1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States;
2. An action upon a sealed instrument.

§ 91. (71.) Within six years:

1. An action upon a contract, obligation, or liability, express or implied; excepting those mentioned in section ninety.
2. An action upon a liability created by statute, other than a penalty or forfeiture.
3. An action for trespass upon real property.
4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.
5. An action for criminal conversation, or for any other injury to the

person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief, on the ground of fraud, in cases which heretofore were solely cognizable by the Court of Chancery; the cause of action in such case not to be deemed to have accrued, until the discovery, by the aggrieved party, of the facts constituting the fraud.

Dates from 1849. Substantially the same in 1848.

§ 92. (72.) Within three years:

1. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty; including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this State, except where the statute imposing it prescribes a different limitation.

In 1848, the words "or constable," were absent. They were inserted in 1849.

§ 93. (73.) Within two years:

1. An action for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute, for a forfeiture or penalty to the people of this State.

It may be remarked, *obiter*, that these periods are, in many respects, materially reduced from those allowed by the Revised Statutes, with the single exception of slander. The former periods were four years, in assault, battery, and false imprisonment, and six in libel.

§ 94. (74.) Within one year:

1. An action against a sheriff or other officer, for the escape of a prisoner, arrested or imprisoned on civil process.

§ 95. (75.) In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

Dates from 1849. In 1848, the closing words ran thus: "from the time of the last item in the account on the adverse side."

§ 96. (76.) An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter, in behalf of the people of this State, by the attorney-general, or the district attorney of the county where the offence was committed.

§ 97. (77.) An action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued.

§ 98. (78.) The limitations prescribed in this chapter shall apply to actions, brought in the name of the people of this State, or for their benefit, in the same manner as to actions by private parties.

Chapter IV.

General Provisions as to the Time of commencing Actions.

§ 99. (79.) An action is commenced, as to each defendant, when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him.

An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or other officer, of the county in which the defendants, or one of them, usually or last resided; or, if a corporation be defendant, to the sheriff, or other officer, of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

Remodelled as it now stands in 1851. The substance of the original section was to the same purport. The alterations made in 1849 were chiefly formal, except that the verification of the complaint was then a commencement of the action, provided the summons was delivered for the purpose of service during the next five days, and afterwards actually served.

§ 100. (80.) If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the times herein respectively limited, after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

Dates from 1851. Amended also in 1849, but the changes made, on both occasions, were comparatively unimportant.

§ 101. (81.) If a person entitled to bring an action mentioned in the last chapter, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or,
4. A married woman;

The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought, cannot be extended more than five years by any such dis-

ability, except infancy; nor can it be so extended, in any case, longer than one year after the disability ceases.

The four subdivisions of this section have come down unaltered, but the introductory and final clauses were amended; the former thrice, *i. e.*, 1849, 1851, and 1852. The latter in 1849 and 1851, in which latter year it was settled as it stands.

§ 102. (82.) If a person entitled to bring an action, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrator, after the expiration of that time, and within one year after the issuing of letters testamentary, or of administration.

In 1848 this section was confined to parties plaintiff, and consisted of the first sentence only, with a slight verbal difference.

In 1849 it was passed in its present form.

§ 103. (83.) When a person shall be an alien, subject, or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

§ 104. (84.) If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or, if he die, and the cause of action survive, his heirs or representatives may commence a new action, within one year after the reversal.

§ 105. (85.) When the commencement of an action shall be stayed by injunction, or statutory prohibition, the time of the continuance of the injunction or prohibition, shall not be part of the time limited for the commencement of the action.

In 1848 this section was simply confined to a stay by injunction.

In 1849 it was altered as it stands.

§ 106. (86.) No person shall avail himself of a disability, unless it existed when his right of action accrued.

§ 107. (87.) When two or more disabilities shall coexist at the time the right of action accrues, the limitation shall not attach until they all be removed.

§ 108. (88.) This title shall not affect actions to enforce the payment of bills, notes, or other evidences of debt, issued by moneyed corporations, or issued or put in circulation as money.

§ 109. (89.) This title shall not affect actions against directors or stockholders of a moneyed corporation, or banking associations, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

Dates from 1849. In 1848 the reference to the Revised Statutes was specific, and banking associations were not mentioned.

§ 110. (90.) No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

Dates from 1849. In 1848 the phraseology was different, and no mention was made of the effect of a payment of principal or interest.

Other Statutory Provisions.

Independent of those created by the above provisions of the Code, there are a few other special statutory provisions to which attention is necessary.

(*b.*) As to Suits by or against Representatives.

Under 2 R. S., 89, section 38, a claim, disputed or rejected by an executor or administrator, and not referred pursuant to the preceding sections, must be sued upon by the holder, within six months after such dispute or rejection, if the debt or any part thereof be then due; or within six months after some part thereof shall become due; or he will be barred from maintaining any action.

Under 2 R. S., 448, section 8, the term of eighteen months from the death of any testator or intestate, is not to be deemed part of the time limited by law, for the commencement of an action against his executors or administrators. And by section 9, the time between the death of such person and the granting of letters testamentary or of administration, not exceeding six months; and, also, six months after the granting of such letters, is not to be deemed any part of the time limited by law, for the commencement of actions by executors or administrators.

(*c.*) Heirs or Devisees.

By 2 R. S., 109, section 53, no suit is allowed to be brought against the heirs or devisees of any real estate, in order to charge them with the debts of the testator or intestate, within three years from the granting of letters testamentary or of administration, upon the estate of their testator or intestate.

Under 1 R. S., 748, section 3, the title of a purchaser in good faith from heirs, cannot be impaired by any devise of their immediate ancestor, unless the will of such ancestor shall have been duly proved and recorded within four years from his death; except where disability or concealment exists, as noticed in subdivisions 1 and 2, in which latter cases, the limitation is to commence from one year from the re-

moval of the disability, or from the delivery of the will to the devisee, or his representative, or to the proper surrogate.

(*d.*) DOWER.

Under 1 R. S., 742, section 18, a widow is allowed twenty years from the death of her husband to demand her dower; and if, at the time of such death, she be under the disabilities of infancy, insanity, or imprisonment, the time for which such disability shall continue, is to be excluded. This provision of the Revised Statutes was held to be retrospective in *Brewster* vs. *Brewster*, 32 Barb., 428.

(*e.*) EJECTMENT.

Special limitations, with provisions in relation to disabilities, analogous to those of the Code, are fixed by the Revised Statutes, in relation to the statutory right to a new trial in ejectment, and to judgments taken by default in that action.

(*f.*) USURY.

A suit for the recovery back of money paid on usury must be brought by the payer within one year from the transaction, or by the overseers of the poor, or county superintendent, within three years next after such one year, or it will not be maintainable. 1 R. S., 772, §§ 3, 4.

(*g.*) SERVICE BY PUBLICATION.

A defendant, allowed to defend an action, after judgment against him on service by publication, must proceed within one year after notice of such judgment, and within seven years after its rendition, or it will stand against him. Code, § 135, last clause.

(*h.*) JUSTICES' JUDGMENTS.

An action upon a justices' judgment cannot be brought in the same county within five years after its rendition, unless under the circumstances specified in section 71 of the Code.

(*i.*) WRITS OF ERROR.

As regards the few cases to which the proceeding by writ of error may possibly remain applicable, it may be convenient to notice the limitation of two years, with provisions as to disabilities, &c., fixed by 2 R. S., 594, 595, sections 21 to 24, inclusive.

(*j.*) SUITS AGAINST STOCKHOLDERS.

By section 24 of chapter 40 of 1848, p. 54, divers restrictions are imposed in relation to suits against stockholders in manufacturing cor-

porations on their personal liability, and no such suit can be commenced after two years from the time that the defendant shall have ceased to be a stockholder.

§ 42. *Real Estate.*

The provisions of the Code on this subject being mainly, if not entirely, re-enactments of previous statutory provisions, or declaratory of fixed principles of law, have been the subject of comparatively little discussion.

The reported cases may be classified under two heads: 1. Those in relation to actions by the people. 2. Those as to actions by private parties, bearing chiefly on the doctrine of adverse possession.

(*a.*) Actions by the People.

The legislature convened under the Revised Constitution of 1846, showed, at first, a strong disposition to assert the rights of the people to a somewhat harsh extent, as evidenced by the resolution of the 10th of April, 1848. See Laws of 1848, p. 582, expressly directing the attorney-general to impeach all manorial titles throughout the state, wherever it may be found practicable; and, by the provisions of chapter 128 of the Laws of 1850, declaring that proceedings so instituted by him, shall have precedence over all others.

In claims of this nature, every presumption is to be made on behalf of the people, and against parties claiming in opposition to them; and the mere fact of lands having been actually unoccupied, and without the bounds of any known patent, is of itself sufficient to show a *primâ facie* title on their part, unless rebutted by distinct evidence of actual adverse possession, or of adverse documentary title: this rule being founded on the general principle that, *primâ facie*, the state is the owner of all unclaimed and unoccupied lands. See *The People* vs. *Van Rensselaer*, 8 Barb., 189 (193); *Same case*, 5 Seld., 291 (319); *The People* vs. *Livingston*, 8 Barb., 253 (259).

But, as regards an actual occupant of land, there is no presumption of title in favor of the people, until it is shown that the possession has been vacant within forty years. *People* vs. *Rector of Trinity Church*, 22 N. Y., 44; affirming *same case*, 30 Barb., 537. See, also, *McKinnan* vs. *Bliss*, 21 N. Y., 206.

And, even as regards waste lands, proof that those claimed are within the limits of a grant or patent, executed either by the state, or by the crown before the Revolution, however extensive or improvident that grant may have been, will avail to rebut the presumption above referred to, and to bring the case within the limits of the present or former stat-

utes, without regard to any question as to actual user or occupation. *People* vs. *Van Rensselaer*, 5 Seld., 291; reversing 8 Barb., 189; *People* vs. *Livingston*, 8 Barb., 253; *McKinnan* vs. *Bliss*, above cited. See also, as to suit to avoid a grant, *The People* vs. *Clarke*, 5 Seld., 349.

And in relation to proof of adverse possession, the same rules are to be applied as against the state, as are applicable in a suit between one individual and another, provided such possession has continued for the full statutory period. *The People* vs. *Clarke*, 10 Barb., 120; affirmed, 5 Seld., 349. And the period of limitation is the same in a suit brought by a grantee of the people, if, during the time relied upon, the title was in the state. *Champlain and St. Lawrence Railroad Company* vs. *Valentine*, 19 Barb., 484.

Adverse possession must be proved for the whole period to constitute a bar. But, on demurrer to answer, a technical allegation in the exact words of the statute relied upon is sufficient, and will avail to defeat the action. *People* vs. *Arnold*, 4 Comst., 508. In *The People* vs. *Van Rensselaer*, 9 Barb., 189, it is held that, under the Code, a bare averment of this description is insufficient, and that the defendant must plead the facts, and show an adverse possession in himself or his grantors during the whole period, by special allegations. This decision, though acquiesced in in that particular case (*vide* 5 Seld., 291), seems to be irreconcilable with *The People* vs. *Arnold*, as above cited, and the latter is of course of higher authority.

As to loss of property by the state, by omission to enforce claim to it in due time, *vide Phœnix* vs. *The Commissioners of Emigration*, 12 How., 1; 1 Abb., 466.

(*b.*) Actions by Private Parties.

Adverse Possession.

Where adverse possession commenced prior to the Revised Statutes, twenty-five years' occupancy is required to bar a right of entry. *Clark* vs. *Baird*, 5 Seld., 183; *Fosgate* vs. *The Herkimer Manufacturing and Hydraulic Company*, 9 Barb., 287.

Though an alien cannot acquire title by means of adverse possession, yet he may plead the statute, and it will be available to him as a defence, in an action of ejectment by the true owner. *Overing* vs. *Russell*, 32 Barb., 263. But a mere denial of possession itself, does not tender the proper issue. *Ford* vs. *Sampson*, 30 Barb., 183; 17 How., 447; 8 Abb., 332.

As to the distinction between adverse possession as regards the statute against champerty, and that for the purposes of the statute of limitations, see *Crary* vs. *Goodman*, 22 N. Y., 170.

The following have been held sufficient to constitute an adverse possession:

The continuous and uninterrupted user of a water-right or other easement or privilege, for more than twenty years, either under claim of right, or with the assent of the owners of the land affected by such easement. *Olmsted* vs. *Loomis*, 5 Seld., 423; *Miller* vs. *Garlock*, 8 Barb., 253; *Townsend* vs. *McDonald*, 2 Kern., 381; *Hoyt* vs. *Carter*, 16 Barb., 212; *Demeyer* vs. *Legg*, 18 Barb., 14. It creates the presumption of a grant. *Hammond* vs. *Zehner*, 21 N. Y., 118.

But no acquiescence short of the full period of twenty years will have that effect, or repel the contrary presumption, that the diversion of a water-course was in hostility to the rights of riparian proprietors, and not under a grant or license. *Haight* vs. *Price*, 21 N. Y., 241.

An easement granted by deed cannot, however, be lost by mere non-user. To defeat it, there must be an actual adverse possession of twenty years. *Smyles* vs. *Hastings*, 22 N. Y., 217; affirming *same case*, 24 Barb., 44; *Townsend* vs. *McDonald*, *supra*. So likewise as to a prescriptive right of way, which, though disused by assent to a substitute, must be restored, if the substituted way be again closed. *Hamilton* vs. *White*, 1 Seld., 9.

And twenty years' possession gives title to an original encroachment, when not a public nuisance. *Peckham* vs. *Henderson*, 27 Barb., 207.

Lengthened acquiescence in a boundary-line will also be a conclusive bar. *Baldwin* vs. *Brown*, 16 N. Y., 359; *Pierson* vs. *Mosher*, 30 Barb., 81. See, also, *Smith* vs. *McAllister*, 14 Barb., 434, coming to same conclusion, on the ground that an agreement will be presumed. But nothing short of twenty years' acquiescence will be a bar, unless there be an estoppel in *pais*. *Emerick* vs. *Kohler*, 29 Barb., 165.

After twenty years' possession, by a vendee who has performed his contract, a conveyance to him will be presumed. But the presumption will, it seems, only run from the time of actual or presumed performance. *Vrooman* vs. *Shepherd*, 14 Barb., 441. And payment will not, in such a case, be presumed in favor of the vendee, on his affirmative proceeding, though the contract was a sealed contract. *Morey* vs. *Farmers' Loan and Trust Company*, 4 Kern., 302; reversing *same case*, 18 Barb., 401. See likewise, as to presumption of a grant, *Daneyer* vs. *Legg*, 18 Barb., 14.

Possession of thirty-five years, under a grant, originally invalid for want of sufficient consideration, but absolute in its terms, was held to be adverse, in *Corwin* vs. *Corwin*, 9 Barb., 219. See, likewise, as to title derived from parties not originally entitled to convey, but acquiesced in by claimants, *Grim* vs. *Dyar*, 3 Duer, 354.

In *Robie* vs. *Sedgwick*, 35 Barb., 319, it was held, that twenty years'

exclusive possession by trustees of a school district, was sufficient to raise the presumption of a valid right in them, as against defendants confessedly without title; also, that a corporation may claim title by means of adverse possession, the same as an individual. Likewise, that the doctrine of abandonment by *non-user*, applies only to easements claimed by one over the land of another, and not to title to the land itself.

See, as to presumption of payment of a mortgage after twenty years, *Belmont* vs. *O'Brien*, 2 Kern., 394. But such presumption will not lie, if there has been a recognition of such mortgage within twenty years. *Harrington* vs. *Slade*, 22 Barb., 161; or at any time within twenty years after that mortgage has become due, *Ingraham* vs. *Baldwin*, 5 Seld., 45; *Peck* vs. *Mallams*, 6 Seld., 509; *Calkins* vs. *Isbell*, 20 N. Y., 147.

The unequivocal assertion of title on the part of a party in possession, is sufficient to make that possession adverse; and such adverse possession will comprise premises actually so enjoyed, even though they be not technically comprised in the deed under which such party claims title. *Sherry* vs. *Freeking*, 4 Duer, 453. But, unless he repels that presumption by positive evidence of an adverse claim of title on his part, he will, *primâ facie*, be presumed to claim no more than what his deed embraces. *Bowie* vs. *Brahe*, 3 Duer, 35.

In *Thompson* vs. *The Mayor of New York*, 1 Kern., 115, it was held, that the mere appropriation of the whole of the wharfage of a pier, of which the corporation was entitled to receive, and had demised, one moiety, by the owner of the other half, was not sufficient to create a title by prescription against them, there being no notice to, or knowledge shown, on their part, that an adverse claim was made, or that the wharfage was being received in contravention of their rights.

In *Lane* vs. *Gould*, 10 Barb., 254, the nature of adverse possession with reference to open and uninclosed woodlands is defined *in extenso*. The possession there claimed was not continuous as to any specified portion of the property, but consisted in taking wood at various times, and in occasionally inclosing and cultivating small portions for a single season. It was held that this species of enjoyment was not sufficient to constitute a title, and that, to make out an adverse possession, where there is no deed, there must be a real substantial inclosure, a "*pedis possessio*," or an usual cultivation or improvement of the premises, continued for a sufficient length of time, and accompanied throughout by a claim of title. It is not necessary that this occupancy should be under a rightful title, but it must be marked by definite boundaries, and continued for a sufficient period. See also, on these points, *Poor* vs. *Horton*, below cited. It was also held, with reference to a claim under a deed, that the only effect of a paper title was to enlarge and extend the possession, so as to include the entire lot described; but that, if the

instrument claimed under contain no certain and ascertainable description, it cannot have the effect of extending the possession beyond the "*pedis possessio*," which is definite, positive, and notorious.

So, also, in *Corning* vs. *Troy Iron and Nail Factory*, 34 Barb., 529; 22 How., 212, it was held that the limits of property adversely possessed could not be extended by construction. To give the defence effect there must be actual occupancy, measured by a distinct, visible, and marked, and not by a presumptive or constructive possession.

Where, however, there has been an actual occupation and a substantial inclosure, possession for a sufficient time will avail to give title, though part of that inclosure consist of a natural boundary. *Becker* vs. *Van Valkenburgh*, 29 Barb., 319.

The mere exercise of an alleged right of commonage does not avail to constitute an adverse possession. And, if such alleged right be merely personal in respect of inhabitancy, it cannot be sustained. *Smith* vs. *Floyd*, 18 Barb., 522.

Nor will the mere cutting of lumber for sale, or for fuel, indiscriminately exercised over a large uninclosed tract, avail to constitute an adverse possession, under the provisions of the Revised Statutes equivalent to subdivisions 3 and 4 of section 83. *Munro* vs. *Merchant*, 26 Barb., 383.

In *Poor* vs. *Horton*, 15 Barb., 485, it was held, that where an entry had been made on wild lands, but not proved by whom, "the presumption was that such entry was permissive, and not in hostility to the true title." It was also held, that an ejectment for uncultivated lands might be maintained without actual entry; and likewise, that an adverse claimant in possession may legally abandon or release his rights, and will be concluded by his acts in this respect.

Use alone, for twenty years, is sufficient to establish a dedication of land to public purposes; but, to support such a dedication, it must have been the free and voluntary act of the owner. *Gould* vs. *Glass*, 19 Barb., 179; *Wiggins* vs *Tallmadge*, 11 Barb., 457. See, generally, as to dedication, *Clements* vs. *The Village of West Troy*, 10 How., 199; 16 Barb., 251; *Badeau* vs. *Mead*, 14 Barb., 328.

An original dedication may, however, be lost by non-user, against an actual adverse possession during a sufficient period. *Baldwin* vs. *The City of Buffalo*, 29 Barb., 396.

As against a reversioner, there cannot be an adverse possession; it can only exist as against a person entitled at the time. *Clarke* vs. *Hughes*, 13 Barb., 147; *Burhaus* vs. *Van Zandt*, 3 Seld., 523; *Hoyt* vs. *Dillon*, 19 Barb., 644; *Learned* vs. *Tallmadge*, 26 Barb., 443. A reversioner or remainder-man have, each of them, twenty years to bring suit, after the commencement of their right of entry, and also the

further period of disability, if existent. *Randall* vs. *Raab*, 2 Abb., 307.

Nor will a mere trespass, without claim of title, avail to constitute an adverse possession. *Miller* vs. *Platt*, 5 Duer, 272; *vide Bowie* vs. *Brahe*, *supra*.

A grantor, who has remained in possession, will be estopped from claiming that possession to be adverse as against his grantee. But, where the latter has entered under his conveyance, and the title conveyed to him was good, the rule will no longer apply, and the grantor will be no more precluded from setting up an adverse possession subsequently originated, than he would be from taking a subsequent conveyance from the grantee. *Kent* vs. *Harcourt*, 33 Barb., 491; *Despard* vs. *Walbridge*, 15 N. Y., 374.

A judgment-debtor, continuing in possession after an execution sale of his interest, might, it was held, be presumed to hold title under the purchaser. Where the latter had omitted to record his deed, it was held that such possession was not constructive notice to the claimant of a subsequent interest. Also, that by omitting to claim an adverse right, he had waived it. *Cook* vs. *Travis*, 20 N. Y., 400.

Possession held under a derivative or subordinate title, however lengthened, is not adverse. *Howard* vs. *Howard*, 17 Barb., 663; *Learned* vs. *Tallmadge*, 26 Barb., 443. A tenant cannot originate or continue it as against his landlord. *Corning* vs. *Troy Iron and Nail Factory*, 34 Barb., 485; 22 How., 217.

(*c.*) Special Limitation.

In *Roe* vs. *Swezey*, 10 Barb., 247, it was held that a suit, having, directly or indirectly, the effect of charging real estate in the hands of heirs with the debt of their ancestor, could not, under any circumstances, be commenced within the three years' limitation fixed by statute, 2 R. S. 46; even though that suit sought to deprive them of that character, and to render them liable as purchasers, under a deed of trust.

After the expiration of that period, the period of future limitation will be the ten years fixed by section 97. So held, in an action to charge the real estate in the hands of a devisee. *Elwood* vs. *Diefendorf*, 5 Barb., 398; *Wood* vs. *Wood*, 26 Barb., 350.

(*d.*) Disabilities.

In relation to the application of the rule as to disabilities, as laid down by section 88, see *Randall* vs. *Raab*, 2 Abb., 307. As to the exact date from which the period of ten years allowed by that section will commence to run, see *Phelan* vs. *Douglass*, 11 How., 193. Refer to sections 106 and 107 in reference to disabilities in general.

§ 43. *Personal Actions.*

The provisions on this subject form title III. of part II., as above cited; sections 107, 108, 109, and 110 of title IV., which fall more peculiarly within this branch of the subject, will also be considered in the present division; the next being more peculiarly devoted to matters relating to the subject of limitations in general, without regard to the distinction between real and personal causes of action.

As to the rule for the computation of time in such cases, see *McGraw* vs. *Walker*, 2 Hilt., 404.

(*a.*) Twenty Years.

This period is now fixed, as will be seen, as an absolute limitation, and not by way of presumption of payment, as under the analogous provisions of the Revised Statutes. When examined into, it will be found, however, that the distinction does not, in reality, effect any substantial alteration in the rights of parties entitled under a judgment or a sealed instrument; the same conditions, *i. e.*, an acknowledgment or a payment on account of the original debt, which, under the Revised Statutes, availed to rebut the presumption, are, under section 110 of the Code, of equal avail to take the case out of the operation of the present statute. As to the case of part payment, there is a species of interregnum between 1848 and 1849, the section of the former year, though abolishing the provisions of the Revised Statutes, being silent on that subject, and having reference to an acknowledgment only. In 1849, however, this anomaly was removed, and the provisions of the former, and of the present law, substantially harmonized.

The provisions, in this respect, are not retrospective, as will be seen in the cases cited below, in connection with this branch of the subject. The same was the case with reference to those of the Revised Statutes, in cases which arose antecedent to their passage; the older law governs in each case. *Vide Carll* vs. *Hart*, 15 Barb., 565; *Austin* vs. *Tompkins*, 3 Sandf., 22; *Waddell* vs. *Elmendorf*, 12 Barb., 585; affirmed, 6 Seld., 170; *Henderson* vs. *Cairns*, 14 Barb., 15.

In relation to the presumption of payment of a debt secured by mortgage, see *Belmont* vs. *O'Brien*, 2 Kern., 394; *Harrington* vs. *Slade*, 22 Barb., 161; *Ingraham* vs. *Baldwin*, 5 Seld., 45; *Peck* vs. *Mallams*, 6 Seld., 509; and *Calkins* vs. *Isbell*, 20 N. Y., 147; referred to in the preceding section. See, likewise, as to the term presumption of payment, and what it generally imports, *Martin* vs. *Gage*, 5 Seld., 398; *The New York Life Insurance and Trust Company* vs. *Covert*, 29 Barb., 435; *Austin* vs. *Tompkins*, 3 Sandf., 22. But the presumption

of payment, under these circumstances, is strictly defensive in its nature, and cannot, under any circumstances, be made the ground for affirmative relief. *Morey* vs. *The Farmers' Loan and Trust Company*, 4 Kern., 302; *Lawrence* vs. *Bull*, 4 Kern., 477.

The former law, as to pleading such a presumption, has, of course, become obsolete; but the principle laid down in *Austin* vs. *Tompkins*, *i. e.*, that, where a judgment has been taken against executors, for assets "*quando acciderint*," that judgment will still remain in force, and the parties holding it may enforce it at any time, as against assets subsequently accrued, at however late a period, may probably be held to be still existent, even under the present more positive limitation.

An assessment on property has the effect of a mortgage or of a judgment, and the same period of limitation applies to an action for its enforcement. *Mayor of New York* vs. *Colgate*, 2 Kern., 140; affirming 2 Duer, 1.

In foreclosure, on a mortgage for securing the amount of a note, the twenty years' period runs. *Pratt* vs. *Huggins*, 29 Barb., 277.

When the lien of a judgment on real estate is barred by lapse of time, the court will protect the rights of *bonâ fide* purchasers by perpetual injunction. *Wilson* vs. *Smith*, 2 C. R., 18.

The wording of section 90, would seem to be sufficiently large to include the judgments of a court not of record. See *Delavan* vs. *Florence*, 9 Abb., 277, note; see also *Nicholls* vs. *Atwood*, 16 How., 475. Where such judgment is docketed in the county court, such is clearly the case. *Waltermire* vs. *Westover*, 4 Kern., 16.

As against the real estate of an intestate, a surrogate's decree, awarding a mere personal judgment in favor of the administratrix, as the result of an accounting, has not, for the purposes of the statute of limitations, the force of a regular judgment. It is, so far, a mere personal claim, and not enforceable as a debt of the intestate. *Bull* vs. *Miller*, 17 How., 300.

In *White's Bank of Buffalo* vs. *Ward*, 35 Barb., 637, it is laid down that, in a case where judgment had been entered against joint debtors, on service of part of them, under the provisions of the Code, a defendant not served, could not avail himself of the six years' limitation, as against a summons to show cause why he should not be bound by the judgment, under the proceedings now provided for by that measure.

(*b.*) Six Years.

The scope of section 91 is of the widest nature, and embraces within it by far the larger portion of civil actions, whether sounding in tort or in contract.

See, as to proceedings against a joint-debtor not served with the ori-

ginal process, not being comprised within this period of limitation, *White's Bank of Buffalo* vs. *Ward*, above cited.

The following decisions have been made, as to the time from which the statute, when set in motion, will commence to run:

As against administrators of the deceased maker of a joint and several note, the period of eighteen months from the death of their intestate, will have to be added to the six years statutory time. They will, for this purpose, be regarded as sued separately. *Parker* vs. *Jackson*, 16 Barb., 33.

Where the trustee of a religious incorporation had collaterally secured their debt on his own estate, he was held entitled to the rights of a surety, and that, as between him and the society, the statute only ran from the enforcement of the debt against his estate, without regard to that of the original transaction. *Jones* vs. *East Society M. E. Church of Rochester*, 21 Barb., 161.

In a suit by an indorser compelled to pay the amount of a note, against prior indorsers, the statute will run from the time of payment of the money by him, and not from the maturity of the note. *Barker* vs. *Cassidy*, 16 Barb., 177. But the remedy of the payee against the maker, under similar circumstances, arises upon the note itself, and not in respect of the payment, and the statute will run accordingly. *Woodruff* vs. *Moore*, 8 Barb., 171.

So long as a right remains suspended and vested in no one, the operation of the statute is suspended also. Thus, in a case where an action was brought by an administrator, in respect of property received after the intestate's death, but before administration taken out, it was held that the statute did not commence running until the latter date. *Bucklin* vs. *Ford*, 5 Barb., 393.

The stock note of a mutual insurance company, though in form payable on request, is, in law, payable on demand, and the statute begins to run against it from its date. *Howland* vs. *Edmunds*, 23 How., 152; reversing *same case*, 33 Barb., 433; *Bell* vs. *Yates*, 33 Barb., 627; *Sands* vs. *St. John*, 23 How, 140.

A double principle of limitation will be applicable in proper cases. Thus, where a note was secured by mortgage, it was held that, as to the remedies on the latter, the twenty years period applied, but that a suit on the note only should be brought within the six years. *Pratt* vs. *Huggins*, 29 Barb., 277. See also, as to the operation of the former statute, in cases where remedies were concurrent, *Appleby* vs. *Brown*, 23 How., 207.

So also where stock had been pledged, it was held that, although an equitable action to redeem might be brought within ten years, the legal

remedy, by trover or otherwise, was limited to six. *Roberts* vs. *Sykes*, 30 Barb., 173; 8 Abb., 345.

Services rendered for a lengthened period, under a general retainer, will, for the purposes of the statute, be regarded as a hiring from year to year, and not as a claim dating from the expiration of the employment. *Davis* vs. *Gorton*, 16 N. Y., 255.

The right of an attorney to sue his client for the costs of an action accrues, and the statute will run from the recovery of judgment in the client's favor, without regard to the attorney's power to take subsequent proceedings, if advisable. *Adams* vs. *Fort Plain Bank*, 23 How., 45.

In an action against assessors, the statutory time will run from the date of completion of their assessment. *Mygatt* vs. *Washburn*, 15 N. Y., 316.

The same case decides that an action commenced on the 24th of July, 1852, the assessment being completed on the same day in 1846, was not barred, on the ordinary principle of excluding the first and including the last day of a statutory period.

A surrogate's decree in favor of an administratrix for a balance due to her from the estate, is, for the purpose of enforcement against the real estate of the intestate, a mere personal claim under the special provision of 2 R. S., 293 (4th edition), and, as such, falls within the six years' limitation. *Bull* vs. *Miller*, 17 How., 300.

Where credit is given on a sale of goods, the statute commences to run from the expiration of that credit, and not from the date of the sale itself. *Vide Harden* vs. *Palmer*, 2 E. D. Smith, 172.

In actions sounding in tort, the date of the commission of the injury or offence complained of, governs the statutory time.

Thus, in trover, the statute was held to run from the actual conversion of the property, without regard to the time of demand and refusal, in *Kelsey* vs. *Griswold*, 6 Barb., 436.

In an action against an agent, for neglect to pay over moneys collected by him, the statute runs from the date of the collection, no previous demand being necessary. *Hickok* vs. *Hickok*, 13 Barb., 632. *Vide Schroeppel* vs. *Corning*, 2 Seld., 107 (117). This strict doctrine is a little modified in *Lyle* vs. *Murray*, 4 Sandf., 590, which holds that, under such circumstances, the agent is bound to give his principal immediate notice. If he does, and the principal omit to make a demand within a reasonable time, he will then put the statute in motion.

But this is not the case, with respect to goods left with a factor for sale on commission. In such a case the principal is bound to make a demand, and until he does so, the statute will not commence to run. *Baird* vs. *Walker*, 12 Barb., 298; 1 C. R. (N. S.), 329; *Lyle* vs. *Murray*, *supra*; *Halden* vs. *Crafts*, 4 E. D. Smith, 490; 2 Abb., 301. And

even if the factor undertake to remit such funds without direction of the principal, he does so at his own risk. *Heubach* vs. *Rother*, 2 Duer, 227.

The statute does not commence to run against the consignor of merchandise to a foreign port, until after the account of its sale by the consignee has been received by him. *Davis* vs. *Cram*, 4 Sandf., 355.

A suit against a stockholder, to charge him individually with a debt of his corporation, falls within subdivision 2 of the section now in question. It is not an action for a penalty, under section 92. *Corning* vs. *McCullough*, 1 Comst., 47.

In *Schroeppel* vs. *Corning*, 10 Barb., 576, affirmed by the Court of Appeals, 2 Seld., 107, it was held that, in an action brought to set aside an assignment of securities made as part of an usurious transaction, the statute will commence running from the date of that assignment, both as regards the assignment itself, and also as to any moneys paid under it: Paige and Foote, J. J., dissenting from the latter conclusion, and holding that the receipt of such moneys created a new cause of action.

In an action for the use of chattels, the statute is a bar to any portion of the claim which accrued more than six years before the action is brought. *Rider* vs. *Union India Rubber Company*, 4 Bosw., 169. *Same* vs. *Same*, 5 Bosw., 85.

The following cases have been decided under subdivision 6, or the analogous provisions of the Revised Statutes. In an action to enforce an equitable lien for unpaid purchase-money, the debt and not the lien is the cause of action, and the six years' limitation will apply; and the rule would seem to be the same in all cases where, formerly, the courts of common law and equity would have had concurrent jurisdiction. *Borst* vs. *Corey*, 15 N. Y., 505. See also *Mayne* vs. *Griswold*, 3 Sandf., 463; *Appleby* vs. *Brown*, 23 How., 207.

To render the defence, that the plaintiff discovered the facts constituting the fraud more than six years back, available, that defence must be distinctly pleaded and proved. *Sears* vs. *Shafer*, 2 Seld., 268. See also *Mayne* vs. *Griswold*, *supra*. In relation to what may or what may not be held to amount to a discovery, see *Bidwell* vs. *The Astor Mutual Insurance Company*, 16 N. Y., 263, which holds that there is no rule of law fixing the period in which delay in asserting a right under such circumstances will bar a party from relief, other than that contained in this statute.

(*c.*) Three Years.

The sheriff is entitled to the benefit of this limitation in an action against him for taking the goods of a third party, in the absence of any evidence of bad faith. *Dennison* vs. *Plumb*, 18 Barb., 89.

And even where the breach has been a gross one, the statute will

commence running in his favor from the date of the breach of duty on his part, and not from the time of its discovery. *Van Tassel* vs. *Van Tassel*, 31 Barb., 439.

But in such cases, as in others, the periods of suspension consequent upon the death of the party injured, and the taking out of administration to his estate, will be excluded. *Coddington* vs. *Carnley*, 2 Hilt., 528.

A suit against a stockholder for payment of a corporation debt, under the provisions of the Revised Statutes, was held not to be an action for a penalty, within the scope of this provision. *Corning* vs. *McCullough*, 1 Comst., 47. An action to charge trustees of a manufacturing corporation with its debt, on the ground of omissions and breaches of duty, was held to be an action for a penalty in *Merchants' Bank of New Haven* vs. *Bliss*, 21 How., 365; 13 Abb., 225.

(*d.*) One Year.

With reference to an action for an escape, it may, though not in strictness bearing upon the question of limitation, be convenient to observe, that the subsequent death of an escaped prisoner, before action brought, is no discharge of such liability. See *Tanner* vs. *Hallenbeck*, 4 How., 297.

The fact that a prior escape has taken place, unknown to the plaintiff, will not be available as a defence to the sheriff, in such an action, brought in due time after the escape actually complained of. *Renick* vs. *Orser*, 4 Bosw., 384.

In *Schroeppel* vs. *Corning*, 2 Seld., 107, affirming 10 Barb., 576, it was held that the limitation of one year, in relation to suits on usurious contracts, fixed by the provision of the Revised Statutes, cited at the conclusion of the preceding section, applies only to cases where money is actually paid for excess of usury, and not to a suit brought to set aside an assignment of securities for similar purposes, or for moneys received under such assignment. Under these circumstances, the usual statutory period of six years is applicable.

(*e.*) Ten Years.

This period includes, as a general rule, all suits or controversies of an equitable nature, except such as fall within the class of actions for relief on the ground of fraud, and which are specially excepted from its operation, and brought within the six year class, by subdivision 6 of section 91. And this exception applies generally in all cases, whether within the scope of the exclusive or of the concurrent jurisdiction of the courts of equity on that ground. See above under that class, and *Borst* vs. *Corey*, and *Mayne* vs. *Griswold*, there cited.

In the former of these decisions it was held, that an action to enforce a mere equitable lien for unpaid purchase-money, not secured by any special instrument, fell within the six years period. It was, in effect, an action for the debt itself, the lien being held to be a mere incident, and to be of no higher nature than the debt out of which it arose. It may be remarked that the decision is based on the antecedent provisions of the Revised Statutes, now repealed by section 73, the action being antecedent to the code, and that the reasoning in the opinion mainly depends upon the special wording of those provisions. The question may possibly, therefore, be considered as still open, under the present wording of the code, in cases as to which fraud cannot be predicated. In *Bloodgood* vs. *Bruen*, however, 4 Seld., 362, it was held incidentally, that the equitable right to an action against the estate of a deceased partner, where the surviving partner subsequently becomes insolvent, arises at the time of such insolvency, and is barred in ten years therefrom. The question was not raised, but it might fairly be contended that the remedy against the deceased partner's estate, was as much a mere incident to the original indebtedness, as the lien for such original debt, sought to be enforced in *Borst* vs. *Corey*.

A suit for enforcement of a mortgage, or lien secured by deed, is clearly within the longer limitation. *Vide Borst* vs. *Corey*, *supra*, p. 510. See also *Pratt* vs. *Huggins*, before cited. A suit for enforcement of a debt against the real estate of a testator in the hands of the devisee, has been held to be purely equitable, and to fall within the ten years limitation. *Elwood* vs. *Diefendorf*, 5 Barb., 398.

An action for an account in respect of transactions between the cashier of a bank and the bank itself, with a view to ascertain the balance due, claimed by the plaintiff, as purchaser of all demands at a judicial sale of the bank assets, was held to be strictly equitable, and within the ten years limitation in *Mann* vs. *Fairchild*, 14 Barb., 548.

An administrator, who had failed to prove his debt against the intestate's estate for ten years, was held to be barred under this section. *In re Rogers*, *Administrator*, 11 L. O., 245.

In relation to the applicability of this period of limitation (commencing from the expiration of the previous statutory provision of three years), in a suit to charge the debts of a testator on his real estate in the hands of devisees, see close of previous section (42), and *Elwood* vs. *Diefendorf* and *Wood* vs. *Wood*, there cited.

The statute does not commence to run, against a party in actual possession of property, until after his actual eviction, although his cause of action might have previously accrued. *Bartlett* vs. *Judd*, 23 Barb., 262.

As between pledger and pledgee, the time at which the former is en-

titled to redeem, will be that from which the statute commences to run, nor will the subsequent receipt of the profits of the thing pledged, by the latter, avail to constitute a new cause of action, or alter the computation of the time of limitation. *Roberts* vs. *Sykes*, 30 Barb., 173; 8 Abb., 345.

In a suit for the purpose of reforming a deed, the statute does not commence to run, if ever, until the discovery of the error complained of, and the assertion of an adverse claim in consequence. *Bartlett* vs. *Judd*, 21 N. Y., 200. See also, as to the enforcement of unfulfilled conditions in an antenuptial settlement, *De Pierret* vs. *Thorn*, 4 Bosw., 266.

(*f.*) Disabilities, &c.

Although inserted in the Code, as part of the chapter devoted to general provisions (section 101), in relation to disabilities, has more peculiar reference to the statute, as applicable to personal estate only, and is therefore referred to here. There are no reported cases since the Code immediately bearing upon its terms. In relation to the date from which the period allowed will be counted, see *Phelan* vs. *Douglass*, 11 How., 193, already cited under the head of *Real Estate*. Refer to sections 106 and 107, on the subject of disabilities, generally considered.

The two following subjects, though of a general nature, and inapplicable to any specific period of limitation, fall naturally within the head of personal, as contradistinguished from real estate, and will therefore be considered in the present connection. The former of them is in fact classified, by the framers of the Code, in the chapter devoted to that particular subject; the latter, forming the subject of section 110, is disassociated by them, and included in the chapter of general provisions.

(*g.*) Account Current, Effect of.

The present wording of section 95, dating, as above noticed, from 1849, is far more liberal in its scope than the previous provision of 1848, or than the old law upon the subject; under which, it was held in *Hallock* vs. *Losee*, 1 Sandf., 220, that items on one side only were not sufficient to take a case of current account out of the statute, and that there must be items on both sides, within the period of limitation, to have that effect.

To bring the case within the present statute, however, it seems clear that the account must not merely be not one-sided, but that, to have that operation, it must be one in respect of mutual dealings, commenced before, but continued within the period of limitation. See, as to the law on this subject prior to the Revised Statutes, but now obsolete, *Ogden* vs. *Astor*, 4 Sandf., 311. The subsequent receipt of profits on a thing

pledged, by the pledgee, will not avail to make out a case of mutual accounting, but time will run as against the pledgor from the period when he was entitled to redeem. *Roberts* vs. *Sykes*, 8 Abb., 345; 30 Barb., 173.

To bring a case within the statute, the dealings must be direct, and the account an open account between the actual parties. Where therefore one of the parties to such an accounting had purchased a demand against the other, on an open account between the latter and a third party, it was held that his demand on such assigned claim, was barred by the lapse of six years from the time it accrued to his assignor, though the assignment was made before the statute attached, and mutual dealings had subsequently been continued between the assignee and the debtor. *Green* vs. *Ames*, 4 Kern., 225.

(*h.*) Acknowledgment or Part Payment.

The Code prescribes, as will be seen by section 110, that, to bar the operation of the statute, an acknowledgment or new promise must be in writing, signed by the party to be charged thereby. This rule is now imperative.

It destroys, therefore, the authority of the previous class of cases, giving effect to a parol acknowledgment or new promise under similar circumstances. *Vide Watkins* vs. *Stevens*, 4 Barb., 168; *Wakeman* vs. *Sherman*, 5 Seld., 85; and *case below*, 11 Barb., 254; *Beach* vs. *Tooker*, 10 How., 297; *Philips* vs. *Peters*, 21 Barb., 351; *Carshore* vs. *Huyck*, 6 Barb., 583. However binding in its form, such a promise will now, for the future, be unavailing. See *Wadsworth* vs. *Thomas*, 7 Barb., 445; 3 C. R., 227; *Esselstyn* vs. *Weeks*, 2 Kern., 635; 2 Abb., 272; reversing, 2 E. D. Smith, 116; *Hope* vs. *Bogart*, 1 Hilt., 544.

In *Gillespie* vs. *Rosenkrants*, 20 Barb., 35, and *Glen Cove Mutual Insurance Company* vs. *Harrold*, 20 Barb., 298, it is, however, held that this doctrine does not extend to cases where the right of action had accrued prior to the Code; such cases being, by section 73, expressly excluded from the operation of the whole title referring to this subject; and that, accordingly, in such cases, the former law governs, and a parol acknowledgment, though made subsequent to the Code, will still be sufficient to take the case out of the operation of the statute. See also *Winchell* vs. *Bowman*, 21 Barb., 448; affirmed as *Winchell* vs. *Hicks*, 18 N. Y., 558. The *dictum* in this last report (p. 566), seems to overrule the contrary view, as maintained in *Van Alen* vs. *Feltz*, 32 Barb., 139; 9 Abb., 277.

The acknowledgment, by letters, of a balance due upon a note, and a remittance, to be applied on account of it, within six years, were held in *McMullin* vs. *Grannis*, 10 L. O., 57, to be sufficient to take the case out

of the statute; and it was also held, that under such circumstances, the *onus* will lie on the defendant setting up the statute, to show that there was another indebtedness to which such acknowledgment might refer.

To have the effect in question, the acknowledgment relied upon must be direct and voluntary. If deficient in either of these respects it will be unavailing. Thus in *Bloodgood* vs. *Bruen*, 4 Seld., 362; reversing *same case*, 4 Sand., 427, it was held that a recognition of the plaintiff's debt by the defendant, in an answer in another suit brought by a different party, was not sufficient to revive the claim. 1. Because it was not made to the plaintiff or to any one representing him, but to a stranger. 2. Because the admission was not voluntary. 3. Because the defendant there in question did not make the alleged admission in the character of executor, in which he was sued, but in another; and, 4. Because, if the admission had been made by him in the character of executor, it could not bind the estate of the testator. If he could do so in any manner, it could only be by a positive contract. It was likewise held that the party in question, as surviving partner, could not, by any act of his, revive the debt as against the estate of his deceased partner.

See likewise, on first of these heads, *Wakeman* vs. *Sherman*, 5 Seld., 85; see also *Watkins* vs. *Stevens*, 4 Barb., 168, as to a debt barred by a bankrupt, or an insolvent discharge.

The insertion of a creditor's name in an insolvent's schedule, was, on like principles, held not to be a sufficient acknowledgment to take the case out of the statute. *Avery's case*, 6 Abb., 144.

Neither does a devise, for the payment of debts generally, without particular specification, prevent the statute from running, as against a debt due prior to the testator's decease. *Martin* vs. *Gage*, 5 Seld., 398.

To defeat the operation of the statute by a part payment, such payment must appear to be made on account of the specific claim, and on account of a larger debt. It must also be voluntary on the part of the debtor, and consistent with an intent to pay the balance. Thus, a *pro-ratâ* payment by an administratrix, under a surrogate's decree, was held to be no promise on her part to pay such balance, so as to deprive her of the benefit of the statute, in *Arnold* vs. *Downing*, 11 Barb., 554.

In *Woodruff* vs. *Moore*, 8 Barb., 171, it was held that the payment of a note by the indorser, after the statute of limitations had expired, on action brought against him by the then holder before the statute had run out, did not avail to revive his claim against the maker, against whom the statute had also run. The payment was held to be a payment on his own contract as indorser, and not to have been money paid to the use of the maker.

In cases of a strictly joint indebtedness, the acknowledgment of either

party will, of course, suffice to bind both, while the joint interest subsists. If, however, that joint interest be severed, the subsequent acknowledgment of either of the parties, will not suffice to revive it as against the other. Thus, in *Lane* vs. *Doty*, 4 Barb., 530, it was held that a surviving principal on a joint promissory note, could not revive the debt by acknowledgment or part payment, as against the representatives of the surety deceased, even though the transaction took place within six years. In *Van Keuren* vs. *Parmelee*, 2 Comst., 523, it was, in like manner, held that, after the dissolution of a partnership, a subsequent acknowledgment by one of the partners, did not avail to revive the debt as against the firm.

Where the liability is joint and several, a payment by one of the parties, whether in respect of principal or interest, will not avail to revive the debt as against the others, but only as against himself. *Bogart* vs. *Vermilyea*, 10 Barb., 32; 3 C. R., 142; 1 C. R. (N. S.), 212; affirmed by Court of Appeals, 6 Seld., 477; *Dunham* vs. *Dodge*, 10 Barb., 566; *Shoemaker* vs. *Benedict*, 1 Kern., 176. See likewise, as to the general principle, *Lewis* vs. *Woodworth*, 2 Comst., 512. *Reed* vs. *McNaughten*, 15 Barb., 168, holding the contrary, as regards a payment of interest, is stated to have been reversed by the Court of Appeals, in *Winchell* vs. *Hicks*, 18 N. Y., 558 (561).

In the above cases, the surety, or party jointly liable, sought to be charged, and setting up the statute, had taken no part in the transaction. Where, however, two out of three sureties on a promissory note, being called upon by the holder for payment, referred him to the principal, and the principal, on such reference, made a payment on account, it was decided that such part payment extended so as to bind the two sureties in question. The third, who took no part in the transaction, was held, on the contrary, to be discharged. *Winchell* vs. *Hicks*, 18 N. Y., 558; affirming *same case*, headed as *Winchell* vs. *Bowman*, 21 Barb., 448. See also *Monroe* vs. *Potter*, 22 How., 49; 34 Barb., 358.

Where two out of three joint and several promisors, made an assignment in trust for creditors, it was held that a part payment by the trustee, availed to suspend the statute as against such two assignors, but not as to the third party, also originally liable. *Barger* vs. *Durvin*, 22 Barb., 68.

This conclusion is, however, controverted, on the ground that the assignee is not the agent of the debtor for that purpose, in *Pickett* vs. *King*, 34 Barb., 193; and, being a general term decision, it must be looked upon as overruling the former.

An action on a demand taken out of the operation of the statute by a subsequent acknowledgment or part payment, is in the nature of an action on the old demand, and not on the new promise, and should be

brought accordingly. *Carshore* vs. *Huyck*, 6 Barb., 583; *Philips* vs. *Peters*, 21 Barb., 351; *Winchell* vs. *Bowman*, 21 Barb., 448; affirmed, *Winchell* vs. *Hicks*, 18 N. Y., 558 (566); *Van Allen* vs. *Feltz*, 32 Barb., 139; 9 Abb., 277.

In *Carroll* vs. *Carroll*, 11 Barb., 293, acts of the executor in the management of the estate, were held to be sufficient acknowledgments of his continued liability as such, and to prevent the statute from running, as between him and the devisees.

A payment made on account of a general bill, but accompanied by a protest as to a particular item, does not prevent the statute from running as to that item. To take the case out of its operation, such payments must be general in their nature. *Peck* vs. *New York and Liverpool United States Mail Steamship Company*, 5 Bosw., 226.

§ 44. *General Provisions.*

Before quitting the subject of limitations, it is proposed to consider such of the provisions of chapter IV. of this portion of the Code as above cited, as have not been already disposed of in connection with the subject of personal actions, taking those provisions in their order, as they appear in the chapter in question.

(*a.*) Commencement of Action.

As to the law on the subject of the commencement of an action against joint contractors, immediately previous to the Code, *vide Vandenburgh* vs. *Biggs*, 3 How., 316.

It will be observed that the section now in question (§ 99), prescribes distinctly what may be considered as an attempt to commence an action, sufficient to take the case out of the operation of the statute. The student must be careful, in this connection, not to confound the technical commencement of an action with the acquisition of jurisdiction by the court, in such proceedings, when first instituted. Jurisdiction may, under section 139 of the Code, be acquired by the allowance of a provisional remedy, but such acquisition of jurisdiction will not be sufficient of itself to bar the operation of the statute. See also amendment in section 122 as to the effect of a notice of *lis pendens*. To have that effect there must be a positive service of process, or a delivery of that process for service, in the manner prescribed by section 99. Under the recent amendment of section 132 (1862), the filing of a notice of *lis pendens* is to be considered as the commencement of an action for the purposes of that section, *i. e.*, for the acquisition of a charge on the property claimed, provided that step be followed up by service of the summons within the time there specified. It may probably be held that the commence-

ment of the action in this manner would not, either, be sufficient to take the case out of the operation of section 99. A voluntary appearance of the defendant is the only other condition that will avail for that purpose. Such an appearance is, under section 139, "equivalent to personal service of the summons," on the defendant appearing. The obtaining such an appearance is therefore no longer an attempt to commence, but an actual commencement of the action. As to the inefficiency of the mere allowance of a provisional remedy to form a basis for ulterior proceedings, independent of that remedy itself, see *Kendall* vs. *Washburn*, 14 How., 380. *Moore's Executors* vs. *Thayer*, 6 How., 47; *In re Griswold*, 13 Barb., 412. The mere indorsement of the sheriff on the summons, of the date, is not, however, conclusive, or even sufficient evidence of its being delivered to him for the purpose of service. It must be proved independently, by specific evidence, or possibly by a certificate under 2 R. S., 440, § 78. *Wardwell* vs. *Patrick*, 1 Bosw., 406.

As to the rules by which the time of the actual commencement of an action will be computed, see *McGraw* vs. *Walker*, 2 Hilt., 404.

The amendment of a complaint dates back to the actual commencement of the action, and will save the statute from attaching, even as to a new cause of action thereby first introduced. *Ward* vs. *Kalbfleisch*, 21 How., 283.

(*b.*) Suspension of Limitations.

By Absence.

On reference to section 100, as above cited, it will be seen that, to suspend the statute as against an actual debtor, both departure and residence out of the state are required. The "*animus revertendi*" is therefore an essential element in any decision of the question. Under the Code, as it stood from 1849 to 1851, a simple departure was, however, sufficient. *Vide supra;* note to section.

The provision as to residence has, however, received a liberal construction. To constitute a party a non-resident under this provision, a change of domicile is not necessary; a material absence is sufficient, as contradistinguished from a temporary departure, followed by an immediate or speedy return. *Harden* vs. *Palmer*, 2 E. D. Smith, 172.

But a mere temporary absence, with a view to a return to the state as the debtor's residence, will be of no avail. *Wheeler* vs. *Webster*, 1 E. D. Smith, 1; *Hickok* vs. *Bliss*, 34 Barb., 321.

The provision in the first part of the section, that the statute shall not run as against a debtor, absent when the cause of action accrued, until after his return, is equally applicable to a non-resident as to a resident. Time will not commence to run against him until he shall come

into the state. *Cole* vs. *Jessup*, 6 Seld., 96; 10 How., 515; reversing *same case*, 2 Barb., 309; *Ford* vs. *Babcock*, 2 Sandf., 518; 7 L. O., 270; *Carpenter* vs. *Wells*, 21 Barb., 593.

But this rule is confined to natural persons. A foreign corporation does not come within, and cannot plead the statute. *Olcott* vs. *The Tioga Railroad Company*, 20 N. Y., 210; reversing *same case*, 26 Barb., 147. See also *Dart* vs. *The Farmers' Bank of Bridgeport*, 27 Barb., 337 (343).

The operation of the section is not confined to any one single absence of the debtor. Any number of successive absences, however numerous, may be accumulated, and the aggregate of the whole will have to be deducted from the period of limitation. A return, however short, without residence, is, however, sufficient to set the statute in motion. *Ford* vs. *Babcock*, 2 Sandf., 518; 7 L. O., 270; *Harden* vs. *Palmer*, 2 E. D. Smith, 172; *Berrien* vs. *Wright*, 26 Barb., 208; *Cole* vs. *Jessup*, 6 Seld., 96; 10 How., 515; *Cutler* vs. *Wright*, 22 N. Y., 472 (477); overruling *Dorr* vs. *Swartwout*, 5 L. O., 172.

The death of the debtor during his absence works the following results: If he was so absent at the time the debt accrued, the statute will only commence to run as against his representatives, from the time of granting of letters of administration in this state. *Davis* vs. *Garr*, 2 Seld., 124. But if, when actually indebted, he subsequently depart, his personal exemption is no longer available, and the statute will commence to run as against his representatives, excluding only the statutory time allowed to them as such. N. B. One year under the Code, and eighteen months previous to its passage. *Christopher* vs. *Garr*, 2 Seld., 61.

In cases of a joint and several liability, the operation of the statute is individual. It does not run against one of two makers of a joint and several promissory note, while such maker is residing in a foreign country, though the other remain a resident, and the action, in the mean time, becomes barred as against him. *Bogart* vs. *Vermilyea*, 6 Seld., 447; affirming *same case*, 1 C. R. (N. S.), 312. See also previous decision in *same case*, 10 Barb., 32; 3 C. R., 142. See likewise *Denny* vs. *Smith*, 18 N. Y., 567; *Cutler* vs. *Wright*, 22 N. Y., 472 (477). By these decisions *Halden* vs. *Crafts*, 4 E. D., Smith, 490; 2 Abb., 301, is so far overruled.

But, where the liability is joint, and not joint and several, as in the case of partners, the statute will not run in favor of one of them during his absence. *Davis* vs. *Kinney*, 1 Abb., 440.

(*c.*) Death of Party.

The effect of the death of a party interested, as extending the period

during which the statute will run in favor of his representatives, has already been considered in the present and the next previous section. See cases of *Bucklin* vs. *Ford*, 5 Barb., 393; *Christopher* vs. *Garr*, 2 Seld., 61; *Davis* vs. *Garr*, 2 Seld., 124; *Coddington* vs. *Carnley*. above cited. See likewise *Carroll* vs. *Carroll*, 11 Barb, 293, as to virtual suspension of the statute by acts and declarations of executors. See also *Arnold* vs. *Downing*, 11 Barb., 554, and *Martin* vs. *Gage*, 5 Seld., 398, as to the extent to which the power of a representative to plead the statute will remain unaffected, either by a surrogate's decree, or a general devise for payment of debts.

(*d.*) Injunction or Prohibition.

It is not necessary for a plaintiff to plead specially that an injunction obtained by the defendant has been actually served upon him. It is sufficient if he had notice of it, and the disabilities of absence and stay by injunction may be concurrent. *Berrien* vs. *Wright*, 26 Barb., 208.

(*e.*) Concluding Remarks.

A foreign statute of limitations, however unquestionable as the *lex loci*, is wholly unavailable in an action brought within this state. *Vide* Story on Conflict of Laws, ch. XIV., §§ 576 to 583, inclusive.

Section 108, exempting actions brought against moneyed corporations on bills, notes, &c., put into circulation as money, from all limitation whatsoever, will not have escaped attention.

BOOK III.

OF THE COMMENCEMENT OF AN ACTION, AND THE PRELIMINARIES THERETO, WHEN NECESSARY

CHAPTER I.

OF THE PRELIMINARIES TO THE COMMENCEMENT OF AN ACTION IN CERTAIN CASES.

§ 45. *Various Preliminaries.*

(*a.*) Infants.

Before an action can be commenced by or on behalf of an infant plaintiff, a guardian *ad litem* must be regularly appointed. As to the mode of procedure for that purpose, see chapter IV. of this book.

If the summons be previously issued, the whole proceeding will be irregular, and, on application, will be set aside. *Vide Hill* vs. *Thacter*, 3 How., 407; 2 C. R., 3.

It is equally essential to the regularity of ulterior proceedings against an infant defendant, that a guardian should be appointed in due time. A judgment taken against an infant, without such previous appointment, was accordingly absolutely set aside, with costs, in *Kellogg* vs. *Klock*, 2 C. R., 28.

The old practice, of suing by a next friend, is, as a general rule, absolutely abolished by the Code, and an infant must now sue or defend by a guardian alone, in all cases. *Hoftailing* vs. *Teal*, 11 How., 188. See also *Hulbert* vs. *Young*, 13 How., 413.

Special authority is given to institute a suit for partition on behalf of an infant tenant in common, by chapter 277 of the Laws of 1852. In this particular proceeding, the appointment of a next friend, instead of a guardian, is prescribed by section 2, according to the old practice. So also, special statutory proceedings may be originated by a next friend. See *In re Whitlock*, 32 Barb., 48; 19 How., 380; 10 Abb., 316. The change in nomenclature, for it amounts to little more, effected by sections 115 and 116 of the Code, seems to have been overlooked by

the legislature in framing the statute of 1852, above cited. The reference to the Revised Statutes is also erroneous. The provisions intended to be referred to, are evidently sections 2, 3, and 4, of title III., chapter V. of those statutes, and not chapter I., as the reference stands in section 2. In relation to the proof necessary to authorize such an appointment, and the mode in which the facts should be stated in the referee's report, see *In re Marsac*, 15 How., 383.

As to the presumption in favor of the regularity of a surrogate's sale, where infants are concerned, whether made before or since the Revised Statutes, *vide Chandler* vs. *Northrop*, 24 Barb., 129.

(*b.*) Lunatics, &c.

As before noticed under the head of *Parties*, special statutory authority is given to the committee of a lunatic, or person of unsound mind, to sue in his own name for any debt or demand transferred to him, or to the possession of which he is entitled as such. But, before commencing such a suit, the committee should apply to the court for leave to sue, otherwise he may be held responsible for the costs. His position in this respect is precisely analogous to that of a receiver—the practice in which case is below considered.

There remains, however, a large class of cases, as there noticed, to which this statutory authority does not extend. In all these, the lunatic or other disqualified individual must sue, or be sued, in person (*vide McKillip* vs. *McKillip*, 8 Barb., 552); and the previous leave of the court must be obtained, before a suit can properly be instituted.

The course to be pursued by a party having a claim against the estate of a lunatic, of which a committee has been appointed, is to apply to the court by petition, to enforce his claim. If that claim is undisputed, the committee will be ordered to pay it; if disputed, so as to bring it seriously in question, a reference will be ordered, or the plaintiff will be permitted to bring an action to determine its justice and extent. He will not be allowed to commence such an action without the express sanction of the court. And, even where there appears to be a right of action, the preference will be given to a reference under the control of the court. *Williams* vs. *Estate of Cameron*, 26 Barb., 172. *Soverhill* vs. *Dickson*, 5 How., 109. The same rule holds good as to proceedings against the estate of an habitual drunkard. *Hall* vs. *Taylor*, 8 How., 428.

The commencement of a suit against a lunatic's estate, without leave so obtained, is a contempt of court, and, on application, proceedings in it will be restrained. A judgment so obtained is also liable to be set aside, on suggestion of fraud, or undue advantage taken on the part of the plaintiff. It is not, however, *ipso facto* void, but only voidable;

and, when no real defence was shown, the courts have refused to interfere. *Sternbergh* vs. *Schoolcraft*, 2 Barb., 153. See likewise *Crippen* vs. *Culver*, 13 Barb., 424.

The above cases apply to proceedings against the estate of a lunatic, after inquisition found and appointment of a committee. Before such inquisition, there would not appear to be any special restriction; though in a proper case, the court would doubtless interfere, and stay proceedings until the appointment of a committee. Till such inquisition found, the usual presumption of sanity would of course apply. The declarations of an habitual drunkard, prior to his being declared such, were accordingly admitted in *Davis* vs. *Carpenter*, 12 How., 287.

Inquisition, when found, is conclusive evidence of incapacity, and no subsequent act of an habitual drunkard will have any avail. *Wadsworth* vs. *Sherman*, 14 Barb., 169; affirmed, 4 Seld., 388. Even the issuing of a commission, if known to a party dealing with the drunkard, will render the transaction voidable for fraud. *Griswold* vs. *Miller*, 15 Barb., 520. And the finding on a subsequent inquisition, dating back the lunacy of a party who had executed a bond and warrant of attorney, to a period antecedent to that execution, was held to render such transaction voidable, in the discretion of the court. *Person* vs. *Warren*, 14 Barb., 488.

(*c.*) Receivers.

As a general rule, a receiver cannot properly bring or defend a suit without the special authority of the court. If he does so without authority, and fails in the proceeding, he will be personally responsible for the costs (*Phelps* vs. *Cole*, 3 C. R., 157); and this is so, even when he is appointed in supplementary proceedings; *Smith* vs. *Woodruff*, 6 Abb., 65. He has, it is true, under rule 92, a general authority in such cases, to sue for and collect all debts due to the debtor; but still, if he exercise that authority without the special sanction of the court, he does so at his peril, in case of failure. When prosecuting with leave, and in good faith, his exemption from liability for costs, stands on the same footing as that of an executor or administrator prosecuting in behalf of an estate. *St. John* vs. *Denison*, 9 How., 343. When once authorized, he is not merely enabled, but bound to proceed. *Winfield* vs. *Bacon*, 24 Barb., 154.

In all cases, therefore, a receiver, before suing, should apply to the court for leave to do so. The application should be made in the suit in which he is appointed. It is, of course, *ex parte* in its nature, and should be founded on affidavit, showing the facts under which he applies, and which render a suit expedient; or, which seems the better course, those facts may be laid before the court in the form of a verified

petition. An action against a receiver should not be commenced without leave of the court; and the doing so without permission, may be adjudged a contempt, and the proceedings in such action set aside. *De Groot* vs. *Jay*, 30 Barb., 483; 9 Abb., 364; reversing, it would seem, *Jay's case*, 6 Abb., 293; *Taylor* vs. *Baldwin*, 14 Abb., 166; *Hubbell* vs. *Dana*, 9 How., 424. Nor can he properly be restrained by injunction in the discharge of his official trust. To restrain him, under these circumstances, is in fact to restrain the operation of the court itself. The proper remedy is to apply to that court for instructions. *Van Rensselaer* vs. *Emery*, 9 How., 135; *Hubbell* vs. *Dana*, *supra*; *Winfield* vs. *Bacon*, 24 Barb., 154. As to the general power of a receiver to apply to the court for instructions, *vide Curtis* vs. *Leavitt*, 1 Abb., 274; 10 How., 481.

It has been held incompetent for a receiver under supplementary proceedings, to bring an action in the nature of a creditor's bill, to set aside a fraudulent assignment by the debtor. *Seymour* vs. *Wilson*, 16 Barb., 294; *Hayner* vs. *Fowler*, 16 Barb., 300; *Gasper* vs. *Bennett*, 12 How., 307. See also *Goodyear* vs. *Betts*, 7 How., 187. The contrary, and that such receiver, as representing the creditors, may maintain such an action, is established by the Court of Appeals in *Porter* vs. *Williams*, 5 Seld., 142; 12 How., 107. See likewise *Seymour* vs. *Wilson*, 15 How., 355; reversing *same case*, 16 Barb., 294, above cited. No opinions are, however, given in this last case, and the report itself is indecisive.

(*d.*) Suit in Forma Pauperis.

The practice in this case is expressly defined by the Revised Statutes, title I., chapter VIII., part III., 2 R. S., 444, 445.

The application may be made to the court in which the suit is brought or intended to be brought, section 1. It may, under section 2, be made by petition, stating:—1. The nature of the suit or intended suit; 2. That the applicant is not worth $20, except wearing apparel and necessary furniture, and excepting the subject-matter of the action, when he is not in possession thereof.

The petition must be verified by the applicant's own affidavit, and supported by a certificate of a counsellor of the court, that he has examined the claim, and is of opinion that the applicant has a good cause of action. The court, if satisfied of the facts, and that there is a meritorious cause of action, shall, by rule, admit the applicant to prosecute as a poor person, and shall assign him counsel, solicitors, and attorneys, and all other officers requisite for prosecuting the suit, who shall do their duty without fee or reward—section 3.

By such order such applicant is exempted from the payment of fees and from costs, though it seems that, if he succeed, he may recover

them (*vide* Graham's Pr., p. 917); but, in case of misconduct, the privilege may be revoked—sections 4, 5.

It is obvious that, when made antecedent to suit, this application is *ex parte* in its nature. If made *pendente lite*, notice should be given to the opposite party. *Ostrander* vs. *Harper*, 14 How., 16.

Where the motion for this purpose on behalf of a non-resident infant plaintiff, was unreasonably delayed until after the cause had been noticed for hearing, the court refused to make the order, or to exonerate the attorney and guardian *ad litem* from the responsibility they had already incurred. *Florence* vs. *Bulkley*, 1 Duer, 705; 12 L. O., 28.

An application of the same nature was denied, on the ground of delay, in *Ostrander* vs. *Harper*, 14 How., 16. It was further held that the statute does not extend at all to the case of a plaintiff against whom judgment has been already rendered, and who merely seeks to appeal from that judgment. Also, that it is not competent for one of several plaintiffs to sue in this manner. The poverty of all must be shown, and the leave must extend to all, or it cannot be granted.

In *Roberti* vs. *Carlton*, 18 How., 416, it was held that liability for the costs of a former suit, is no bar to an application of this nature; and also that a married woman may so prosecute for injuries to her separate property.

(*e.*) Actions by Attorney-General.

Under section 430 of the Code, the leave of the court is also made a prerequisite to actions brought by the attorney-general, for vacating the charters, or annulling the existence of corporations other than municipal, under the peculiar circumstances there specified.

See, as to proceedings of this description, *Smith* vs. *The Metropolitan Gas Light Company*, 12 How., 187. The mode of application, under such circumstances, will doubtless be analogous to that in the case of any other officer of the court seeking its direction. See above, under the head of *Receivers*.

This provision is not applicable to suits by the same officer for intrusion into office, &c., under section 432 of the Code, and those succeeding. In these cases, the determination rests with the attorney-general alone, and not with the court, and *mandamus* will not lie. *The People* vs. *The Attorney-General*, 22 Barb., 114; 13 How., 179; 3 Abb., 131.

(*f.*) Actions on Judgments.

The following are the provisions of the Code on this subject, which have come down unaltered:

§ 71. (64.) No action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same

parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace, shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

The above section operates, as will be seen, by way of imposition of a condition precedent, prior to the bringing of actions on the judgments of courts of record, and, as to those on justices' judgments, by way of limited prohibition.

It is evident that, under the wording of the section itself, this prohibition does not, as regards the latter, extend to the bringing of such an action on a justice's judgment in any other county. Under the machinery, as to docketing judgments of that nature, as provided by section 63, it is clear, however, that the plaintiff has now a sufficient remedy, without any necessity of going through the form of a fresh proceeding.

An action cannot be commenced in another court upon a judgment rendered, in a court of record, on service by publication. Its effect is strictly that of a judgment *in rem*, not *in personam*. *Force* vs. *Gower*, 23 How., 294.

(*g.*) As to Judgments of Courts of Record.

The provisions of this section are equally applicable to judgments recovered before as after the Code. *Finch* vs. *Carpenter*, 5 Abb., 225.

The defendant's remedy, in the event of an action being brought against him, without leave obtained, as prescribed, is by motion to set aside the summons and complaint. *Same case.* On such a motion, when made by the defendant, leave will not be granted to the plaintiff to commence such action, *nunc pro tunc.* He cannot claim this as part of his opposition, but will be put to a substantive motion on his own part, so as to give the defendant a full opportunity of answering the affidavits on which it is grounded.

The mode of procedure, on the part of the plaintiff, is an application to the court on notice to the adverse party. This application may be made, either on verified petition, or on notice of motion, and affidavits. Good cause must be shown, as expressly prescribed by the section. The affidavits, or petition, must, therefore, be full and explanatory, showing the existence of the judgment, and the reasons why relief cannot be obtained without a fresh proceeding. In framing such affidavits, express attention should be paid to the provisions of section 284, enabling the

issuing of execution after five years, by leave of the court, on notice to the adverse party. The affidavits should show good reason, sufficient to convince the court that this provision is inadequate to afford relief, under the peculiar circumstances, without going through the forms of a fresh proceeding, or the application may probably be denied.

The necessity of obtaining leave, as above prescribed, is enforced in *Thompson* vs. *Sutphen*, 2 E. D. Smith, 527, where a judgment obtained in an action commenced without it, was reversed on the ground of the omission.

The words "between the same parties," however, operate to give the section a comparatively limited scope. Where, therefore, the interests of either party are in any manner changed, the prohibition is no longer effective.

Thus it has been held, that where a judgment has been assigned *bonâ fide*, the assignee may commence and maintain a fresh action in his own name, without any necessity of applying for leave for that purpose. *Tufts* vs. *Braisted*, 4 Duer, 607; 1 Abb., 83; *McButt* vs. *Hirsch*, 4 Abb., 441; *Kopper* vs. *Howe*, 2 Hilt., 69. Nor does the section prohibit the setting up of a justice's judgment by way of counter-claim or defence, especially by an assignee. *Clark* vs. *Story*, 29 Barb., 295.

A suit by an executor or administrator of a deceased party is similarly maintainable, without leave or previous application to the court. Under these circumstances, the representative has no remedy under section 284, and a fresh action is the only course that is open to him. This action is in the nature of the ancient proceeding by *scire facias*, and the right to bring it is expressly reserved by section 428, abolishing that form of remedy. *Thurston* vs. *King*, 1 Abb., 126; *Cameron* vs. *Young*, 6 How., 372; *Wheeler* vs. *Dakin*, 12 How., 537; *Jay* vs. *Martine*, 2 Duer, 654; *Ireland* vs. *Litchfield*, 22 How., 178.

An action in the nature of a creditor's bill, is not an action on a judgment within the meaning of this section, and may accordingly be maintained without previous leave of the court. *Quick* vs. *Keeler*, 2 Sandf., 231; *Dunham* vs. *Nicholson*, 2 Sandf, 636; 3 C. R., 205; *Catlin* vs. *Doughty*, 12 How., 457.

In *Smith* vs. *Paul*, 20 How., 97, an application of this nature was held to be the proper form of bringing up the question, as to whether a claim under an old judgment was or was not extinguished by the defendant's subsequent discharge in insolvency, alleged to be void.

By chapter 153 of 1853, p. 283, a special prohibition is imposed on the multiplication of suits against shareholders in a joint-stock company, founded on a judgment against the company itself. No more than one suit can, under this provision, be brought and be maintained

against any such shareholder at one time, nor until the same shall be determined, and execution issued and returned unsatisfied, in whole or in part.

The Assistant Justices' or District Courts in the City of New York, are not Justices' Courts, within the meaning of the section now in question. It will be equally necessary, therefore, to obtain the leave of the court, before commencing an action on one of their judgments, as it is in the case of one of the higher courts of record. *Thompson* vs. *Sutphen*, 2 E. D. Smith, 527; *Mills* vs. *Winslow*, 2 E. D. Smith, 18; 3 C. R., 44. See also *Jackson* vs. *Whedon*, 1 E. D. Smith, 141; 3 C. R., 186. By these cases *McGuire* vs. *Gallagher*, 2 Sandf., 402; 1 C. R., 127, is clearly overruled.

(*h.*) On Justices' Judgments.

It will be seen by the cases last above cited, that the New York local courts of inferior jurisdiction are not courts of a justice of the peace, within the purview of the foregoing section.

As to an action on a justice's judgment, generally considered, see *Humphrey* vs. *Person*, 23 Barb., 313; and *Nicholls* vs. *Atwood*, 16 How., 475.

In *Smith* vs. *Jones*, 2 C. R., 78, it was held by Hogeboom, county judge, that a justice's judgment could not be set up by way of set-off in another action, when rendered within five years. See, however, *per contra*, *Clark* vs. *Story*, 29 Barb., 295.

A justice's judgment, from the time a transcript is docketed in the county clerk's office, loses its primary quality, and becomes a judgment of the County Court; and an action cannot afterwards be brought upon it without leave of the latter. *Lyon* vs. *Manly*, 18 How., 267; 32 Barb., 51; 10 Abb., 337.

(*i.*) Notice or Demand in certain Cases.

Under section 348, as amended in 1862, no action can be commenced on an undertaking given on appeal from a judgment to the general term, till ten days after service of notice on the adverse party, of the entry of the order or judgment of affirmance. And in case of security being duly giveu, on an appeal to the Court of Appeals, proceedings in any such action are further suspended, till the determination of such appeal.

In proceedings against the corporation of New York, presentment of the plaintiff's demand to the comptroller for adjustment, and a second demand in writing, made upon that officer after the expiration of twenty days from the first presentation of the claim, are made a prerequisite by chapter 379 of 1860, p. 645, § 2.

CHAPTER II.

OF PROCEEDINGS FOR SETTLEMENT OF A CONTROVERSY WITHOUT ACTION BROUGHT.

General Remarks.

THE modes of accomplishing this object, as pointed out by the Code, are twofold. 1. The bringing such controversy to a final decision upon a case, without going through the forms of an action; and 2. The confession of judgment in respect thereof; which subjects will be successively treated.

The proceeding by arbitration, under the powers conferred by the Revised Statutes, is also analogous to the former of the above. This remedy belongs, however, strictly to the class of special proceedings, and, as such, falls without the scope of this work.

§ 46. *Submission of Controversy.*

The following are the provisions of the Code upon this subject, as contained in chapter I., title XII., part II. They were all contained in the original measure, and have come down unaltered.

CHAPTER I.

Submitting a Controversy, without Action.

§ 372. (325.) Parties to a question of difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceeding in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case at a general term, and render judgment thereon, as if an action were depending.

§ 373. (326.) Judgment shall be entered in the judgment-book, as in other cases, but without costs, for any proceeding prior to notice of trial. The case, the submission, and the copy of the judgment, shall constitute the judgment-roll.

§ 374. (327.) The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

The sections above cited point out clearly the nature of the case and

submission to be prepared, when this mode of procedure is adopted, and also of the affidavit by which that case, when prepared, must be verified.

On the case being set down for argument, it assumes, in all essential respects, the character of an appeal to the general term, on questions of law, from a judgment ordinarily obtained; both parties being, as to all questions of fact, concluded by the submission. The practice has, in short, the effect of enabling parties desirous of effecting an amicable, yet conclusive settlement of a controversy between them, to place their case precisely on the same footing as if, after having gone through all the regular stages, it had been passed upon by a single judge, and an appeal taken from that decision to the general term, but without the delay and expense consequent on the ordinary proceedings for that purpose.

The papers are to be printed as on an appeal, at the expense of the party who stands in the position of plaintiff. Rule 43.

This remedy is only appropriate in cases where no action has been brought. Where, therefore, pending a regular action, the parties agreed upon and submitted a case in this form, it was held that the action must be deemed to be abandoned, or at least suspended, and the case considered and determined entirely independent of it. If the submission of the case did not of itself work a discontinuance of the action, it must do so when followed by a judgment, and must, meanwhile, suspend it. *Van Sickle* vs. *Van Sickle*, 8 How., 265.

In *Lang* vs. *Ropke*, 1 Duer, 701; 10 L. O., 70, it was held that the provisions of the Revised Statutes for granting a new trial, as of right, in ejectment cases, are not applicable to a judgment rendered on a submission of this nature. Such a proceeding is not an action within the scope of those provisions. The submission has the effect of passing the case at once to the general term; nor can the parties be released, on motion, from the legal effect of their submission, so as to enable them to litigate before a jury the facts upon which they had agreed.

The necessity of the fullest consideration of the whole of a controversy, in all its possible bearings, before this course, if proposed by the adverse party, is finally assented to, is so clearly evidenced by the above decision as to need no comment.

This conclusion is made still more clear by the case of *Neilson* vs. *The Commercial Mutual Insurance Company*, 3 Duer, 455, which holds that, where a case is thus submitted, the court can only determine the questions of law that arise upon the facts agreed upon, and has no power to vacate the submission, or to send the cause to a jury, for determination of any questions of fact that upon its face may appear to be doubtful. The court must itself construe the submission. As to the costs in such cases, see *same case*, 3 Duer, 683.

This mode of proceeding is wholly inapplicable to cases in which an infant is legally interested. It rests essentially upon consent, which an infant has no power to give, nor has the court, it would seem, any power to appoint a guardian for such purpose. *Fisher* vs. *Stilson*, 9 Abb., 33.

And, of course, the same principle will hold good as to any other controversy, to which a person incompetent to give a consent is a necessary party.

§ 47. *Confession of Judgment.—Statutory Provisions.*

The provisions of the Code on this subject form chapter III., title XII., part II. They run as follows:—

Chapter III.

Confession of Judgment, without Action.

§ 382. (335.) A judgment by confession may be entered, without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

§ 383. (336.) A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

§ 384. (337.) The statement may be filed with a county clerk, or with a clerk of the Superior Court of the city of New York, who shall indorse upon it and enter in the judgment-book a judgment of the supreme or said superior court, for the amount confessed, with five dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, shall thenceforth become the judgment roll. Executions may be issued and enforced thereon, in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in instalments, and the instalments are not all due, the execution may issue upon such judgment for the collection of such instalments as have become due, and shall be in the usual form, but shall have indorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of

said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the instalments thereafter to become due; and whenever any further instalments become due, execution may, in like manner, be issued for the collection and enforcement of the same.

In 1848 the powers were less comprehensive, and confined to the Supreme Court. In 1849 the power to the Superior Court was added. In 1851 the section was enlarged, and remodelled in its present form.

The above remedy is equivalent to the *cognovit*, or warrant of attorney, under the former practice. The following provision is made by section 424 in relation to entry of judgment on securities of that nature, taken before the passage of the Code, but on which such judgment had not then been perfected:

§ 424. Upon any bond and warrant of attorney executed and delivered before the first day of July, 1848, judgment may be entered in the manner provided by sections 382, 383, and 384, upon the plaintiff's filing such bond and warrant of attorney, and a statement, signed and verified by himself, in the form prescribed by section 382.

This section dates from 1849. There was no analogous provision in the original measure.

It will be remembered that, under subdivision 8 of section 53 of the Code, before cited, justices of the peace are authorized to enter judgment on confession, where the amount does not exceed $250, in the manner prescribed by the Revised Statutes, article VIII., title IV., chapter II., part III. The student is referred to such provision, but the practice on the entry of a judgment, under the authority so given, does not enter within the scope of this work. Reference may, however, be made to the recent cases of *Chapin* vs. *Churchill*, 12 How., 367; and *Pollock* vs. *Aldrich*, 17 How., 109.

§ 48. *Subject Generally Considered.*

In cases where judgment is entered upon an old *cognovit* or warrant of attorney, the whole of the ancient forms are swept away, and the only course now adoptable is that prescribed by section 424, in connection with the other provisions of the Code above cited. *Allen* vs. *Smillie*, 12 How., 156; 1 Abb., 354. It was also considered that where the security had, as there, been in existence more than five years, notice was necessary to be given to the adverse party before the entry of judgment, or the issuing of execution thereon, in analogy to the provisions of section 284 and 71 of the Code, as above cited or referred to.

It is not competent for a trustee to confess judgment so as to bind the trust estate, even by direction of the court. The proper course is

an order to him to pay the debt out of the first moneys received from the estate. *Mallory* vs. *Clark*, 9 Abb., 358 ; 20 How., 418.

Nor can a party accept a confession as a trustee for others ; the liability must be direct, in order to sustain the proceeding. *Marks* vs. *Reynolds*, 12 Abb., 403 ; reversing *same case*, 20 How., 338.

A confession of judgment, under the Code, cannot be made in an action arising out of tort. The proceeding is only authorized in respect of money due or to become due, or for security against a contingent liability. *Boutel* vs. *Owens*, 2 Sandf., 655 ; 2 C. R., 40.

This form of proceeding is, in the same case, held to be wholly inapplicable where an action has been already commenced. It is no longer a " confession of judgment without action."

It was likewise there held that the confession in that particular case was wholly void, on the ground that it had been obtained from the defendant whilst in custody at the suit of the plaintiff, and without the presence of an attorney to advise him. See also *Wilder* vs. *Baumstack*, 3 How., 81.

A confession prepared by the plaintiff, in the absence of a legal adviser for the defendant, will, in all cases, be strictly watched, and if there be any absence of good faith in it, or the proceedings under it, a stay will be at once granted, or it may even be set aside, although the statements on the motion may be contradictory. *Merritt* vs. *Baker*, 11 How., 456.

Where an action has been already commenced, the proper form for bringing about a virtual confession of judgment, is by an offer, under section 385 of the Code. This practice may be often conveniently adopted for bringing about the same result as a confession without action, especially where the preparation of such a confession would involve a long and complicated statement of facts. There can be no doubt that such an offer may be made and accepted, immediately the action is commenced ; or that, when made, it may embrace an acknowledgment of the whole of the plaintiff's demand.

Being an ordinary instead of a statutory proceeding, the rules of interpretation which govern it are much less rigid, and the power to amend or disregard errors in form, much more extensive. The courts, as will be seen below, are disposed to place a strict construction on the phraseology of a confession, and to require, as indispensable, a much greater precision and detail in averment, than such as is sufficient to sustain an ordinary complaint, and render it good upon demurrer. Such a complaint, however, if sufficient for the purpose of bringing a case to trial, is sufficient for the support of an offer, and of the consequent judgment entered upon it. See *Hill* vs. *Northrop*, 9 How., 525 ; also *Emery* vs. *Redfield*, 9 How., 130. The proceeding, however, if taken in this form,

must be strictly *bonâ fide*. Any absence of good faith will unquestionably be equally fatal to a judgment entered upon offer as to one entered upon confession, if such judgment be impeached by subordinate creditors. See *Bridenbecker* vs. *Mason*, 16 How., 203.

As between confessor and confessee, a judgment entered on a confession deficient in particularity, must be, nevertheless, sustained. It is not competent for the former to impeach his own act. *Von Keller* vs. *Muller*, 3 Abb., 375, note; *Ely* vs. *Cook*, 2 Hilt., 406; 9 Abb., 366; *Park* vs. *Church*, 5 How., 381; 1 C. R. (N. S.), 47. A mere assignee for creditors stands, as representing the debtor himself, or the creditors at large only, in the same position. *Beekman* vs. *Kirk*, 15 How., 228. So, also, as to an administrator. *Whitney* vs. *Kenyon*, 7 How., 458. See generally, as to where creditors do not intervene, *Delaware* vs. *Ensign*, 21 Barb., 85 (91).

Nor can a judgment, entered upon confession, be collaterally impeached. Though voidable in a direct proceeding at the instance of other creditors, it is not void, even though irregular. *Sheldon* vs. *Stryker*, 34 Barb., 116; 21 How., 329.

A confessee of judgment has been held precluded from impeaching a prior confession by the debtor, as against an assignee for value, where his own statement had tended to induce the assignment. Nor can a plaintiff, whose own statement is defective, impeach a prior confession for defect. *Rae* vs. *Lawser*, 18 How., 23; 9 Abb., 380, note.

And, under similar circumstances to the above, an amendment has been permitted. *Johnston* vs. *Fellerman*, 13 How., 21; *Davis* vs. *Morris*, 21 Barb., 152. In the latter case it is stated that no superior equities existed, and, in the former, an express reservation was made, that such leave was given, so as not to interfere with the rights of any judgment-creditors, which might, in the mean time, have attached.

In *Mann* vs. *Brooks*, 7 How., 449, an amendment of this description seems to have been sustained, even though subsequently impeached by a junior judgment-creditor, and the possibility of an amendment being granted, where the transaction was satisfactorily proved to be *bonâ fide*, and the form of the confession was defective, on account of a misapprehension of the practice and of the requirements of the statutes, is also recognized by Dean, J., in *Chappell* vs. *Chappell*, 3 Kern., 215 (222). See, however, disapproval by S. B. Strong, J., in *Boyden* vs. *Johnson*, 11 How., 503 (506).

In *Von Beck* vs. *Shuman*, 13 How., 472, it was held that the better practice, under such circumstances, would be to set aside the judgment altogether, leaving the plaintiff to pursue such course as he might be advised.

On an application by a junior judgment creditor, a judgment entered

on an insufficient confession is not merely voidable, but void, and cannot stand. *Von Beck* vs. *Shuman*, *supra*; *Bonnell* vs. *Henry*, 13 How., 142; *Hammond* vs. *Bush*, 8 Abb., 152; *Chappell* vs. *Chappell*, 2 Kern., 215. See also numerous cases below cited.

Where, however, the confession itself was sufficient, and the judgment entered upon it was irregular, through the mere omission of an officer of the court, an amendment was permitted, even as against other judgment creditors. *Neele* vs. *Berryhill*, 4 How., 16. It was there held that the formal provisions of the statute, however imperative in terms, are nevertheless directory in their nature, and therefore the court will not allow an innocent party to suffer, from a mistake or omission of one of its officers in this respect. See also *Daly* vs. *Mathews*, 20 How., 267; 12 Abb., 403, note.

In *Post* vs. *Coleman*, 9 How., 64, the same disposition was evinced to disregard mere technicalities, and it was held that the defendant's signature to the verification following the statement, instead of to the statement itself, was a sufficient compliance with the statute; and, likewise, that the verification before one of the plaintiff's attorneys was no objection to the regularity of the judgment. The rule in that respect does not apply to affidavits preparatory to the commencement of a suit. There is then no suit pending.

It does not clearly appear in the report by whom the motion was made in this case. In *Purdy* vs. *Upton*, 10 How., 494, the first of these points, *i. e.*, that a signature to the verification only was a sufficient signature under the statute, was so held, on the motion of a junior judgment-creditor. The motion was granted, however, on other grounds. A verification by which the debtor merely swore "that he believed the above statement of confession to be true," was held sufficient in *Delaware* vs. *Ensign*, 21 Barb., 85.

A public officer, liable to be sued for services rendered to the public, may confess judgment in his official capacity; but the supervisors of the county will not be concluded, and may go behind it, and inquire whether the whole or part of the cause of action was a county charge. *Gere* vs. *Supervisors of Cayuga*, 7 How., 255.

A confession of judgment will, it seems, be good, though made to a substituted party, if the transaction be otherwise *bonâ fide*. *Paton* vs. *Westervelt*, 12 L. O., 7; 2 Duer, 362. See also *Purdy* vs. *Upton*, 10 How., 494 (497), and *Marks* vs. *Reynolds*, 20 How., 338.

A confession made by a person disqualified from entering into a contract, will be wholly void. So held, as to a married woman. *Wotkyns* vs. *Abrahams*, 14 How., 191. A warrant of attorney, executed by a person, subsequently found on inquisition to have been a lunatic at the time, was, on similar grounds, held voidable, and set aside on terms in

Person vs. *Warren*, 14 Barb., 488. A trustee cannot confess judgment so as to bind the trust estate. *Mallory* vs. *Clark*, 9 Abb., 358; 20 How., 418.

A judgment, confessed to a party who was already secured, by assignment in trust for himself and other creditors, under which he still claimed, has been set aside as fraudulent and void. If he would enforce it, he must abandon the assignment. *D'Ivernois* vs. *Leavitt*, 23 Barb., 63.

One partner cannot confess judgment as against the firm, without the consent of the other. Such judgment may probably be valid as against the party signing, but it will be void as against the other, and cannot be enforced against the joint property. *Stoutenburgh* vs. *Vandenburgh*, 7 How., 229. See also *Eversohn* vs. *Gehrman*, 10 How., 301; 1 Abb., 167; and *Groesbeck* vs. *Brown*, 2 How., 21; *Lambert* vs. *Converse*, 22 How., 265. In *Van Keller* vs. *Muller*, 3 Abb., 375, note, which at first sight might imply the contrary, the application was on the part of the confessor himself, and the other partner did not intervene.

The question as to how far an offer under section 385, made by one co-partner under similar circumstances, may or may not operate to sustain a judgment against the firm property, a point on which considerable discussion has arisen, does not fall in strictness within this division of the subject, and will be considered hereafter under its proper head.

It seems that the mere confession of a judgment is not *per se* a violation of an injunction restraining the disposition of property; but, if accompanied by acts showing an intent to dispose of such property, it will be held to be so. *Ross* vs. *Clussman*, 1 C. R. (N. S.), 91; 3 Sandf., 676.

An order vacating a judgment entered upon confession, is appealable to the Court of Appeals. *Belknap* vs. *Waters*, 1 Kern., 477.

A confession obtained and judgment entered thereon, by an attorney, during the creditor's absence and without his knowledge, but on which the attorney afterwards issued execution at the request of that creditor's partner, was held to be good, as regarded creditors whose judgments were recovered subsequent to such request. The acceptance was sufficient as against them. *Johnston* vs. *McAusland*, 9 Abb., 214.

(*a.*) Form of Confession.

The form of the document to be drawn up, and the requisites which it must embody, are clearly prescribed by section 383, as above cited. As to the affidavit, see *Post* vs. *Coleman*, *Purdy* vs. *Upton*, and *Delaware* vs. *Ensign*, *supra*.

The provisions in subdivisions 2 and 3, which require a concise statement of the facts out of which the indebtedness arose, or which

constitute the liability intended to be secured, have, nevertheless, given rise to considerable discussion.

It appears to have been frequently considered that a general allegation, such as would be sufficient to sustain a complaint for the same indebtedness or liability, would be sufficient, and the cases are numerous in which this course has been substantially pursued. It is clear, however, that this is not sufficient.

The statement of facts required by the legislature, is not for the mere purpose of sustaining the judgment itself, but for that of enabling other creditors of the defendant to test the *bona fides* of the transaction, by inquiry and examination into the facts stated, and as a guard against fraud. See *Chappell* vs. *Chappell*, 2 Kern., 215 (217, 218, 221); *Dunham* vs. *Waterman*, 17 N. Y., 9 (11); 6 Abb., 357; *Purdy* vs. *Upton*, 10 How., 494, and most of the other cases below cited.

It is proposed, in view of this general principle, to consider the different classes of indebtedness, as to which confessions of judgment have been either sustained or impeached, citing and considering the decisions under each head.

(*b.*) Promissory Notes.

The law upon this subject, is now settled by the cases of *Chappell* vs. *Chappell*, and *Dunham* vs. *Waterman*, above referred to.

The statement in *Chappell* vs. *Chappell*, 2 Kern., 215, merely described two promissory notes held by the plaintiff, averring that a specified amount was justly due thereon, without entering into any particulars as to their consideration and origin. This confession was decided to be bad. The reasoning on which that conclusion is predicated, is thus given in the opinion of Gardiner, C. J.: "If that object" (*i. e.*, the object of the legislature in enacting this provision) "was to improve the condition of the other creditors, by compelling the parties to spread upon the record a more particular and specific statement of the facts out of which the indebtedness arose, thus enabling them, by a comparison of that statement with the known circumstances and relations of the debtor, to form a more accurate opinion as to his integrity in confessing the judgment, than was possible under the former system, then the statement in this case is clearly insufficient."

The learned judge, after remarking that the maker did not become indebted by the mere execution of a written promise to pay money, added: "The statute looks not to the evidence of the demand, but to the facts in which it originated; in other words, to the consideration which sustains the promise. The law requires this to be concisely set forth, in the statement which is to form part of the record."

The same views are expressed by Dean, J., at page 221, in the fol-

lowing terms: "The intention of this requirement, was to compel the person confessing a judgment to disclose under oath, which oath was to become part of the public records, what was the real consideration of the judgment confessed, and to show, to all interested, the transaction out of which the debt originated."

In *Dunham* vs. *Waterman*, 17 N. Y., 9; 6 Abb., 357; reversing *same case*, 3 Duer, 166, a similar statement, containing a mere description of the note, adding, only, that it was given on a settlement of accounts between the plaintiff and the defendant on a specific date, was, in like manner, held to be void, and set aside.

But, where consideration for the note, by which the demand is evidenced, appears upon the face of the confession, the details need not be shown. A general allegation that it was given for money had, or money borrowed, will suffice. *Freligh* vs. *Brink*, 22 N. Y., 418; affirming *same case*, 18 How., 89; reversing decision, at special term, 16 How., 272; 30 Barb., 144; *Laning* vs. *Carpenter*, 20 N. Y., 447. And, where the facts in relation to the indebtedness appear fully, an omission to add the merely formal allegation that the sum for which judgment is confessed, "is justly due, or to become due," will not destroy the validity of the judgment. *Laning* vs. *Carpenter*, *supra*.

In all these cases, the application for relief was on behalf of a junior judgment-creditor: in *Dunham* vs. *Waterman*, by suit; in the others, by motion for that purpose.

These decisions are in affirmance of the same principles, as laid down in the following cases: *Plummer* vs. *Plummer*, 7 How., 62; *Bank of Kinderhook* vs. *Jameson*, 15 How., 41; *Johnston* vs. *Fellerman*, 13 How., 21; *Bonnell* vs. *Henry*, 13 How., 142; *Von Beck* vs. *Shuman*, *ibid.*, 472; *Moody* vs. *Townsend*, 3 Abb., 375; *Kendall* vs. *Hodgins*, 7 Abb., 309; 1 Bosw., 659. See also *Beekman* vs. *Kirk*, 15 How., 228; *Winebrenner* vs. *Edgerton*, 30 Barb., 185; 17 How., 363; 8 Abb., 419; *Norris* vs. *Denton*, 30 Barb., 117. See also *Daly* vs. *Mathews*, 20 How., 267; 12 Abb., 403, note. In *Daly* vs. *Mathews*, above cited; in *Claflin* vs. *Sanger*, 11 Abb., 338, affirming *same case*, 31 Barb., 36; 17 How., 574; 9 Abb., 214, note; and also in *McKee* vs. *Tyson*, 10 Abb., 392, the rule seems to be too strictly laid down, and the cases to be deprived of their authority, so far as regards confession of judgment on a promissory note, by *Freligh* vs. *Brink*, above cited.

The above class of cases overrules *Mann* vs. *Brooks*, 8 How., 40; affirming *same case*, 7 How., 449; *Whitney* vs. *Kenyon*, 7 How., 458; and, so far, the opinion of Willard, J., in *Murray* vs. *Judson*, 5 Seld., 73 (84).

In *Post* vs. *Coleman*, 9 How., 64, a statement that the defendant gave his promissory note there described, for coal purchased of the plaintiff

for the use of the defendant's house, was held to be sufficient, and that the defendant's declaration that the debt was justly due, made it legally due, though, by the terms of the note, the credit had not expired. The debt became merged in the judgment.

In *Healey* vs. *Preston*, 14 How., 20, a confession for security to an accommodation indorser was similarly sustained, though executed before the note was negotiated, and execution issued thereon, before it became due.

This point is also settled by *Dow* vs. *Platner*, 16 N. Y., 562, which holds that a statement in such case is sufficient, if it sets forth that the judgment is confessed to secure the plaintiff for a debt justly to become due on his indorsement, as the surety of the plaintiff, and for his benefit, of bills and notes, which are fully described, as to names, dates, amounts, and times of payment.

This case and that immediately previous, fall, as will be seen, more peculiarly under subdivision 3, rather than subdivision 2 of the section in question.

A confession for "amount due to the plaintiff for plaintiff's liability on guarantee, now past due, to a specified person, for a specified sum," was held void for want of sufficient particulars, in *Winebrenner* vs. *Edgerton*, 30 Barb., 185; 17 How., 363; 8 Abb., 419.

The case of a confession of judgment, by a drawer or indorser of a bill of exchange, or the payee or indorser of a note, in respect of his liability as such, irrespective of the transaction between the original parties; or by a maker of a note tainted with usury, as between him and the original holder, but executed by such maker to a *bonâ fide* purchaser of such note, without notice so as to avoid it in his hands, does not appear to have as yet come up for adjudication. The same principles will probably be held to govern them. The statement, if taken, should be full and particular, setting out sufficient to show the original consideration for the note or bill, where the maker, or drawer, or a party cognizant of the facts is the confessor. Where the confession is simply from a prior to a subsequent indorser, it might be argued that this could not be reasonably required, but, whether this be so or not, care must be taken in all cases to make the statement as distinct and specific as it is possible to make it, and to set forth all facts, necessary to show title in the actual plaintiff and liability in the defendant, within the knowledge of the latter.

The test might seem to be this: It is necessary to set forth in the confession all facts which, if his debt were contested, would be necessary to be proved by the plaintiff, to enable him to recover; concisely, of course, but substantively and distinctly.

See, as to a confession purporting to state a liability, on sundry

promissory notes in a schedule thereto annexed, but deficient in want of particularity, both as to the statement itself, and also as to the schedule, *Hamann* vs. *Keinhart*, 11 Abb., 132.

(*c.*) Goods Sold.

The amount of detail necessary in a confession of this nature has also been the subject of considerable discussion. On the one hand, it is not necessary that the statement for this purpose should assume the form, or give the full information of a bill of particulars. The statute requires a concise, not a detailed statement of facts. On the other, that statement should be full enough specifically to point out the nature, date, and amount of the transaction or transactions out of which the indebtedness arises.

The cases on this head are numerous, and in some slight degree conflicting.

The following have been held to be insufficient: A confession for goods, &c., sold and delivered to the confessor by the confessees, "and purchased by me," *i. e.*, the confessor, "in the years 1851 and 1852." *Schoolcraft* vs. *Thompson*, 7 How., 446. This decision is, it is true, reversed, 9 How., 61, but it is so fully sustained by those next cited, that it may be considered as of authority, and the reversal overruled. See especially *Boyden* vs. *Johnson*, 11 How., 503 (505).

Confessions, merely stating certain articles to have been sold and delivered, and not giving time, place, quantity, or price or value. *Purdy* vs. *Upton*, 10 How., 494. A confession, simply for goods sold and delivered, or on a note for goods sold and delivered, not giving further particulars. *Moody* vs. *Townsend*, 3 Abb., 375. A statement that the plaintiff, at various times in two given years, sold and delivered to the defendant large quantities of meat, on which there was due a balance specified. *Neusbaum* vs. *Keim*, 7 Abb., 23; see also *same case*, 1 Hilt., 520; the total amount of the debt and the amount of the payments should have been concisely stated. A statement that the debt arose upon a promissory note given by the debtor to a third party for goods sold, and indorsed by such third party to the plaintiff. *Claflin* vs. *Sanger*, 31 Barb., 36; 17 How., 574; 9 Abb., 214, note; affirmed, 11 Abb., 338. Or a similar statement, that the note in question was given for goods, furnished before its date. *McKee* vs. *Tysen*, 10 Abb., 392 (see, however, observations as to the above cases, so far as regards a confession on a promissory note). A statement that the indebtedness was for "goods sold and delivered, and upon an accounting had, on the day when the confession was made." *Boyden* vs. *Johnson*, 11 How., 503, citing *Chappell* vs. *Chappell*, 2 Kern., 215, as generally applicable. Statements that the indebtedness arose on account of goods,

wares and merchandise, and property sold and delivered by the plaintiff, for which the defendant had not paid; and another for goods, &c., sold and delivered by the plaintiff to the defendant "since the 1st day of January, 1855," the judgment being signed in December of that year, *Gandal* vs. *Finn*, 23 Barb., 652; 13 How., 418: such case laying down generally, that, when the indebtedness is for property sold, the confession "should state when it was sold, the general nature of the property, and the time of credit, the price or aggregate of the purchase, and the amount of payments, if any." A form is also suggested on p. 422. See likewise, to the same effect, *Daly* vs. *Mathews*, 20 How., 267; 12 Abb., 403, note; *Clements* vs. *Gerow*, 30 Barb., 325. A statement that the indebtedness was for goods heretofore delivered to the defendant, and now due. *Hoppock* vs. *Donaldson*, 12 How., 141.

This last case, however, is in favor of a comparatively liberal construction of the statute, and a statement in a second confession naming a specific sum, "being the amount of a bill of goods this day purchased of" the plaintiff, was held sufficient, and the judgment on that confession was supported.

A confession that the indebtedness arose on a balance of account of merchandise, purchased by the defendant of the plaintiff, on various bills, commencing on a specified day in 1855, the last bill being dated on a specified day in 1856, amounting to a specified total; and then proceeding to state that such total had been reduced by payments made by the defendant, commencing on a specified day in 1855, the last payment being made on a specified day in 1856 (the total of such payments being given), and leaving a balance also specified, and the principles, as to credit, on which that balance was struck, explained, was held sufficient in *Mott* vs. *Davis*, 15 How., 67, by Harris, J., a more liberal view being taken by him of the intrepretation of the statute, than in most of the other cases, above cited.

A confession for a sum due for grain, purchased on or about a given day, without specifying the kind or quantity of grain, was sustained in *Healy* vs. *Preston*, 14 How., 20.

In *Delaware* vs. *Ensign*, 21 Barb., 85, a confession "for goods, wares, and merchandise," sold and delivered to the defendant by the plaintiff, in a specified month, was sustained. See also, *Reid* vs. *Clark*, noticed p. 90. It must be remarked, however, that *Delaware* vs. *Ensign* came up simply as between confessor and confessee, on a motion for a new trial, and was not a case where adverse rights were set up. See report, p. 91-92.

A confession for a debt for goods, &c., sold and delivered at various times, as per schedule annexed—no schedule being annexed in fact—was held void in *Clements* vs. *Gerow*, 30 Barb., 325.

(*d.*) Balance of Account.

A mere statement that a balance is due from the defendant to the plaintiff, on account, is insufficient. The total amount of the debt and of the payments should be stated. *Neusbaum* vs. *Keim*, 7 Abb., 23. See also, *Gandal* vs. *Finn*, 23 Barb., 152; 13 How., 418; *Boyden* vs. *Johnson*, 11 How., 503. See, however, *Mott* vs. *Davis*, 15 How., 67, *supra*, sustaining a confession of this nature, where general particulars of the account between the parties, were given.

(*e.*) Moneys Lent.

A confession of indebtedness for "money lent and advanced at divers times, from the 1st of December, 1853, to date," was held bad, as not sufficiently particular, in *Davis* vs. *Morris*, 21 Barb., 152; *Chappell* vs. *Chappell*, 2 Kern., 215, *supra*, being considered as conclusive. See also *Ely* vs. *Cook*, 2 Hilt., 406; 9 Abb., 366.

And confessions, merely purporting to be for money borrowed, without specifying the amount, were held bad for want of particularity, in *Clements* vs. *Gerow.*, 30 Barb., 325.

The same conclusion is come to with respect to a statement that, since a day in 1845, the plaintiff had lent to the defendant, a religious incorporation, a specified sum to pay off and discharge their debts, and which had been used for such purpose. It should have stated whether the money was all advanced at one time or at several times, and when and in what sums; and also how the debts, paid off with the amount, arose, for what consideration, who were the creditors, and whether the amounts were real *bonâ fide* debts of the congregation. A number of judgments confessed to individual creditors, with the same deficiency of detail, were also set aside. *Stebbins* vs. *The East Society of the M. E. Church of Rochester*, 12 How., 410. See likewise, *Hammond* vs. *Bush*, 8 Abb., 152.

A confession that, on or about a date specified, the plaintiff lent to the defendant in cash a fixed sum, which sum, with interest thereon, giving the total amount, was then justly due, was sustained in *Johnston* vs. *McAusland*, 9 Abb., 214.

(*f.*) Judgments and Written Instruments.

Even where the plaintiff's debt arose upon a balance due on three previous judgments, a confession, merely stating that fact, without giving the dates, amounts, or time of docketing, or the balance due on each, or the particulars of the consideration out of which they arose, was held fatally defective, on the authority of several of the above cases, and of *Chappell* vs. *Chappell*, and *Dunham* vs. *Waterman*, in particular;

and relief was altogether denied to the defendant, whether by way of reformation of the judgment, or enforcement of an equitable lien. *Hammond* vs. *Bush*, 8 Abb., 152.

A similar conclusion was come to in *Beekman* vs. *Kirk*, 15 How., 228, as to a confession predicated on a judgment, without giving particulars as to when or how it was obtained, or whether any thing remained due on it; and likewise on a bond, giving the date and amount, but not stating what amount remained due on it; though the relief there moved for was refused on other grounds.

A confession for an indebtedness stated to arise "on the sale and conveyance by the plaintiff to the defendant of his right, title and interest in certain property, in January, 1854," without giving any further particulars, or even that the amount mentioned was a fixed price, was likewise held to be insufficient in *Thompson* vs. *Van Vechten*, 5 Abb., 458.

(*g.*) Contingent Liability.

The requisites of a confession of this nature are clearly defined in subdivision 3, of section 383, as above cited.

If deficient in particularity, so as not to give full information upon the subject of the liability, against which security is intended to be given, the judgment entered under it will not stand. *Hamann* vs. *Keinhart*, 11 Abb., 132.

If a confession be made to cover any future indebtedness, it should be particularly specified, and should appear to be called for by some existing liability. *Boyden* vs. *Johnson*, 11 How., 503.

Where, however, the confession was made to indemnify the plaintiff as accommodation indorser, it was held sufficient to give a full description of the notes in question, and that the consideration of the notes need not be stated, nor that they had been actually discounted, that fact being inferable. *Marks* vs. *Reynolds*, 12 Abb., 403; reversing, but not on this point, *same case*, 20 How., 338.

A judgment, confessed on warrant of attorney under the old practice, executed to secure future advances, was held good in *Truscott* vs. *King*, 2 Seld., 149; but, when such advances are made to the amount of the judgment, and afterwards paid by the debtor, the authority so given is, as against subsequent incumbrances, *functus officio*, and cannot stand as a continuing security for still further advances, or for the final balance of a current account.

(*h.*) Entry of Judgment.

A confession before the actual entry of judgment, is a bare authority. Until such judgment is actually entered by the clerk, there is no suit, no recovery or adjudication, actual or formal, nothing, of which notice

can be given to subsequent incumbrancers or grantees, or a lien acquired so as to bind them. It is this act of the clerk that not only creates the lien, but the judgment. Till it is done, there is neither. *Blydenburgh* vs. *Northrop*, 13 How., 289.

Although no previous adjudication of the court is required, to warrant the entry of a judgment by confession; yet, when entered, it has all the qualities and attributes of other judgments. Such entry requires the exercise of the jurisdiction of the court; and, when entered, the judgment is the judicial act of the court, recorded by its clerk. *Lansing* vs. *Carpenter*, 23 Barb., 402; affirmed, 20 N. Y., 447.

A judgment entered by the clerk of the county of Schuyler, before the completion of its legal creation, was accordingly held to be void.

Every direction of the statute must be fully complied with, before the judgment is valid and a lien. The bare entry in the judgment-book, by the clerk, is of itself insufficient; he must also indorse such judgment upon the statement itself. Both are essential to its validity. *Neele* vs. *Berryhill*, 4 How., 16. This is, however, the duty of the clerk, and not of the attorney; and, if omitted, the court will not allow the party to suffer, but will direct an amendment of the record, "*nunc pro tunc*." See also *Daly* vs. *Mathews*, 20 How., 267; 12 Abb., 403, note.

A description in an execution, when issued, that the judgment had been obtained in an action, has been held not to be a substantial defect, it being clear that the proper judgment was intended. *Healey* vs. *Preston*, 14 How., 20.

A judgment of this nature may be vacated in part, and may stand valid, as to another portion of the indebtedness professed to be secured. See *Marks* vs. *Reynolds*, 12 Abb., 403, above cited; *Lambert* vs. *Converse*, 22 How., 265.

(*i.*) Vacating of Judgments by Confession.

As before stated, the following points are distinctly established by the cases above cited.

1. That it is competent for subsequent judgment-creditors of the debtors to attack, and, if irregularly entered, to set aside a judgment entered by confession, and that this right also extends to a *bonâ fide* purchaser of lands, or to an adverse trustee.

2. That it is competent for parties interested in attacking such a judgment to do so, either by motion entitled and made in the proceeding itself, which, for the purposes of such motion, is treated as an action, or, if they elect, to take that course by means of separate and independent suit brought for that purpose, or by way of counter-claim in a suit for enforcement of the judgment.

3. It is not competent for a creditor at large to take either proceed-

ing. Before he can do so, he must reduce his indebtedness into actual judgment. A voluntary assignee stands in the same position as representing the creditors at large.

4. It is not competent for the party confessing, to move to avoid his own confession, on the ground of a defect of statement; and this incompetency extends to those who derive title under him, and are bound by his acts, as voluntary assignees, representatives, &c., or even, it would seem, a subsequent confessee. Nor can such judgment be impeached, in a strictly collateral proceeding.

But this last disqualification does not extend to a *bonâ fide* purchaser or grantee of lands on which the judgment is an apparent lien. *Kendall* vs. *Hodgins*, 1 Bosw., 659; 7 Abb., 309; *Neusbaum* vs. *Keim*, 7 Abb., 23; 1 Hilt., 520.

Or to a trustee, representing an interest, adverse to that of the party confessing or suffering the entry of judgment against him. *Lowber* vs. *The Mayor of New York*, below cited.

See above, on first and second points, *Chappell* vs. *Chappell*, 2 Kern., 215; *Bonnell* vs. *Henry*, 13 How., 142; *Kendall* vs. *Hodgins*, 1 Bosw., 659; 7 Abb., 309; *Lowber* vs. *Mayor of New York*, 15 How., 123; 5 Abb., 484; 26 Barb., 262; and also 5 Abb., 325 (being the case of a judgment suffered); *Winebrenner* vs. *Edgerton*, 30 Barb., 185; 17 How., 163; 8 Abb., 419; *Dunham* vs. *Waterman*, 17 N. Y., 9; 6 Abb., 357; *Neusbaum* vs. *Keim*, 1 Hilt., 520; 7 Abb., 23; also, *Hammond* vs. *Bush*, 8 Abb., 152; *Norris* vs. *Denton*, 30 Barb., 117; *Daly* vs. *Mathews*, 20 How., 267; 12 Abb., 403 (note).

On the third point, *Kendall* vs. *Hodgins*, 1 Bosw., 659; 7 Abb., 309; *Neusbaum* vs. *Keim*, 7 Abb., 23; 1 Hilt., 520; *Beekman* vs. *Kirk*, 15 How., 228; *Lowber* vs. *The Mayor of New York*, *supra*.

On the fourth point, *Neusbaum* vs. *Keim*, *supra*; *Beekman* vs. *Kirk*, 15 How., 228; *Sheldon* vs. *Stryker*, 34 Barb., 116; 21 How., 329; *Ely* vs. *Cook*, 2 Hilt., 406; 9 Abb., 366; *Davis* vs. *Morris*, 21 Barb., 152.

A defendant cannot be heard on a motion to set aside the judgment, for irregularity in matters merely directory; and, a lapse of one year will bar him from all relief in this respect. *Vide* 2 R. S., 282, § 2; *Park* vs. *Church*, 5 How., 381; 1 C. R. (N. S.), 47.

A defect in the statement of indebtedness is not, however, an irregularity, but is matter of substance, avoiding the judgment, and unamendable as against other judgment-creditors. See *Winebrenner* vs. *Edgerton*, 30 Barb., 185; 17 How., 363; 8 Abb., 419; *Von Beck* vs. *Shuman*, 13 How., 472; *Dunham* vs. *Waterman*, 17 N. Y., 9; 6 Abb., 357; *McKee* vs. *Tyson*, 10 Abb., 392; *Hammond* vs. *Bush*, 8 Abb., 152; *Boyden* vs. *Johnson*, 11 How., 503; *Johnson* vs. *Fellerman*, 13 How.,

21; *Clements* vs. *Gerow*, 30 Barb., 325; *Norris* vs. *Denton*, 30 Barb., 117; *Daly* vs. *Mathews*, 20 How., 267; 12 Abb., 403, note; *Chappell* vs. *Chappell*, 2 Kern., 215; *Bonnell* vs. *Henry*, 13 How., 142; all above cited.

CHAPTER III.

OF THE COMMENCEMENT OF AN ACTION.

§ 49. *Statutory Provisions.*

An action is commenced, in all cases, by summons.

The following are the provisions of the Code on this subject, and those immediately connected with it, as contained in title V., part II., of that measure:

TITLE V.

Of the Manner of Commencing Civil Actions.

§ 127. (106.) Civil actions in the courts of record in this State, shall be commenced by the service of a summons.

§ 128. (107.) The summons shall be subscribed by the plaintiff, or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the State, to be therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service.

§ 129. (108.) The plaintiff shall also insert in the summons a notice, in substance as follows:

1. In an action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint, in twenty days after the service of the summons.

2. In other actions, that if the defendant shall fail to answer the complaint, within twenty days after service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

Dates as it stands from 1849.

In 1848 the time allowed for answering was not referred to, and the notice under subdivision 2 was to specify the time and place of application to the court.

§ 130. (109.) A copy of the complaint need not be served with the summons. In such case, the summons must state where the complaint is or will

be filed; and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and in person, or by attorney, demands in writing a copy of the complaint, specifying a place within the State where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly, and, after such service, the defendant has twenty days to answer, but only one copy need be served on the same attorney.

Dates as it stands from 1851.

In 1848 the structure of this and the succeeding section was wholly different, and the service of the complaint was obligatory in the first instance.

In 1849 it was amended, approximating more closely to its present form, but allowing ten days only for a demand of copy of the complaint, when not served in the first instance.

§ 131. (109 and 110.) In the case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice, subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless within the time for answering, he shall, in writing, demand the same. If a defendant, on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff.

Passed in its present form in 1851. Before that year the first clause formed part of the preceding section, and this consisted only of the concluding sentence.

§ 132. (111.) In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterward, or, whenever a warrant of attachment, under chapter IV. of title VII., part II. of this Code, shall be issued, or at any time afterward, the plaintiff, if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and, if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceeding taken after the filing of such notice, to the same extent as if he were made a party to the action.

For the purposes of this section an action shall be deemed to be pending from the time of the filing of such notice, provided, however, that such notice shall be of no avail, unless it shall be followed by the first publication of the summons on an order therefor, or by the personal service thereof on a defendant within sixty days after such filing.

And the court in which the said action is pending may, in its discretion, at any time after the action shall have become abated, as is provided in section number one hundred and twenty-one, on good cause shown, and on application of any party aggrieved, after the action shall have become abated, as is provided in section one hundred and twenty-one, direct the notice authorized by this section to be removed from record by the clerk of any county in whose office the same may have been filed.

In 1848 this section was confined to actions affecting the title to real property. In 1849 and 1851 the wording was changed, the purport remaining substantially the same. In 1857 the authority to file such a notice in cases where a warrant of attachment has been issued was first conferred; and, in 1858, the persons who were to be deemed subsequent purchasers or incumbrances were first defined as at present.

The concluding clauses, giving to the filing of such a notice the effect of a commencement of the action, for certain purposes, were added upon the amendment of 1862.

§ 133. (112.) The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons, may, at his option, by an indorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly.

§ 134. (113.) The summons shall be served by delivering a copy thereof, as follows:

1. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation, only when it has property within this State, or the cause of action arose therein, or where such service shall be made within this State, personally, upon the president, treasurer, or secretary thereof.

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or, if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed; to such committee, and to the defendant personally.

4. In all other cases, to the defendant personally.

The preamble, and the three last subdivisions, have come down unchanged. The first, in 1848, consisted of only the first portion of the sentence; in 1849, the wording was changed, and the second portion added. In 1859 it was completed, by the addition of the third and concluding part.

§ 135. (114.) Where the person, on whom the service of the summons is to be made, cannot, after due diligence, be found within the State, and that

fact appears by affidavit, to the satisfaction of the court, or a judge thereof, or of the county judge of the county where the trial is to be had, and it in like manner appears that a cause of action exists against the defendant, in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this State, such court or judge may grant an order that the service be made by the publication of a summons, in either of the following cases:

1. Where the defendant is a foreign corporation, and has property within the State, or the cause of action arose therein;

2. Where the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein, with the like intent;

3. Where he is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action;

4. Where the subject of the action is real or personal property in this State, and the defendant has, or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein;

5. Where the action is for divorce, in the cases prescribed by law.

The order must direct the publication to be made in two newspapers, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the State, is equivalent to publication and deposit in the post-office.

The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown, at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant, against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and, if the defence be successful, and the judgment, or any part thereof, have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith, shall not be thereby affected. And, in all cases where publication is made, the complaint must be first filed, and the summons, as published, must state the time and place of such filing.

In actions for the foreclosure of mortgages on real estate, already instituted, or hereafter to be instituted, if any party, or parties, having any interest

in, or lien upon such mortgaged premises are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear, by affidavit, to the court, or to a justice thereof, or to the county judge of the county where the trial is to be had, such court, justice, or county judge, may grant an order that the summons be served on such unknown party or parties, by publishing the same for six weeks, once in each week successively, in the State paper, and in a newspaper printed in the county where the premises are situated, which publication shall be equivalent to a personal service on such unknown party or parties.

This section has undergone considerable variation.

In 1848 it was shorter and less comprehensive, nor was it subdivided as at present.

In 1849 it was first reduced into separate heads. The provisions, though enlarged from those of 1848, were still comparatively restricted, except only in subdivision 1, which was general, without limitation as to property or origin of the controversy, and the remedy was confined to actions on contract, or for damages for breach of contract.

In 1851 the section was added to and remodelled as it stands now, save only that the restriction last above referred to was still continued.

On the amendment of 1858, this restriction was removed.

The concluding clause was added upon the amendment of 1860.

§ 136. (115.) Where the action is against two or more defendants, and, the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, and, if they are subject to arrest, against the persons of the defendants served: or,

2. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone.

Passed as it stands in 1851. In 1848 it was much less comprehensive, both as regards the number of subdivisions, of which there were two only, and also as to their nature. In 1849 it was again changed, approximating more closely to its present form, but with differences in substance as well as form.

§ 137. (116.) In the cases mentioned in section 135, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

§ 138. (117.) Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, must be as follows:

1. If served by the sheriff, his certificate thereof; or,
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post-office, as required by law, if the same shall have been deposited; or,
4. The written admission of the defendant.

In case of service, otherwise than by publication, the certificate, affidavit, or admission, must state the time and place of the service.

Dates as it stands from 1851.

In the original Code the substance was the same, but the wording a little less particular and comprehensive.

§ 139. From the time of service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

In 1848 there was no such provision.

In 1849, the section, as then passed, consisted only of the first sentence, as it now stands. The second, as to the effect of an appearance, was added to it in 1851.

(*b.*) Act of 1853, as to Substituted Service.

The above are the whole of the provisions of the Code on the subject of this chapter.

In 1853, however, a separate measure was passed by the legislature, giving additional facilities for the service of process, and also of notices, &c., essential to the prosecution of an action when commenced.

The measure in question constitutes chapter 511 of the laws of that year, p. 974. It is entitled "an act to facilitate the service of process in certain cases," and its provisions run as follows:

Whenever it shall satisfactorily appear, to any court, or any judge of the Supreme Court, or any county judge, by the return or affidavit of any sheriff, deputy sheriff, or constable, authorized to serve or execute any process or paper for the commencement, or in the prosecution, of any action or proceeding, that proper and diligent effort has been made to serve any such process or paper on any defendant in any such action, residing in this state, and that such defendant cannot be found, or, if found, avoids or evades such service, so that the same cannot be made personally, by such proper diligence and effort, such court or judge may, by order, direct the service of any summons, subpœna, order, notice or other process or paper to be made by leaving a copy thereof at the residence of the person to be served, with some person of proper age, if admittance can be obtained, and such proper person found who will receive the same; and if admittance cannot be obtained, or any such proper person found, who will receive the same, by

affixing the same to the outer or other door of said residence, and by putting another copy thereof, properly folded or enveloped, and directed to the person to be served, at his place of residence, into the post-office in the town or city where such defendant resides, and paying the postage thereon. On filing with the clerk of the county where such defendant resides, or the county in which the complaint in any such action is by law to be filed, an affidavit showing service according to such order, such summons, subpœna, order, notice, or other process or paper, shall be deemed served, and the same proceedings may be taken thereon as if the same had been served by delivery to such defendant personally, or otherwise, as by law now required; but the court may, upon any application by them deemed reasonable, at any time, permit any defendant to appear and defend, or have such other relief, in any action or proceeding founded on any such service, as the nature of the case may require.

(*c.*) Unknown Defendants.

The following provision of the Code is also material in relation to suits, brought against a defendant whose name is, at such time, unknown to the plaintiff:

§ 175. (150.) When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and, when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

(*d.*) Special Indorsement.

By the Revised Statutes (2 R. S., 481, section 7), it is provided, that upon every process issued, to compel the appearance of the defendant to any action for the recovery of a penalty or forfeiture, there shall be indorsed a general reference to the statute by which such action is given.

There is as yet no reported decision on the subject of this provision; but it may probably be held that it is still in force, not being inconsistent with the Code, and, till the point is settled, it may be more prudent to comply with it in that class of cases.

§ 50. *Summons Generally Considered.*

(*a.*) Nature of.

Under section 127 as above cited, summons is the process by which every civil action is commenced. This provision does not really conflict with that in section 139, that, from the time of the allowance of a provisional remedy, jurisdiction may be acquired. Jurisdiction of this latter nature is merely limited, and for the purposes of the remedy itself, and, in fact, before a provisional remedy can be obtained, the summons

must, in all cases, be issued, if not served. See Code, sections 183, 206, 220, 227; see also *Burgess* vs. *Stitt*, 12 How., 401. For the purposes of ulterior proceedings, independent of that remedy, such jurisdiction is, practically, of no avail. See heretofore under the head of *Limitations*, section 44, of this work. Nor is the mere attempt to commence an action (see section 99 of the Code), of any greater avail. It merely serves to take the case out of the operation of the statute, and it must be followed by service of the summons, either personally or by publication, within a limited period, or it will be a nullity.

The provisions of the code have swept away the forms of the old practice, and a summons is necessary in all cases. An attempt to commence an action by service of declaration, soon after its coming into operation, was accordingly held to be a nullity, and the defect unamendable. *Diefendorf* vs. *Elwood*, 3 How., 285; 1 C. R., 42.

Where any other proceeding is necessary as a condition precedent to the right to sue, a summons previously issued will be a nullity. Thus a summons dated and issued in the name of an infant plaintiff, before the appointment of her guardian *ad litem*, was set aside as irregular. *Hill* vs. *Thacter*, 3 How., 407; 2 C. R., 3.

In proceedings for the determination of claims to real estate, summons in accordance with the provisions of the code, has been held to be the proper form of commencement under section 449, notwithstanding its discrepancy with the form of notice prescribed by the Revised Statutes. *Hammond* vs. *Tillotson*, 18 Barb., 332; overruling *Crane* vs. *Sawyer*, 5 How., 372; 1 C. R. (N. S.), 30.

The plaintiff will be bound by the form of his summons as issued, and cannot subsequently change his position before the Court. Where, therefore, he issued his summons as administrator, and subsequently declared generally, the variance was held to be fatal. *Blanchard* vs. *Strait*, 8 How., 83.

In one case, and one only, the issuing of a summons will not only be unnecessary, but unadvisable, and that is with reference to moneys collected by an attorney and not paid over on demand, in respect of which an attachment is issuable under the Revised Statutes. If, instead of issuing such attachment, the client bring an action in the ordinary course, the right to the former remedy will be held to have been waived, and it cannot be afterwards obtained. *Cottrell* vs. *Finlayson*, 4 How., 242.

Independent of the provisions of the Code below cited, it has been held to be necessary that the summons, when issued, should contain the name of the court in which the defendant is required to appear.

In *Ward* vs. *Stringham*, 1 C. R., 118, a summons and copy complaint, thus deficient, were held to be a nullity, and leave to amend was re-

fused. In an anonymous case, 2 C. R., 75, a judgment entered upon a summons so issued, the complaint not being served, was also set aside. In *Dix* vs. *Palmer*, 5 How., 233; 3 C. R., 214, the omission in question was considered "a fatal objection" (though held to be waived by subsequent acquiescence); and in *James* vs. *Kirkpatrick*, 5 How., 241; 3 C. R., 174, the same view was sustained, and a judgment, entered on such a summons, set aside as irregular, leave to amend being only granted, on terms equivalent to the bringing of a fresh action.

In *Walker* vs. *Hubbard*, 4 How., 154, this omission was held to be a defect, but amendable. In that case a complaint had been served. In *Dix* vs. *Palmer*, and *James* vs. *Kirkpatrick*, it does not appear that such had been the case. *Tallman* vs. *Hinman*, 10 How., 89, conflicts, however, with the above view. It is there decided, that an order refusing to set aside a judgment taken by default, on the ground of this specific defect, is not appealable, on the ground that the statement of the name of the court is not a statutory prerequisite, and that the omission is therefore one which it is competent for the court to disregard in its discretion.

This view seems better grounded, and more consonant with the spirit of section 176, in those cases in which the defendant has no real reason to complain of being actually misled, and does not show the existence of a defence, from which, if the judgment stands, he would be precluded. See also *Cook* vs. *Kelsey*, 19 N. Y., 412, below cited.

In *Yates* vs. *Blodget*, 8 How., 278, the defect was likewise disregarded, and the decisions first above cited are dissented from, on the same ground, *i. e.*, that the insertion of the name of the court is not a statutory requisition. See *Cook* vs. *Kelsey*, *supra*. In that case, the name of the court appeared on the complaint, which was served at the same time.

The liberal view taken in *Yates* vs. *Blodget*, is supported by the two following decisions made by the same judge, which hold the converse, *i. e.*, that the omission of the name of the court in the complaint, which is in fact a statutory requisite (see section 142), may, nevertheless, be disregarded where that information is given by the summons. *Van Namee* vs. *Peoble*, 9 How., 198; *Van Benthuysen* vs. *Stevens*, 14 How., 70. This doctrine is, however, dissented from in *Merrill* vs. *Grinnell*, 12 L. O., 286, where the latter omission was held to be a defect, but amendable.

It is not necessary that the name of the state should appear on the face of the summons, even where the defendant is non-resident, and the service by publication. *Cook* vs. *Kelsey*, 19 N. Y., 412; affirming *same case*, 17 How., 134; 8 Abb., 170. This decision overrules *Titus* vs. *Relyea*, 16 How., 371; 8 Abb., 177.

A summons properly issued in replevin, will not be affected by any defect in the collateral papers relating to the provisional remedy. *Wisconsin Marine and Fire Insurance Company Bank* vs. *Hobbs*, 22 How., 494 (499).

(*b.*) Form of Summons.

The requisites in this respect, which are imposed by sections 128 and 129, may be shortly summed up as follows. It is, in all cases, indispensable—

1. That the summons should be subscribed by the plaintiff or his attorney.

2. That it should be directed to the defendant.

3. That he should be formally required thereby to answer the complaint in the action.

4. That the place where his answer is to be served should be distinctly specified.

5. That the time within which such service should be made should also be distinctly pointed out.

6. That he should be distinctly warned that, in the event of his not answering, the plaintiff will take judgment, or apply for relief against him.

(*c.*) 1. Subscription.

The subscription of an agent of the plaintiff, not an attorney, is bad, and a summons so subscribed will be set aside. *Weare* vs. *Slocum*, 3 How., 397; 1 C. R., 105.

The printing the attorney's name at the foot of the usual form of summons, is not a subscription within the provisions of the statute. For a copy it will be sufficient, but the original must be actually subscribed in writing. *Farmers' Loan and Trust Co.* vs. *Dickson*, 17 How., 477; 9 Abb., 61.

The defect in question was, however, held to be immaterial, and disregarded in *Mutual Life Insurance Co.* vs. *Ross*, 10 Abb., 260, note.

In addition to the subscription, the attorney should add his place of business. If he neglect to do so, papers may be served upon him at his place of residence, through the mail; and the same regulation applies to a party prosecuting in person. (Rule 10.) Where, however, the summons specifies on its face, as usual, the place where the answer is to be served, such insertion would doubtless be held to be a sufficient compliance with the rule.

(*d.*) 2. Direction to Defendant.

In an action against a county, the suit should be brought against the board of supervisors. When against the supervisors, as such, they

should be individually named. *Wild* vs. *Supervisors of County of Columbia*, 9 How., 315.

In this connection, the provisions of section 175, enabling suits against unknown defendants to be brought in a fictitious name, falls naturally under notice.

See, as to power to use any reasonable designation for that purpose, *Pindar* vs. *Black*, 4 How., 95; 2 C. R., 53.

It is not, however, allowable to the plaintiff to use a fictitious name at his discretion; but only when he is ignorant of the true one. Some description must also be given, so as to identify the party intended as far as possible; and the facts of the use of a fictitious name, and of the plaintiff's ignorance of the true one, must likewise appear on the subsequent proceedings. *Crandall* vs. *Beach*, 7 How., 271.

A misnomer of the defendant will be a fatal objection; and, where he has not appeared in the action, may be raised by him at any time, even after judgment and execution. *Farnham* vs. *Hildreth*, 32 Barb., 277.

In the *Waterbury Manufacturing Company* vs. *Krause*, 1 Hilt., 560, 9 Abb., 175, note, the plaintiff was allowed to correct an error of this description on motion.

In *Elliott* vs. *Hart*, 7 How., 25, it was held that the objection might be taken in the same manner by the defendant. This conclusion is, however, denied, and an answer, in the nature of a plea in abatement, held the proper remedy in *Miller* vs. *Stettiner*, 22 How., 518.

In *Allen* vs. *Allen*, 11 How., 277, it was held that the section warranted the publication of a summons in partition, addressed to "Thos. Allen and his wife and children, and others, owners unknown."

Where new parties are added by amendment of the complaint, a corresponding amendment of the summons is essential. *Follower* vs. *Laughlin*, 12 Abb., 105.

(*e.*) Requisition to Answer Complaint.

This is essential in all cases. If a copy is served with the summons, the latter must expressly refer to that copy. If the summons is served alone, a reference to the complaint is equally necessary, and, in addition, it must be stated where that complaint is or will be filed. (§ 139.) An omission of this nature was held to render the summons wholly irregular in *Piguolet* vs. *Daveau*, 2 Hilt., 584.

The omission of this statement is a positive defect. It has been held, however, that the provision is directory, and an amendment permitted, both on general grounds, and also because the statute of limitations would otherwise have run. *Keeler* vs. *Betts*, 3 C. R., 183. In the *same case* an omission to annex the complaint, the summons stating it

to be so, was in like manner disregarded. So also in *Hart* vs. *Kremer*, 2 C. R., 50, it was held there was nothing in the objection that the summons stated that a copy of the complaint would be filed, instead of the complaint itself, as prescribed by the section.

(*f.*) PLACE OF SERVICE OF ANSWER.

The summons, to be regular, must require the answer to be served on the actual subscriber, whoever that subscriber may be. Any other direction will be clearly bad. *Weare* vs. *Slocum*, 3 How., 397; 1 C. R., 105. An amendment, however, was there permitted, as otherwise the statute would have run.

(*g.*) TIME OF SERVICE OF ANSWER.

This requisition is so clear that as yet there is no reported decision on its bearing, as regards the form or regularity of the summons. In its other aspect, as to the time allowed to the defendant to answer, it will be considered hereafter.

(*h.*) NOTICE OF TAKING JUDGMENT, OR APPLICATION FOR RELIEF.

The classification of actions under the second subdivision of section 129, has given rise to considerable discussion, the great difficulty being to ascertain the precise extent of the terms, "An action arising on contract for the recovery of money only," employed in the first of those subdivisions, and what are the "other actions" not included within the scope of these terms.

To a certain degree, this classification, as regards common law remedies, is grounded on the old distinction between actions *ex contractu* and *ex delicto*. The latter fall almost universally within subdivision 2. The same may be predicated of the whole class of proceedings for equitable relief.

The expression, "arising on contract," standing alone, would be clearly synonymous with action "*ex contractu*." The qualification of that expression involved in the additional words, "for the recovery of money only," has been the source of the difficulty which has been experienced in arriving at a satisfactory construction.

Amongst the many cases in which the question has been passed upon, *The People* vs. *Bennett*, 6 Abb., 343; affirming *same case*, 5 Abb., 384, may be selected as that which goes most deeply into the subject, and in which the nearest approach to a satisfactory definition is arrived at. The conclusion come to is couched in the following words:

Taking the whole definition together, "the action arising on contract for the recovery of money only," I think the rule is this:

Where the action is brought for the recovery "of a sum of money

payable by the contract on which the action is brought, whether the contract be verbal or written, express or implied, and even if it be no more than a legal duty or liability, whether imposed by statute or declared by the judgment of a court—if the sum sued for is certain in amount, or capable of being reduced to certainty by computation, then the summons must be in the form prescribed by subdivision 1, of section 129 of the Code, and, upon any failure to answer and contest the existence of the contract, liability or duty, judgment may be taken for want of an answer in the manner prescribed by subdivision 1, of section 246. In other actions, the summons must be in the form prescribed by subdivision 2, of section 129, and judgment can be obtained only on application to the court."

This rule, on the whole, comes nearest to the general result of the various cases below cited, and may be accepted as that sanctioned by the weight of authority. It is obvious, however, that it is founded in some degree on expediency, and on the collateral provisions of section 246. The judges would seem to have looked beyond mere abstract reasoning, founded on the wording of section 139, exclusively considered (*vide same case*, 6 Abb., 346), and to have framed their decisions in view of what would or would not be most conducive to substantial justice to the defendant, in the event of his neglecting or declining to appear, and allowing the plaintiff to take judgment by default. In cases where the former, though admitting generally the plaintiff's right to recover, might still, upon the trial, have contested the amount of liability flowing from the admission of that right, the power of doing so is, by the above construction, substantially secured to him, when the summons is under subdivision 2. He may then, by a notice of appearance, secure to himself the right to be heard on the application for the relief demanded, and of being present and presenting his views or counter-evidence, on any reference or assessment which may then be ordered. *Vide* section 246, subdivision 2. In cases where the contract itself, or the liability or duty sought to be enforced, fixes the amount due, either by way of a specific sum, or in such a manner that a bare computation, without extraneous or collateral evidence, is all that is requisite to arrive at a correct conclusion as to the amount of recovery, it is equally obvious that he cannot claim any such opportunity, as of right, and that, if extended, it could in nowise avail him.

(*i.*) As to Subdivision 1.

A wide view of the operation of this subdivision is taken in the following cases, which hold that any action for damages arising from breach of contract is within its wording. Such an action is "an action arising on contract for recovery of money only." So held as to an ac-

tion for breach of promise of marriage. *Leopold* vs. *Poppenheimer*, 1 C. R., 39; *Williams* vs. *Miller*, 4 How., 94; 2 C. R., 55. As to an action for breach of a carrier's contract, *Trapp* vs. *The New York and Erie Railroad Company*, 6 How., 237; 1 C. R. (N. S.), 384. As to an action for breach of a contract to convey real estate, the opinion going to the extent that all cases in which a recovery is sought on contract, whether the sum be fixed or not, and even on a *quantum meruit*, fall within the scope of this provision, *Croden* vs. *Drew*, 3 Duer, 652; 6 Abb., 338, note. As to an action for breach of covenants in a lease, for proper cultivation, *Cobb* vs. *Dunkin*, 17 How., 97; referring also to *Cook* vs. *Pomeroy*, 10 How., 103.

Of the above, *Williams* vs. *Miller*, and *Trapp* vs. *New York and Erie Railroad Company*, are directly, and the others, as will be seen below, substantially overruled. *Cobb* vs. *Dunkin* is reversed, 19 How., 164.

In an action for goods sold and delivered, a summons under subdivision 2 was, at an early period, decided to be bad. *Diblee* vs. *Mason*, 1 C. R., 37; 6 L. O., 363.

An action for a statutory penalty, of fixed amount, has been decided to fall within subdivision 1. *The People* vs. *Bennett*, 5 Abb., 384; affirmed, 6 Abb., 343; *Commissioners of Excise of Albany County* vs. *Classon*, 17 How., 193. Though arising out of an offence, the statute makes the penalty, in effect, a debt. See also *dicta* as to the same being the case, in a suit brought on a judgment, for a cause of action originally arising *ex delicto*. 5 Abb., 387; 6 Abb., 348.

An action for liquidated damages under the express provisions of a contract, falls within subdivision 1. *Cemetery Board of Town of Hyde Park* vs. *Teller*, 8 How., 504.

The following have been held to be erroneously commenced under that subdivision, and to fall under the class of actions for relief:

A suit for foreclosure. *Wynant* vs. *Reeves*, 1 C. R., 49. For malicious prosecution. *Webb* vs. *Mott*, 6 How., 439. For loss of goods by common carriers. *Hewitt* vs. *Howell*, 8 How., 346; *Flynn* vs. *Hudson River Railroad Company*, 6 How., 308; 10 L. O., 158. Where the complaint, though the debt arose out of contract, contained charges of fraud, making that the gravamen. *Field* vs. *Morse*, 7 How., 12. A suit for wrongfully detaining property. *Voorhies* vs. *Scofield*, 7 How., 51. For breach of an agreement to convey real property. *Johnson* vs. *Paul*, 14 How., 454; 6 Abb., 335, note. For breach of a manufacturing contract. *Tuttle* vs. *Smith*, 14 How., 395; 6 Abb., 329.

Swift vs. *De Witt*, 3 How., 280; 1 C. R., 25; 6 L. O., 314, is authority, if authority were required, for the usual form of summons under this subdivision, viz.: that the plaintiff will also take judgment for interest on the amount specified.

(*j.*) As to Subdivision 2.

The following establish the principle above laid down, viz.: that wherever the claim of the plaintiff arises *ex delicto*, or in equity, or where, in an action sounding in contract, he seeks to enforce a claim for an unliquidated amount, or to obtain any other relief than such as is represented by or included in a mere money judgment, his proper form of commencing the action is by a summons for relief under subdivision 2, and that in such cases he cannot avail himself of the more summary remedy which subdivision 1, when applicable, provides in case of a default.

Subdivision 2 has been held the proper form.

In an action against a common carrier for loss of goods, *Clor* vs. *Mallory*, 1 C. R., 126; *Flynn* vs. *The Hudson River Railroad Company*, 6 How., 308; 10 L. O., 158, directly overruling *Williams* vs. *Miller*, *supra*; *Hewitt* vs. *Howell*, 8 How., 346; *Luling* vs. *Stanton*, 2 Hilt., 538; 8 Abb., 378; as to a carrier's liability, *Campbell* vs. *Perkins*, 4 Seld., 430.

In an action for breach of promise of marriage, overruling *Leopold* vs. *Poppenheimer*, and *Williams* vs. *Miller*, above cited; *McNeff* vs. *Short*, 14 How., 463; *McDonald* vs. *Walsh*, 5 Abb., 68; *Davis* vs. *Bates*, 6 Abb., 15; in an action for malicious prosecution, *Webb* vs. *Mott*, 6 How., 439.

In an action against an attorney for moneys collected, involving an accounting between the parties, *West* vs. *Brewster*, 1 Duer, 647; 11 L. O., 157.

For a breach of warranty on sale of a horse, *Dunn* vs. *Bloomingdale*, 14 How., 474; 6 Abb., 340, note. See likewise, *Masten* vs. *Scovill*, 6 How., 315.

In an action for an unliquidated amount of damages on breach of contract, and for demands under that contract, *Tuttle* vs. *Smith*, 14 How., 395; 6 Abb., 329. For unliquidated damages generally (per Barculo, J.), *The Cemetery Board of Hyde Park* vs. *Teller*, 8 How., 504; *Johnson* vs. *Paul*, 14 How., 454; 6 Abb., 335, note; *McNeff* vs. *Short*, 14 How., 463; *Luling* vs. *Stanton*, 2 Hilt., 538; 8 Abb., 378; *Cobb* vs. *Dunkin*, 19 How., 164; reversing, 17 How., 94.

Generally, in an action sounding in tort, though arising out of breach of contract, or where collateral relief is prayed, *Rider* vs. *Whitlock*, 12 How., 208; *Field* vs. *Morse*, 7 How., 12; *Travis* vs. *Tobias*, 7 How., 90. See also *Atwell* vs. *Le Roy*, 15 How., 227; 4 Abb., 438.

In an action against bail for not surrendering their principal, *Kelsey* vs. *Covert*, 15 How., 92; 6 Abb., 336.

An action for foreclosure is clearly within this subdivision. *Wynant* vs. *Reeves*, 1 C. R., 49. An action for goods sold and delivered, as clearly not. *Diblee* vs. *Mason*, 1 C. R., 37; 6 L. O., 363.

Under the Code of 1848, it was necessary to specify in the summons a time and place at which, and the county in which, the application for judgment would be made. *Warner* vs. *Kenny*, 3 How., 323; 1 C. R., 96; *Anonymous*, 1 C. R., 82. Since the amendment of 1849, and the making of rule 24, formerly 85, this is no longer necessary.

A summons issued under both of the subdivisions, against three defendants, demanding a money judgment against two of them, and relief against all three, was held to be irregular. The Code contemplates only one notice, or a notice under one of its subdivisions. It should have been confined to subdivision 1. *Baxter* vs. *Arnold*, 9 How., 445.

(*k.*) Special Indorsements.

As to the special indorsement on process in an action for a statutory penalty, required by the Revised Statutes, see 2 R. S., 481, § 7, above referred to as probably still in force.

§ 51. *Summons, Amendment of.*

Defects in a summons cannot be disregarded nor amended as of course. *Diblee* vs. *Mason*, 1 C. R., 37; 6 L. O., 363; *McCrane* vs. *Moulton*, 3 Sandf., 736; 1 C. R. (N. S.), 157.

These decisions seem clearly to overrule *Davenport* vs. *Russel*, 2 C. R., 82.

Such defects are, however, amendable on application to the court. Special power for this purpose is conferred by section 173; and, in *Lane* vs. *Beam*, 19 Barb., 51; 1 Abb., 65, the general power of the court to amend proceedings before it, is asserted as existent, independent of the provisions of the Code.

That application, when made affirmatively, must be upon notice where there has been a general appearance of the defendant. *Hewitt* vs. *Howell*, 8 How., 346. And, in all cases, an application to the court is necessary, either by way of affirmative proceeding, or in answer to a motion of the defendant on the ground of defect or variance. *Gray* vs. *Brown*, 15 How., 555; *Allen* vs. *Allen*, 14 How., 248; *McDonald* vs. *Walsh*, 5 Abb., 68.

Where new parties are brought in by amendment of the complaint, an amendment of the summons will be absolutely necessary. *Follower* vs. *Laughlin*, 12 Abb., 105.

The power of amendment has for the most part been liberally exercised, and, when in furtherance of justice, will be so at any stage of the proceedings, even after judgment. *Sluyter* vs. *Smith*, 2 Bosw., 673. See generally, *Van Wyck* vs. *Hardy*, 20 How., 222; 11 Abb., 473; *The Waterbury Manufacturing Company* vs. *Krause*, 1 Hilt., 560; 9

Abb., 175, note; *Keeler* vs. *Belts*, 3 C. R., 183; *Elliott* vs. *Hart*, 7 How., 25; *Weare* vs. *Slocum*, 1 C. R., 105; 3 How., 397. And, as to terms to be imposed, *James* vs. *Kirkpatrick*, 5 How., 241; 3 C. R., 174. In *Ward* vs. *Stringham*, however, 1 C. R., 118, relief of this nature was denied, no name of any court appearing in either the summons or complaint, as originally served. So also in *Hallett* vs. *Righters*, 13 How., 43, and *Kendall* vs. *Washburn*, 14 How., 380, such relief was denied, for the purpose of sustaining judgment obtained on service by publication. Being a statutory proceeding, no amendment could be made for the purpose of aiding the acquisition of jurisdiction under those circumstances.

A general appearance, or its equivalent, has been held to waive all inherent defects in the summons, and even the want of any summons at all. See cases below cited under section 59.

In *Dunn* vs. *Bloomingdale*, 14 How., 474; 6 Abb., 340, note, there is a *dictum* that the issuing of a summons under subdivision 2, instead of subdivision 1, of section 129, is a harmless error, which it does not concern the defendant to have corrected. The summons in that case was, however, decided to be properly issued. See also, as to disregard of mere technical objections, *Hart* vs. *Kremer*, 2 C. R., 50; *Mutual Life Insurance Company* vs. *Ross*, 10 Abb., 260, note; *Van Wyck* vs. *Hardy*, 20 How., 222; 11 Abb., 473.

A stricter view is taken on the subject in *Voorhies* vs. *Scofield*, 7 How., 51; *Shafer* vs. *Humphrey*, 15 How., 564; *Tuttle* vs. *Smith*, 14 How., 395; 6 Abb., 329; where it was held that the objection that the complaint does not conform to the summons, is not waived by a general appearance. In the latter of these two cases, the complaint was not served with the summons, and, therefore, an appearance could not properly be held to waive a defect of which the defendant was then ignorant, and of which he could not obtain a knowledge without appearing. In *Voorhies* vs. *Scofield*, the complaint had been served at the outset, and the doctrine seems at the first glance a little more questionable. The defendant moved, however, simultaneously, to set aside the proceedings, and therefore could not be held as guilty of *laches*.

Considerable discussion has taken place as to which of the two is irregular, the summons or the complaint, in case of variance between them. The position that, inasmuch as the summons brings the defendant into court, and the complaint subsequently states the grievances of the plaintiff and the remedy he asks, the former controls, and that the latter, if inconsistent, is irregular (according to the old practice of setting aside a declaration for variance with the writ), is maintained in the following decisions, viz., *Rider* vs. *Whitlock*, 12 How., 208; *Allen* vs. *Allen*, 14 How., 248; *Boington* vs. *Lapham*, 14 How., 360; *Tuttle* vs.

Smith, 14 How., 395; 6 Abb., 329; *Johnson* vs. *Paul*, 14 How., 454; 6 Abb., 335, note; *Gray* vs. *Brown*, 15 How., 555; *Shafer* vs. *Humphrey*, 15 How., 564; *Davis* vs. *Bates*, 6 Abb., 15; *Follower* vs. *Laughlin*, 12 Abb., 105; *Campbell* vs. *Wright*, 21 How., 9. See also, as to a motion on the part of the defendant being the proper course under such circumstances, *Elliott* vs. *Hart*, 7 How., 25.

The contrary position, *i. e.*, that, under these circumstances, the summons and not the complaint is irregular, is laid down in *Voorhies* vs. *Scofield*, 7 How., 51; *Field* vs. *Morse*, 7 How., 12; *Webb* vs. *Mott*, 6 How., 439; *Flynn* vs. *The Hudson River Railroad Company*, 6 How., 308; 10 L. O., 158; *The Cemetery Board of Hyde Park* vs. *Teller*, 8 How., 504. See also, *Croden* vs. *Drew*, 3 Duer, 652; 6 Abb., 338, note; and *Chambers* vs. *Lewis*, 11 Abb., 210; affirming *same case*, 2 Hilt., 591; 10 Abb., 206.

The former theory seems preferable, and the weight of authority preponderant; but both classes of cases converge practically to a similar result. Proceedings based or judgment entered upon a summons and complaint inconsistent with each other, cannot stand, if attacked by the adverse party. The proper form of attack would seem to be to set aside the latter as inconsistent. At the same time the mistake committed by the plaintiff is more likely to have arisen in the framing of the former, and the relief which he will more probably seek, either affirmatively or by way of answer to an adverse motion, will be to have the summons made conformable to the complaint. Either amendment lies within the power of the court, and neither is likely to be refused, of course, upon proper terms. In *Ridder* vs. *Whitlock*, relief of this nature was given in the alternative, at the plaintiff's election; in *Allen* vs. *Allen*, and *Gray* vs. *Brown*, an amendment of both was permitted.

An amendment of the summons, and a notice that the plaintiff will abide by the complaint originally served, will not prejudice his right to amend the latter, as of course, after the coming in of the defendant's answer. *Ross* vs. *Dinsmore*, 20 How., 328; 12 Abb., 4.

Mere delay in an application for leave to amend the summons will not be a bar to the application, but, in such a case, the court will impose such terms, if necessary, as will prevent it from working to the prejudice of the defendants. *McElwain* vs. *Corning*, 12 Abb., 16.

§ 52. *Service of Complaint, with Summons.*

It is left optional by the Code, section 130, as to whether a copy of the complaint should or should not be served with the summons; but, in a majority of instances, the expediency of adopting that course is unquestionable; for the obvious reason, that a defendant, desirous of

delay, may wait till the very last day, before he demands a copy of the complaint, and, by then serving that demand, may practically gain an extension of his time to defend, amounting to double that allowed to him, when the complaint accompanies the summons.

There are, however, two classes of cases in which the summons may advantageously be served alone; *i. e.*, 1, those in which an immediate commencement of the action is an object, or in which it is likely that several defendants may defend jointly; and 2, those in which no personal claim is made against any one or more of the defendants.

§ 53. *Notice of no Personal Claim.*

In these last cases, the Code has made provision for the service of a notice to that effect, concurrent with the summons, the requisites as to which are prescribed by section 131. Under the Code of 1849, the plaintiff's power in this respect was limited to cases of partition or foreclosure; but, by the last amendment, it is extended to causes of every description, without limitation, and may now be advantageously exercised, with reference to every mere formal defendant, against whom no personal claim is made, in any suit, of whatever nature. In cases involving a claim upon specific real or personal property, a brief description of that property must be inserted.

The benefits of adopting this course, wherever practicable, in reference both to the proceedings at the outset, and also to the ultimate award of costs in the action, in the event of an unreasonable defence, are obvious; and therefore, wherever possible, it should never be omitted; though, of course, it cannot be done with reference to any defendant against whom substantive relief is sought, and, if attempted under such circumstances, would render the proceedings so far void, *ab initio*. It would seem that, where husband and wife are mere formal defend ants, service of notice on the former alone would be held sufficient.

As to the proper fees to be allowed for service of this proceeding, *Vide Gallagher* vs. *Egan*, 2 Sandf., 742; 3 C. R., 203; *Benedict* vs. *Warriner*, 14 How., 568.

§ 54. *Service of Summons.*

The essentials of a valid summons, and of the accompanying notice, in cases where that course is admissible, having thus been considered, the next point to be entered upon is that as to their due service.

Even in courts of record of limited authority, the mere issuing of a summons is sufficient, *primâ facie*, to confer jurisdiction; and, if such summons be served within the proper limits, the presumption will be that it was duly issued. *Barnes* vs. *Harris*, 4 Comst., 374.

As a general rule, and for general purposes, an action is not commenced until actual service of the summons. The operation of section 99 is confined to cases in which the statute of limitations would otherwise operate. Held accordingly in an action against the sheriff for an escape, that the mere delivery of the summons to the coroner did not bar the defence of a voluntary return of the prisoner before actual service. *Wiggins* vs. *Orser*, 5 Duer, 118; see also, *Lee* vs. *Averill*, 1 Sandf., 731. There is no way of bringing a party into court against his will, but by the service of process; and a judgment otherwise obtained will be void. *Akin* vs. *The Albany Northern Railroad Company*, 14 How., 337. The only exception to this rule is where the defendant voluntarily appears, which, under section 139, is equivalent to personal service. See *ante*, section 51; see also *Varian* vs. *Stevens*, 2 Duer, 635. In certain cases, however, it has been held that a party under disability may be bound by service on a person standing in the place of his or her legal protector. Thus, in a suit respecting the real estate of a husband, to which the wife was merely made a party as inchoate doweress, it was decided that the husband, on service on himself alone, was bound to enter a joint appearance for both. *Eckerson* vs. *Vollmer*, 11 How., 42. So also service of the summons and complaint in partition on a guardian *ad litem*, appointed under the Revised Statutes, was considered sufficient to bind the minors whom he represented. *Althause* vs. *Radde*, 3 Bosw., 410; *Varian* vs. *Stevens*, 2 Duer, 635. These two last cases seem to conflict with section 134 of the Code, prescribing personal service on an infant in all cases. In *Althause* vs. *Radde*, it appears, however, that such service had actually been made, 3 Bosw., 434; and in *Varian* vs. *Stevens*, the infants had appeared and petitioned for the guardian's appointment. See likewise, as to the guardian *ad litem* for an infant and lunatic defendant, *Rogers* vs. *McLean*, 11 Abb., 440.

Another case in which personal service may be dispensed with, is in the case of an action involving the title to real estate, commenced in a justice's court, and discontinued under sections 55 to 58 of the Code. Under these circumstances, deposit of the summons and complaint with the justice entitles the plaintiff to an admission of service, pursuant to the defendant's undertaking, as prescribed in section 56. It seems, however, that the action will not be considered as technically commenced, until such admission or its equivalent is actually given, or service actually made. See *Davis* vs. *Jones*, 4 How., 340; 3 C. R., 63; *Wiggins* vs. *Tallmadge*, 7 How., 404.

A defendant against whom relief is prayed, has the right to appear and answer, even though the summons has not been served on him. *Higgins* vs. *Rockwell*, 2 Duer, 650.

In an action against two parties not joint-debtors, the recovery of judgment against one severs the action, and the other cannot be subsequently served. *The East River Bank* vs. *Cutting*, 1 Bosw., 636.

It has been held that, where an order for publication had been obtained, subsequent service of the summons and complaint within the state was not sufficient to sustain a judgment, the publication having been subsequently continued, and the defendant not having been informed at the time, that the personal service would be relied upon. *Niles* vs. *Vanderzee*, 14 How., 547.

The law imposes sundry restrictions as to the days on which service can be made.

Service made on a Sunday is utterly void. 1 R. S., 675, § 69. So likewise, service cannot be made on an elector on election day, in the city or town in which he is entitled to vote. 1 R. S., 127, § 4. Or on an elector entitled to vote at a town meeting, on any day during which such town meeting shall be held. 1 R. S., 342, § 10. See, as to service on election day being void, *Weeks* vs. *Noxon*, 11 How., 189; 1 Abb., 280; and *Bierce* vs. *Smith*, 2 Abb., 411. *Marks* vs. *Wilson*, 11 Abb., 87, refers to proceedings in Justices' Courts, and the head-note is inconsistent with the decision.

If any fraud be committed in connection with the service, it will be absolutely void. Thus, where a summons and complaint in divorce was delivered to the defendant when actually on board a foreign steamer, in a sealed package, without any indication of its contents, in consequence of which she remained wholly unaware of the action till too late to take measures to defend, judgment obtained on such service was set aside, with costs. *Bulkeley* vs. *Bulkeley*, 6 Abb., 307. So also in cases where misrepresentation had been made, with a view to bring the defendant within the jurisdiction of the court, or the bailiwick of the sheriff making such service. *Carpenter* vs. *Spooner*, 2 Sandf., 717; 2 C. R., 140; affirmed, 3 C. R., 23; *Goupil* vs. *Simonson*, 3 Abb., 474.

Service made on an Indian, contrary to the statute, 2 R. L., 153, § 2, is void. *Hastings* vs. *Farmer*, 4 Comst., 293.

A non-resident witness, who has voluntarily come within the jurisdiction of the court for the express purpose of being examined, is privileged from the service of process during his attendance. He has the same privilege as a witness attending under subpœna, and that privilege extends to the service of process as well as to exemption from arrest. *Seaver* vs. *Robinson*, 3 Duer, 622; 12 L. O., 120; *Merrill* vs. *George*, 23 How., 331. But these exemptions would seem not to extend to service of a copy complaint, when the summons had been previously served in due course. *Van Pelt* vs. *Boyer*, 7 How., 325.

It is essential to the due service of process, that it should not merely

be delivered to, but left with the party served. *Beekman* vs. *Cutler*, 2 C. R., 51. See likewise, *Niles* vs. *Vanderzee*, 14 How., 547. Rule 18, prescribing the mode of proof, is also explicit on this point.

The service must also be made by a person *not a party* to the action—section 133. But this objection must be taken in due season. If delayed till after the entry of judgment, it will not be necessarily available. *Hunter* vs. *Lester*, 18 How., 347; 10 Abb., 260; *Myers* vs. *Overton*, 4 E. D. Smith, 428; 2 Abb., 344.

Although, as a general rule, service upon another person is wholly unavailing to bring a defendant within the jurisdiction of the court, it has been held, in some cases, that this rule is not wholly inflexible. Thus, where the sheriff had made his formal return of service of *capias*, under the former practice, the judgment, in the absence of any affidavit of merits, or proof of collusion, was refused to be set aside for irregularity, *Anon.*, 4 How., 112. This case is, however, expressly overruled, and the strict doctrine, that the plaintiff must bring the defendant within the jurisdiction, and that the mere silence of the latter, though subsequently cognizant of the service, and in possession of the summons itself, is not sufficient as a waiver, the defect being one of jurisdiction, and not of regularity, is maintained at general term, in *Williams* vs. *Van Valkenburg*, 16 How., 144.

In *Southwell* vs. *Marryatt*, 1 Abb., 218, a more liberal view is taken, where an attempt at evasion on the part of the defendant was made out. He was, however, allowed to come in and defend upon terms. In *Hilton* vs. *Thursten*, 1 Abb., 318, a motion to set aside a judgment, under similar circumstances, was denied, on the ground of laches, the defendant having taken no steps until supplementary proceedings were instituted, no defence being shown.

It is obvious that the rule, as laid down in *Williams* vs. *Van Valkenburg*, is the safer, if not the only safe guide in practice, so far as the plaintiff is concerned.

A defect of this, or any analogous nature, should, on its discovery, e impeached at once upon motion; it is not available to a defendant on demurrer. *Nones* vs. *The Hope Mutual Insurance Company*, 8 Barb., 541; 5 How., 96; 3 C. R., 161.

The fact that an attachment has been placed in the hands of the sheriff, is no bar to service of the summons by another person. *Mills* vs. *Corbett*, 8 How., 500. Nor is it essential that all the parties originally named in the summons should be actually served, or subsequently proceeded against. *Travis* vs. *Tobias*, 7 How., 90.

In an action against joint-debtors, brought in the Superior Court, it was held that by personal service upon one of such joint-debtors, within the city of New York, jurisdiction was fully acquired, and service

might be made upon the others, in any other county. *Porter* vs. *Lord*, 4 Duer, 682; 13 How., 254; 4 Abb., 43. The same principle holds good, of course, as to the other tribunals possessing the same jurisdiction in that respect.

Where, however, there was sufficient to warrant a suspicion of connivance between the plaintiff and the defendant served, the judgment was opened, to give the others an opportunity to defend generally. *Cleveland* vs. *Porter*, 10 Abb., 407.

In certain cases, service upon public officers or companies may, under special statute, be made upon parties or agents specially designated for that purpose.

Thus, service against the board of supervisors, is to be made on their chairman or clerk. 1 R. S., 384, § 3.

Life and fire insurance companies are, under the general incorporation laws of 1853, to appoint an attorney in this state, on whom process of law can be served, and file the appointment with the comptroller. Chap. 463, of 1852, § 15, p. 893; chap. 466, of 1853, § 23, p. 915.

By chapter 279, of 1855, section 1, every insurance or other corporation, created by the laws of any other state, and doing business in this, is to designate a similar agent in each county where it transacts business, and file such designation in the office of the secretary of state. In default of this designation, service may, under section 2, be made on any person found within the state, acting as the agent of such corporation, or doing business for them. But, to bring a company within the operation of this statute, it must be doing business within this state. *Vide Doty* vs. *The Michigan Central Railroad Company*, 8 Abb., 427.

These provisions are merely to facilitate service; they do not operate to give or enlarge jurisdiction against such bodies, where it does not otherwise exist. *The Cumberland Coal Company* vs. *Sherman*, 8 Abb., 243.

By chapter 282, of 1854, section 14, analogous provisions are made for the appointment, by railroad companies, of a special agent, in each county through which their line may pass, to receive service of process issued by a justice of the peace. The provisions at 2 R. S., 285, sections 55–57, for the service of notices and other papers at the sheriff's office, do not seem to extend to original process.

Since the amendment of 1859, service on the president, secretary, or treasurer of a foreign corporation, made personally within this state, is good service, for all purposes connected with the commencement and prosecution of an action; if served on any other officer, it is only effective when that corporation has property within the state, or the cause of action arose therein; the latter prerequisite was introduced on the amendment of 1851. See, as to service of this latter nature, *President*

of Bank of Commerce vs. *The Washington and Rutland Railroad Company*, 10 How., 1.

Under the Code of 1848, 1849, it was held that service of this nature was good, so far as notice of commencement of a suit was concerned, but that the only way of making such a service effectual for the entry of judgment, was by the issuing of an attachment, either concurrent or subsequent, the proceeding being in its nature *in rem* and not *in personam*. *Hulbert* vs. *The Hope Mutual Insurance Company*, 4 How., 275; affirmed, 4 How., 415; *Nones* vs. *The Hope Mutual Insurance Company*, 8 Barb., 541; 5 How., 96; 3 C. R., 161; *Brewster* vs. *The Michigan Central Railroad Company*, 5 How., 183; 3 C. R., 215.

The amendment of 1851 embodies this view in one of its branches. See, on the same point as above, under this amendment, *Bates* vs. *The New Orleans, Jackson, and Great Northern Railroad Company*, 13 How., 518; 4 Abb., 72.

By that of 1859, the restrictions against taking a general judgment are, as will be seen, importantly enlarged. As to when the cause of action may be considered as arising within this state, see cases heretofore cited under section 31, under head of corporations.

In *Brewster* vs. *The Michigan Central Railroad Company*, 5 How., 183; 3 C. R., 215, above cited, decided in 1850, it was held that service on a mere local agent of a foreign corporation for special purposes, was not service on the managing agent within the terms of the section, but that such managing agent must be one whose agency extends to all the transactions of the company. The act of 1855, above cited, would seem to remove this particular difficulty, when such company does business in this state, but not otherwise. *Vide Doty* vs. *The Michigan Central Railroad Company*, 8 Abb., 427.

As regards domestic corporations, however, the restriction subsists, and a "managing agent," on whom service can be made, must be one whose powers are not limited, but extend to a general supervision and control of the general interests of the corporation. Service on the following has therefore been held to be insufficient: On the baggage master or freight agent at a railroad station. *Flynn* vs. *The Hudson River Railroad Company*, 6 How., 308; 10 L. O., 158; *Wheeler* vs. *The New York and Harlem Railroad Company*, 24 Barb., 414: on an agent for a foreign railroad corporation, merely for the purpose of selling tickets for passage over their road. *Doty* vs. *The Michigan Central Railroad Company*, 8 Abb., 427.

An agent of an insurance company, authorized to effect insurances, though residing at a different place from where the principal office of the company is located, has been held a managing agent within the meaning of the section, *Bain* vs. *The Globe Insurance Company*, 9

How., 448; and in a motion to set aside a judgment entered on service of this nature, the corporation will be held bound to establish the irregularity clearly, the information being within their power. *Donadi* vs. *The New York State Mutual Insurance Company*, 2 E. D. Smith, 519. See, as to the legal location of the principal office of a company, *Western Transportation Company* vs. *Scheu*, 19 N. Y., 408.

When the subject matter of the suit is within the jurisdiction of the court, an appearance on the part of a foreign corporation will waive, however, all other irregularities, and give that jurisdiction. *Watson* vs. *The Cabot Bank*, 5 Sandf., 423.

Service on the secretary of a religious incorporation was held to be good, but upon individual trustees to be bad service under the former practice, in *Lucas* vs. *The Trustees of the Baptist Church of Geneva*, 4 How., 353.

Service of this nature must be made upon the officers *de facto* of such a corporation; if made on others claiming to be officers *de jure*, but out of possession, it will be ineffectual. *Berrian* vs. *The Methodist Society in New York*, 6 Duer, 682; 4 Abb., 424.

Although, by subdivision 3, a special mode of service is prescribed in the cases of lunatics, &c., yet the commencement of an action against a party judicially declared to be such, will not be regular, without previous application to the court, on petition for leave for that purpose, as under the former practice; and, if commenced, the proceedings in such an action will be restrained, until such leave has been obtained. *Soverhill* vs. *Dickson*, 5 How., 109. See also, *Hall* vs. *Taylor*, 8 How., 428, as to action against a committee.

Service on a lunatic in person is absolutely indispensable, in all cases, whether a committee has been appointed or not. *Heller* vs. *Heller*, 6 How., 194; 1 C. R. (N. S.), 309.

A mere admission of personal service, made out of the state, on a non-resident, has been held a nullity, and incompetent to confer jurisdiction, and that publication was the only proper course under such circumstances. *Litchfield* vs. *Burwell*, 5 How., 341; 9 L. O., 182; 1 C. R. (N. S.), 42. This decision was made in 1850, before the amendment of section 139, prescribing the effect of a voluntary appearance, which would probably be now held sufficient.

Where the proof of service on parties deceased since the commencement of a suit in partition was defective, but complete as to the successors to their interests, subsequently brought in, the original objection was held to be obviated. *Waring* vs. *Waring*, 7 Abb., 472.

§ 55. *Substituted Service against Resident Defendants.*

The statute of 1853, authorizing service of this nature, *vide ante*, section 49, has received, as might be expected, a strict construction; and, to enable the acquisition of jurisdiction by service under it, its provisions must be strictly and literally complied with.

Thus, where the party was stated to be absent from the state, in Ohio, and not expected back, except on a visit, service was set aside, on the ground that neither inability to find the defendant, nor avoidance or evasion on his part, had been shown. *Collins* vs. *Campfield*, 9 How., 519. So also where the defendant was known to be absent in California on business. *Jones* vs. *Derby*, 1 Abb., 458. And, where the defendant was in Europe, and the time of his return was uncertain. *Foot* vs. *Harris*, 2 Abb., 454.

In *Collins* vs. *Campfield*, the action related to real estate, and the plaintiff had a clear remedy by publication, under the Code, section 135, subdivision 4. See report, pp. 521, 522. Whether the statute may not have received too strict a construction, and whether the words, "so that the same (*i. e.*, service) cannot be made personally," have received their due weight in the other two decisions, may possibly be doubted. The plaintiff, under these very circumstances, *i. e.*, of a prolonged but *bonâ fide* absence from the state, has no remedy by publication, and it might be contended that the legislature, in providing for a service on a resident who cannot be found, had in contemplation to provide for this very state of things, *i. e.*, of a defendant who cannot be found for the purposes of service, "so that service cannot be made personally on him," and which yet does not fall within the other alternative, of avoidance or evasion. In neither of the two cases does the actual residence of the defendant appear to have been given; in the one he is stated to have been in California, in the other in Europe, nor would either address have enabled service upon him.

In *Foot* vs. *Harris*, it is considered that the circumstances of the case were similar to those in *Close* vs. *Van Husen*, 6 How., 157, decided in January, 1851, and that the course there taken was open to the plaintiff. It was there held, under somewhat similar circumstances, that in equitable cases the plaintiff still possessed a remedy, under the act of April 12, Laws of 1842, p. 363, where the last known residence of the defendant was within the state; and that such act was not inconsistent with the Code, and therefore still in force. The plaintiff, it was held, "should present his application by petition, bringing his case within the 135th section of the Code, so far as form is concerned, and the first section of the act of 1842. The publication of the order should be in

two newspapers, to be designated, as most likely to give notice to the persons to be served, and for the period of three months." (Compare Code, section 135, with Law of 12th April, 1842, section 2, subdivision 2.)

On examination, the analogy seems, however, to be incomplete, and that the plaintiff would have no greater remedy under that statute. In *Close* vs. *Van Husen*, it is expressly stated that the "plaintiff, after diligent inquiry, could not ascertain where the defendant's place of residence was at present." There seems to be no substantial distinction to be drawn between this phraseology and the expressions of the statute of 1853; and the latter would seem adequate to afford substantially the same measure of relief as was contemplated in the former.

As to the necessity of a strict and literal observance of the forms and phraseology of the statute, in proceedings of this nature, see *Foot* vs. *Harris*, *supra*; *Collins* vs. *Ryan*, *infra*.

By this measure, provision is clearly made for such a case as *Van Rensselaer* vs. *Dunbar*, 4 How., 151, of designed and persistent avoidance of service, which the provisions of the Code as to publication were held incompetent to reach.

Before making the order, the judge should be fully satisfied that the case is brought within the provisions of the statute. He is authorized and required to decide whether or not sufficient facts are shown to confer jurisdiction, and, if he decides affirmatively, the question becomes *res judicata*. *Collins* vs. *Ryan*, 32 Barb., 647.

§ 56. *Service by Publication.—Generally Considered.*

This remedy is of wider scope and earlier date than that considered in the previous section, and extends to all cases where the defendant is non-resident, or cannot, after due diligence, be found within the state. It is coeval with the Code, and embodies substantially the former practice in equity. It has, upon the whole, been extended from time to time by the different amendments which have taken place, as before noticed in citing the section (135).

Being a statutory proceeding, in derogation of the fundamental right of every party, sought to be affected by an adjudication "*in invitum*," to have personal notice of the proceedings, and in particular of the original process conducing to that result, the statute must be strictly followed, as a prerequisite to the acquisition of jurisdiction. See *Haight* vs. *Husted*, 4 Abb., 348; affirmed, 5 Abb., 170; *Morrell* vs. *Kimball*, 4 Abb., 352; *Hallett* vs. *Righters*, 13 How., 43; *Towsley* vs. *McDonald*, 32 Barb., 604; *Fiske* vs. *Anderson*, 33 Barb., 71; 12 Abb., 8;

Cook vs. *Farren*, 34 Barb., 95; 21 How., 286; 12 Abb., 359; affirming *same case*, 11 Abb., 40; *Kendall* vs. *Washburn*, 14 How., 380. The same was the case under the former practice. See *Brisbane* vs. *Peabody*, 3 How., 109. As to the general powers of the legislature to provide for substituted service of this or an analogous description, and the constitutionality of enactments for that purpose, when passed, *vide In re Empire City Bank*, 18 N. Y., 199; 8 Abb., 192, note. And it has been held that this remedy is even available against defendants whose names are unknown, a proper designation being given. *Allen* vs. *Allen*, 11 How., 277.

It may be expedient to depart in a trifling degree from the arrangement of the section itself, and to consider—

1. The prerequisites to obtaining the remedy.
2. The mode of application.
3. The proceedings under the order when obtained; and,
4. The rights reserved to the defendants against whom service is ordered.

(*a.*) Prerequisites.

The first prerequisite is that the person to be served "cannot after due diligence be found within the state." As this fact must appear by affidavit, it will be better considered in treating of the form of application. The same course will be expedient as to the other statements prescribed by the introductory sentence.

This inability appearing, the case must then be brought within one of the five categories prescribed by the section, which will be considered in their order.

1. The remedy is applicable in the case of foreign corporations, but it must appear either that such corporation has property within the state, or that the cause of action arose therein. Some little difficulty has occurred in the construction of this provision, in connection with section 427, as respects an action brought by a non-resident plaintiff. See heretofore section 32, under the head of *Corporations*, and decisions there cited and commented upon. Where the plaintiff is a resident, no such difficulty arises.

In *Cantwell* vs. *The Dubuque Western Railroad Company*, 17 How., 16, an order for publication was set aside, on the ground that the plaintiff, being a non-resident, had not brought his case within the provisions of the section in question. See also *Campbell* vs. *The Proprietors of the Champlain and St. Lawrence Railroad*, 18 How., 412. See, however, observations, *supra* section 32.

2. It is applicable in the case of a fraudulent departure or concealment on the part of the defendant. But such fraudulent intent must be

shown distinctly, and not by mere inference. *Warren* vs. *Tiffany*, 17 How., 106; 9 Abb., 66; *Towsley* vs. *McDonald*, 32 Barb., 604.

The wording of this subdivision of the section being identical with a portion of section 229, prescribing precisely the same condition, as one of those under which an attachment may be issued, the consideration of this branch of the subject, and the cases which bear upon it, are deferred until that portion of the work (*infra*, § 110), to which the reader is therefore referred. Few if any of the decisions which bear upon the point, with the one exception above cited, have been pronounced with immediate reference to the mere question of service; attachment being the more important remedy, and the two being ordinarily moved for in connection with each other, especially since the making of rule 25, which in effect makes the concurrence of both indispensable in the class of common law actions.

3. It is applicable as against non-resident defendants, having property within the state, provided the court has jurisdiction of the subject of the action.

This provision has again a complete analogy with those on the subject of attachments, see sections 227, 229, and the decisions are mutually applicable. *Vide infra*, section 109.

The mere temporary bringing of the defendant's team within the limits of the state, was held not to be *per se* a sufficient having of property therein, whereon to ground service by publication. A judgment so obtained was set aside. *Haight* vs. *Husted*, 4 Abb., 348; affirmed, 5 Abb., 170.

4 and 5. It is applicable to the class of proceedings to foreclose or exclude a lien on real and personal estate, and to suits for divorce.

This class of cases, being equitable in their nature, do not fall within the scope of rule 25, and the issuing of an attachment is not a necessary concomitant.

On the applicability of this remedy to cases of divorce there are no reported decisions. As regards real estate it is held in *Allen* vs. *Allen*, 11 How., 277, that, in partition, where the names of persons supposed to have a possible interest in the premises were unknown, publication might be made, a proper designation being given.

(*b.*) Mode of Application.

The proceeding for this purpose is of course *ex parte*. It is of necessity founded on affidavit, which must show the requisite jurisdictional facts.

It is cognizable by the court in which the action is brought, or by a judge thereof, or by the county judge of the county where the trial is

to be had. Prior to 1851, any county judge was competent to make the order, but, in that year, the jurisdiction was limited as above.

The form of the order is prescribed. The complaint must be filed before publication, and the summons, as published, must state the time and place of such filing.

It is proposed to consider these subjects in their order, omitting the second, which does not require any further illustration.

(*c.*) Affidavit.

The utmost care must be taken in preparing this document, as any failure in proof may involve a failure to acquire jurisdiction. *Vide Evertson* vs. *Thomas*, 5 How., 45; 3 C. R., 74.

To comply with the statute, it must appear by such affidavit or by affidavits, if the facts requisite are not all within the cognizance of one person.

1. That the defendant in question cannot, after due diligence, be found within the state.

2. That a cause of action exists against such defendant, or that he is a proper party to an action relating to real property within the state.

3. The case must be clearly brought within the scope of one of the five subdivisions.

The different facts necessary for the above purpose must be stated as facts, and with sufficient detail to establish them as such, especially where an inference is sought to be grounded on them. A mere allegation in the words of the statute, standing alone, will not avail; though, on the other hand, the exact wording should always be carefully followed, either in part of the statement of facts, as such, or in immediate connection with it. The statement so made must be made positively and directly, as far as practicable, and not on mere information and belief; or, when it is necessary to swear to facts not within the personal knowledge of the deponent, the sources of the information and the grounds of the belief must be clearly given, so as to lead the mind of the judge or officer to the same conclusion. See hereafter, under the head of *Provisional Remedies*. See also *Evertson* vs. *Thomas*, and *Warren* vs. *Tiffany*, *supra*.

When the party sought to be served is clearly a non-resident, it seems that it is not necessary to prove an attempt to serve the summons upon him. *Vernam* vs. *Holbrook*, 5 How., 3; *Rawdon* vs. *Corbin*, 3 How., 416; *Titus* vs. *Relyea*, 17 How., 265 (269); but, in all other cases, actual diligence for that purpose should not merely be sworn to, but shown by a statement of the means employed.

It should be shown also that a summons and complaint have been

made out. *Rawdon* vs. *Corbin*, 3 How., 416. See also note, 1 C. R., 13, which is, however, too vague to be of much practical use.

Where the complaint has been already filed, as directed at the end of the section, a statement of that fact should be made. See *Kendall* vs. *Washburn*, 14 How., 380.

The place of residence of the defendant proposed to be served, or the fact that such residence is either unknown to the plaintiff, or cannot, with reasonable diligence, be ascertained by him, must also appear, with sufficient detail in the latter event, to show such diligence. *Hyatt* vs. *Wagenright*, 18 How., 248. Especially is this the case when the application is made under the last clause, as added on the amendment of 1860, and a mere publication is ordered, without directing a service, or attempt at service, by mail. See *Cook vs. Farren*, 34 Barb., 95; 21 How., 286; 12 Abb., 359; affirming *same case*, 11 Abb., 40. The statement of residence may be made, however, on information and belief. *Vide Van Wyck* vs. *Hardy*, 20 How., 222; 11 Abb., 473.

In the case of a non-resident defendant, the existence of property belonging to him within the limits of the state, is a jurisdictional fact, and must be shown affirmatively *Fiske* vs. *Anderson*, 33 Barb., 71; 12 Abb., 8.

The requisites of an affidavit under subdivision 2 are prescribed with considerable detail in *Towsley* vs. *McDonald*, 32 Barb., 604. It must not merely show the existence of a cause of action, and that the defendant cannot be found, but also an intent to defraud or avoid service must be substantiated. To establish the intent to defraud creditors, the affidavit must show that the defendant has property of some kind; that he has made, or is about to make, a fraudulent or illegal disposition of it; or that he unjustly refuses to apply it to the payment of his debts; or has secreted or removed, or is about to secrete or remove; or has fraudulently incumbered it.

And, to authorize an order on the ground of departure to avoid service, the affidavit must furnish proof of such intent. Where, therefore, it did not appear that, at the time of departure, any summons had been issued, or was about to be served, or that the defendant was threatened with, or feared, or expected a suit, the affidavit was held defective, and the order void.

The disposal of the affidavits used upon an application of this nature was left unprovided for until the last revision of the rules, when, by rule 4, it was directed that they and also the order, should be forthwith filed with the clerk of the proper county. If not so filed within five days, the defendant may move to vacate the proceedings for irregularity, with costs. Prior to the making of this rule, it had been held

that the usual practice was to file or leave the former with the judge who granted the order. *Vernam* vs. *Holbrook*, 5 How., 3.

(*d.*) FORM OF ORDER.

The section itself is clear as to the terms of the order, which must distinctly direct the publication of the summons, give the names of the newspapers in which the publication is to be made, and define the length of time, exceeding the prescribed minimum, for which it is to continue. It must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant, at his place of residence, unless it appear that such residence is unknown, and cannot be ascertained. The applicant should, of course, be prepared with the names of the newspapers in which he proposes that publication should be made.

Any variation from this prescribed standard will be fatal to the validity of the whole proceeding. Thus, where the order submitted to the judge, merely directed that a copy of the summons and complaint be deposited in the post-office, addressed to the defendant, the papers were returned without granting it. It should have provided that such copy be *forthwith* deposited, directed to the defendant at his residence, naming it if known. *Hyatt* vs. *Wagenright*, 18 How., 248. A similar defect was held fatal to the whole proceeding, and judgment set aside, in *Warren* vs. *Tiffany*, 17 How., 106; 9 Abb., 66. See also, *Back* vs. *Crussell*, 2 Abb., 386. In *Van Wyck* vs. *Hardy*, however, 20 How., 222; 11 Abb., 473, the rule was less strictly applied.

It has also been held expedient that the order should either recite the summons, or refer to it as being annexed, for the purposes of connecting it with the record; which seems advisable. *Rawdon* vs. *Corbin*, 3 How., 416.

In a case falling under subdivision 2, which presupposes that the defendant is a resident of the state, but has departed or concealed himself, the order, if his residence appears upon the papers, must direct service upon him by mail. *Towsley* vs. *McDonald*, 32 Barb., 604.

(*e.*) PROCEEDINGS UNDER ORDER.

The first proceeding is to file the complaint, if not already filed, as, by the last clause of the section, this is a positive prerequisite to publication.

The affidavits and the order itself, must also be filed forthwith, and within five days at the furthest, as directed by rule 4, under peril of the penalty there prescribed.

Before publishing the summons, it must be carefully examined, to see whether the time and place of filing the complaint is properly in-

serted. The courts are strict upon this subject, but not to excess. Where, therefore, the summons against a non-resident, distinctly stated in the body, that the summons would be filed in the office of the clerk of the County of Kings, at the City Hall, city of Brooklyn, Kings County; and then, in a note at the foot, stated the date of such filing, the Court of Appeals overruled the objections: 1st, that the name of the state was omitted; and, 2d, that the statement of time was in a foot-note, and not in the body of the summons. *Cook* vs. *Kelsey*, 19 N. Y., 412. See report below, 17 How., 134; 8 Abb., 170, as *Cook* vs. *Esleeck*. By this decision, *Titus* vs. *Relyea*, 16 How., 371; 8 Abb., 177, holding the direct contrary, is overruled, and the dissenting opinion, in that case, of Rosecrans, J., 17 How., 265, confirmed.

Where, too, the summons, as published, misstated the day of filing the complaint, the latter having been actually on file one day earlier than that inserted, the technical irregularity was disregarded. *Jacquerson* vs. *Van Erben*, 2 Abb., 315. The following irregularities, viz., an omission of the name of some of the defendants from the copy summons filed; and an omission to insert the name of the city, in designating the office of the plaintiff's attorney, were also disregarded in *Van Wyck* vs. *Hardy*, 20 How., 222; 11 Abb., 473.

But, where the filing had been wholly omitted, the defect was held jurisdictional, and judgment set aside. *Kendall* vs. *Washburn*, 14 How., 380. See also *Hallett* vs. *Righters*, 13 How., 43.

As to the proper mode of folding and directing a notice, in the analogous proceeding of foreclosure by advertisement, *vide Rathbone* vs. *Clarke*, 9 Abb., 66, note. If the notice be enclosed in an envelope, that envelope should be sealed. If unsealed, the direction should be on the notice itself.

The complaint need not be published with the summons. *Anon.*, 3 How., 293; 1 C. R., 102. This is clear from the terms of the section itself. A deficiency in the whole period of publication, will be an irregularity, avoiding the judgment. *Hallett* vs. *Righters*, 13 How., 43. As to the time during which publication must be continued, *vide supra*, section 58, under head of *Proof of Service*.

A delay in mailing the complaint will also render the judgment irregular. So held, and the objection sustained in the mouth of a purchaser, *Back* vs. *Crussell*, 2 Abb., 386. An omission to mail will be fatal. *Hallett* vs. *Righters*, 13 How., 43. But, where duly mailed, it will be presumed that the defendant received it. *Mackay* vs. *Laidlaw*, 13 How., 129.

And in *Van Wyck* vs. *Hardy*, 20 How., 222; 11 Abb., 473, a reasonable delay in mailing the papers, caused by waiting to have them printed, was held not to render the judgment irregular. There can be

no doubt, however, of its being the safest, if not the only safe course, to mail them at the earliest possible moment.

After an order for publication, service of the summons only, made out of the state, will be wholly unavailable. *Morrell* vs. *Kimball*, 4 Abb., 352.

Some discussion has arisen as to the effect of personal service of the summons and complaint, out of the state, after an order for publication has been granted. The point seems clear, however, upon the words of the section itself, which prescribes that personal service of both, out of the state, is equivalent to publication and deposit in the post-office. Service of the summons only is a nullity, and it would seem that proof of service of an amended complaint in this manner would be wholly unavailable. *Vide Morrell* vs. *Kimball*, 4 Abb., 352.

In *Roche* vs. *Ward*, 7 How., 416, the force of this provision is acknowledged, though the exact circumstances under which the defendant's application was denied do not appear.

In *Litchfield* vs. *Burwell*, 5 How., 341; 1 C. R. (N. S.), 42; 9 L. O., 182, it was considered that the effect of personal service, out of the state, was merely to dispense with service by mail as prescribed, and not to do away with the necessity of publication. In this *dictum* the positive wording of the section seems to be lost sight of.

That it dispenses with and is equivalent to both, according to the express terms of the statute, is clearly laid down in *Tomlinson* vs. *Van Vechten*, 6 How., 199; 1 C. R. (N. S.), 317; *Dykers* vs. *Woodward*, 7 How., 313; *Abrahams* vs. *Mitchell*, 8 Abb., 123. But, though it clearly has this, no greater effect can be attributed to it. *Fiske* vs. *Anderson*, 33 Barb., 71; 12 Abb., 8.

The effect of personal service, within the state, after an order made, is left unprovided for. In such a case, if that service be relied on, the defendant should be distinctly so informed, and the publication should be abandoned. *Niles* vs. *Vanderzee*, 14 How., 547.

The provisions of section 135 seem to place it beyond a doubt that where an order for publication has once been made, the service will not be deemed complete until the expiration of the time prescribed by the order, notwithstanding that the necessity for publication itself may have been done away with, by personal service out of the state. See *Tomlinson* vs. *Van Vechten*, 6 How., 199; 1 C. R. (N. S.), 317; *Abrahams* vs. *Mitchell*, 8 Abb., 123. The contrary conclusion, *i. e.*, that the defendant's time to answer will run from the date of such actual service, if made without reference to the terms of the order, is maintained in *Dykers* vs. *Woodward*, 7 How., 313; but this view seems to be overruled.

It is also held, in the former cases, that the defendant's time to answer runs from the expiration of the period so limited, and that the plaintiff

must wait that additional time, before he can enter up his judgment. See also *Mackay* vs. *Laidlaw*, 13 How., 129; *Back* vs. *Crussell*, 2 Abb., 386.

The death of a non-resident defendant, pending the order for publication, has been held to abate the action, so that it cannot be revived against his representative. *McEwens Executor* vs. *Public Administrator*, 3 C. R., 139. On appeal to the general term, the doctrine here laid down was approved, but, an attachment having been issued, and property taken, that fact was held sufficient to give the court jurisdiction, and to enable it to grant an order of substitution, by which the plaintiff's provisional lien might be enforced. *Moore* vs. *Thayer*, 10 Barb., 258; 6 How., 47; 3 C. R., 176. The plaintiff's lien, so acquired, was in like manner maintained, as against alleged irregularities in the mode of service. *Burckhart* vs *Sandford*, 7 How., 329.

The mere fact of an attachment pending will not avail, however, to sustain the rendering of judgment; for that purpose, service must be complete and regular. *Kendall* vs. *Washburn*, 14 How., 380. In that case, however, the plaintiff's right to pursue his attachment was retained, on setting aside the judgment as irregular.

The mode of entry of judgment on service of this nature, and the proceedings necessary for that purpose, will be hereafter considered under their proper heads. It may be as well, however, to draw to the student's attention the positive prerequisites now imposed by rule 25, as inserted upon the last revision. In actions for the recovery of money only, it is, since the passing of that rule, essential to show that an attachment should have been previously issued, and a levy made under it. An undertaking for the making of restitution, if ordered, must also be previously produced and filed.

Warren vs. *Tiffany*, 17 How., 106; 9 Abb., 66, would at first sight seem to be a decision in point as to the effect of the rule in question, and the irregularity of entering up judgment, where the plaintiff has omitted to attach the defendant's property. On examination of the report, it appears, however, that this decision was made in September, 1858, and therefore, before the rule came into operation, though after it was actually made. See *Preamble to Rules*. This appears to deprive the case of its direct authority, besides which, there seems strong reason to doubt whether it is competent for the judiciary to deprive the plaintiff of his right to enter and to enforce a general judgment on such service, which the Code itself seems to confer, or to impose restrictions upon that right, which the legislature have not seen fit to prescribe. Still greater is the doubt whether after judgment had once been actually entered, mere non-compliance with such a rule would render it voidably irregular.

The view sustained in the rule seems to proceed upon the theory that an action against a non-resident defendant is strictly in its nature a proceeding *in rem*, and not *in personam*. *Vide Hulbert* vs. *Hope Mutual Insurance Company*, 4 How., 275, 415, and other cases before cited. It seems, however, calculated to work special hardship, in cases falling under subdivision 2, besides which, if the conclusion drawn at the close of *Warren* vs. *Tiffany*, *i. e.*, that the judgment could in no event affect any property of the defendant, except such as had been taken by virtue of an attachment regularly issued in the action, be correct, it would seem to leave the plaintiff, holding such a judgment, wholly remediless as against subsequently acquired or subsequently discovered property of the defendant, an attachment being merely issuable in contemplation of a future judgment. (§ 227.)

This can scarcely be the correct view, besides which, the very rule itself does not call for, or apparently warrant, such extreme strictness of construction.

In *Fiske* vs. *Anderson*, 33 Barb., 71; 12 Abb., 8, the point is suggested, but not passed upon. *Force* vs. *Gower*, 23 How., 294, is authority that the judgment, as regards its ulterior incidents, is strictly a judgment *in rem*, and not *in personam*.

(*f.*) Rights Reserved to, or Exercisable by Defendant.

It remains to notice the measures which the defendant may take to set aside service of this nature, or to obtain leave to come in and defend, after judgment obtained thereon.

It will be seen that, at any time before judgment, the defendant may come in and defend, as of course; and that he possesses the full power of doing so, and of enforcing restitution, if he prevail (except as regards the rights of *bonâ fide* purchasers), within a very extended period after its rendition, except in the single case of divorce, on proof that he has not had a full year's previous notice of such judgment; a provision which renders it highly advisable that, wherever practicable, a formal notice of judgment being entered, should be forthwith served upon him on the part of the plaintiff. Under the Code of 1849, a defendant, who had been personally served out of the state, or who had received the summons by post, was precluded from coming in to defend after judgment. See *Hulbert* vs. *The Hope Mutual Insurance Company*, before cited; but this restriction no longer exists, under the recent amendments.

The courts will not interfere with the discretion of a justice, granting an order of this nature, or set such order aside, merely because the evidence on which it was granted was slight. *Roche* vs. *Ward*, 7 How., 416.

Mere technical irregularities in the proceedings may, too, be amend-

ed or disregarded, and the lapse of one year after judgment will bar an application on that ground. *Jacquerson* vs. *Van Erben*, 2 Abb., 315; *Hallett* vs *Righters*, 13 How., 43.

But where the defect is one of substance, or the irregular proceeding tends to confer jurisdiction, this is not so. The whole proceeding will then be defective, and may be set aside, even though the application be delayed for more than one year after judgment. The limitation imposed by 2 R. S., 358, section 2, does not apply, where the question is one of right or substance. *Hallett* vs. *Righters*, 13 How., 43.

Nor will the issuing of an attachment so far avail the plaintiff, though his rights under it may be saved. *Vide Kendall* vs. *Washburn*, 14 How., 380, and other cases before cited in that connection.

Nor will the laches of the defendant avail to bar such a motion, where the defect is jurisdictional. *Titus* vs. *Relyea*, 16 How., 371; 8 Abb., 177 (185), which, so far, does not appear to be overruled. It will avail, however, to bar a motion on the ground of mere irregularity. *Abrahams* vs. *Mitchell*, 8 Abb., 123.

The question as to whether, on a motion to set aside service of this nature, additional affidavits may or may not be used on the part of the plaintiff, seems to be still open. *Cantwell* vs. *The Dubuque Western Railroad Company*, 17 How., 16. But it may, probably, be held to be governed by the same principles as are applied to the analogous case of attachment, viz., that, where the motion is made simply on the ground of irregularity in the original papers, further affidavits cannot be used; but that where additional facts are stated in the defendant's papers, it is competent for the plaintiff to bring further testimony, to rebut those facts and sustain the proceeding.

An application by the defendant to be allowed to come in and defend, though made in due time, does not, *per se*, open the judgment, or stay proceedings under it. *Carswell* vs. *Neville*, 12 How., 445. Nor is it competent for a third party to move to be allowed to come in, after judgment entered.

A defendant seeking to come in is confined to the assertion of his own rights. The judgment will not be opened, on his application, on the ground of irregularity, as regards proceedings against a co-defendant. *Chapman* vs. *Lemmon*, 11 How., 235. Liberty to defend on the merits was, however, there granted on terms; and such, as a general rule, will be the case, wherever the existence of a defence is shown, these terms, of course, resting in the discretion of the court.

A non-resident defendant, served out of the state, is not entitled, as of right, to the service of a second copy of the complaint. His mere demand will not entitle him to have one. *Mackay* vs. *Laidlaw*, 13 How., 129.

§ 57. *Service on several Defendants, Joint Debtors, &c.*

The provisions of section 136, under which, in actions against several defendants, the summons may be served upon any one or more of them alone, and separate proceedings taken thereupon, against the parties so served, will be remarked; though, of course, it will be premature, at this point, to enter into the details of those proceedings. The peculiar description of process by means of which parties against whom a joint judgment has been entered without personal service upon them, or the representatives of a deceased judgment-debtor, may be respectively summoned to show cause why they should not be bound by the judgment already on record, will be hereafter considered in connection with that branch of the subject.

§ 58. *Proof of Service.*

Section 138 points out three modes by which service, when made, may be proved:

1. By sheriff's certificate.
2. By affidavit.
3. By admission.

(*a.*) Sheriff's Certificate.—Affidavit.

It is essential that the sheriff's certificate should identify the summons and complaint served by him, as being the summons and complaint in the cause, or the service will be defective. *Lichfield* vs. *Burwell*, 5 How., 341; 9 L. O., 182; 1 C. R. (N. S.), 42.

The validity of a sheriff's certificate is confined to acts done within the scope of his official duty. It is no proof whatever of service made by him in another county. Such service, if made by him, can only be proved by affidavit, as in the case of an ordinary person. *Farmers' Loan and Trust Company*, vs. *Dickson*, 17 How., 477; 9 Abb., 61. The same is the case, "*a fortiori*," as to the certificate of service by the sheriff of another state. *Thurston* vs. *King*, 1 Abb., 126; *Morrell* vs. *Kimball*, 4 Abb., 352.

In like manner, the sheriff's certificate is no proof of service, in cases where his return is not required by statute. His affidavit must then be presented. So held, as to service of an order on supplementary proceedings. *Utica City Bank* vs. *Buell*, 9 Abb., 385.

Nor is his indorsement evidence of the time of the receipt of a summons, so as to show the commencement of an action under section 99. *Wardwell* vs. *Patrick*, 1 Bosw., 406.

As a general rule, the sheriff's return is conclusive, nor does it lose

its validity by lapse of time, or by having been previously acted upon. *Brien* vs. *Casey*, 2 Abb., 417; *Columbus Insurance Company* vs. *Force*, 8 Abb., 353. See also *Anon.*, 4 How., 112. The *dictum* to the contrary, in *Van Rensselaer* vs. *Chadwick*, 7 How., 297, is "*obiter*," and seems unauthorized.

An affidavit by a third person may, however, be impeached, and proof given to show that the pretended service was not made in fact. *Van Rensselaer* vs. *Chadwick*, 7 How., 297; *Wallis* vs. *Lott*, 15 How., 567; *Williams* vs. *Van Valkenburgh*, 16 How., 144.

A constable's return, though, as a general rule, conclusive, and incapable of being impeached collaterally, may be questioned on a motion to open the judgment, *Carroll* vs. *Goslin*, 2 E. D. Smith, 376; or when the defendant appears in season, *Wheeler* vs. *The New York and Harlem Railroad Company*, 24 Barb., 414. As to its conclusiveness in general, *vide The New York and Erie Railroad Company* vs. *Purdy*, 18 Barb., 574; *Reno* vs. *Pinder*, 20 N. Y., 298; reversing *same case*, 24 Barb., 423.

The sheriff is entitled to demand prepayment of his fees before service; but, after service, he cannot retain the papers and refuse to make his return. *Wait* vs. *Schoonmaker*, 15 How., 460.

Those fees, in respect of service of process and papers as above, are as follows: For service of the summons, or summons and complaint, 50 cents; for service of notice of object of suit, 37½ cents in addition; and for his certificate of the service of both summons and notice, one fee of 12½ cents only, in addition to those for mileage, at 6 cents per mile, for going only, to which he is entitled under the Revised Statutes, 2 R. S., 644. See *Gallagher* vs. *Egan*, 2 Sandf., 742; 3 C. R., 203; *Benedict* vs. *Warriner*, 14 How., 568 (570).

The form of the affidavit of service, when made by any person other than the sheriff, is prescribed in detail by rule 18 (84), or 90 of 1849. In such affidavit, the time and place of service must be distinctly specified, the identity of the defendant served must be deposed to, and the fact that the copy was left with, as well as delivered to him, must appear. An omission to comply with the requisitions of the rule will not, however, render the service, or the proceedings under it, void, if it appear that the requirements of the statute, section 138, are answered. A rule of court may affect questions of mere practice and regularity, but not the jurisdictional competency of the court to proceed in the action. *Althause* vs. *Rudde*, 3 Bosw., 410 (434), per Pierrepont, J. See, as to a conflict of evidence on this point, *Hunter* vs. *Lester*, 18 How., 347; 10 Abb., 260.

Subdivision 2, of the same section, prescribes the necessary proof of publication.

In *Bunce* vs. *Reed*, 16 Barb., 347, it was held, as to the analogous case of foreclosure by advertisement, that the affidavit of the publisher of a newspaper is sufficient, though the statute prescribes it should be made by the printer, his foreman, or clerk. The affidavit must also prove publication in each week of the period, or it will be defective. It was considered, however, that an amended affidavit might be filed according to the truth of the case. As to what will be considered a publication in each week, in compliance with the statute, *vide Howard* vs. *Hatch*, 29 Barb., 297.

Publication for the full period prescribed by the order is necessary, and publication before the date of that order will be unauthorized and nugatory. *Hallett* vs. *Righters*, 13 How., 43.

See, generally, as to what will or will not be deemed a sufficient publication of a legal notice, as to which a definite period is prescribed, *Olcott* vs. *Robinson*, 21 N. Y., 150; *People* vs. *Gray*, 10 Abb., 468; *Chamberlain* vs. *Dempsey*, 22 How., 356; 13 Abb., 421.

As to the legal fees on publication, *vide* chapter 252, of 1859, p. 551, by which they are fixed at 75 cents per folio for the first insertion, and 30 cents per folio for each subsequent.

The period during which publication must be continued, is expressly prescribed by section 425. It is to be computed "so as to exclude the first day of publication, and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication."

This principle is the same as that prescribed generally by section 407, as to the computation of time, which is to be made by excluding the first day and including the last, unless it be Sunday, when that day is also to be excluded.

As to the reception of the affidavit of a person dead or insane, as presumptive evidence of service of a notice, *vide* chapter 244, of 1858, p. 394. Whether this statute would apply to proof of service of a summons, seems, however, doubtful.

(*b.*) Admissions.

It will be seen that, by section 138, it is equally necessary that the time and place of service should be stated upon an admission, as upon a certificate or affidavit.

An admission signed by the party, cannot be made available, as the ground of ulterior proceedings, without extrinsic evidence. The signature of such party, and the fact that he is the party sought to be charged, must be proved by affidavit. The court takes judicial notice of the signatures of its own officers, but not of those of third parties. *Litchfield* vs. *Burwell*, 5 How., 341; 1 C. R. (N. S.), 42; 9 L. O., 182

The objection, however, may be barred by laches. In a case where the motion was delayed until after judgment, the plaintiff was allowed to amend, and supply the necessary proof, *nunc pro tunc*. *Jones* vs. *The United States Slate Company*, 16 How., 129.

§ 59. *Jurisdiction, Acquisition of, and Appearance.*

The provisions of section 139 are of a twofold application.

1st. It defines when jurisdiction is acquired.

2d. It also provides as to the effect of a voluntary appearance.

(*a.*) Jurisdiction.

The questions which have arisen as to the operation of this provision have been in fact anticipated in the previous divisions of this work. The effect of those decisions may be shortly stated as follows:

For the main objects of an action, *i. e.*, the pleadings, the joinder of issue, the bringing such issue to trial, and the rendering of judgment thereon when brought, together with the numerous branches of relief collateral to such main objects, jurisdiction can only be acquired by service of the summons, or its equivalent.

But, for the purposes of sustaining, enforcing, modifying, or vacating a provisional remedy, or any applications relative to or dependent thereon, jurisdiction, limited to the above objects, is acquired on the allowance of such remedy.

And, for the purposes of that section, a similar effect is ascribed to the filing of a notice of *lis pendens* under section 132, by the amendment of 1862, if followed up by the service of process in the manner there prescribed.

(*b.*) Appearance.

A voluntary appearance of a defendant is by the statute "equivalent to personal service of the summons upon him." On such appearance therefore jurisdiction is fully acquired, for all purposes whatsoever. The mode of appearance and its incidents, apart from the subject of that jurisdiction, will be considered hereafter.

A general appearance waives all irregularity whatever either in the summons itself or in the mode of service, or even the want of any summons at all. It is an admission on the part of the defendant that he has been regularly brought into court. *Dix* vs. *Palmer*, 5 How., 233; 3 C. R., 214; *Mulkins* vs. *Clark*, 3 How., 27; *Flynn* vs. *The Hudson River Railroad Company*, 6 How., 308; 10 L. O., 158; *Webb* vs. *Mott*, 6 How., 439; *Hewitt* vs. *Howell*, 8 How., 346. And it admits likewise, that the court into which he is brought has jurisdiction of his per-

son. *Watson* vs. *The Cabot Bank*, 5 Sandf., 423; *Varian* vs. *Stevens*, 2 Duer, 635. See also, as to appearance by a foreign state, *Manning* vs. *The State of Nicaragua*, 14 How., 517.

And not merely does such an appearance waive all irregularities in the summons or its service, but also in the complaint itself, if made after service of the latter. *Beck* vs. *Stephani*, 9 How., 193. Or in the proceedings on a provisional remedy antecedent to the action, as in replevin. *Hyde* vs. *Patterson*, 1 Abb., 248. So also, as to the objection that an action by a receiver has been commenced without leave of the court, *Hubbell* vs. *Dana*, 9 How., 424.

It does not however extend to give validity to a previous proceeding which is not merely irregular, but void. So held, as to an attachment, issued out of the Superior Court before jurisdiction had been acquired. *Granger* vs. *Schwartz*, 11 L. O., 346. Nor does it waive the objection that the court has no jurisdiction of the subject-matter of the action. *Harriott* vs. *The New Jersey Railroad and Transportation Company*, 2 Hilt., 262; 8 Abb., 284.

Any proceeding in the cause, which assumes that the defendant is regularly in court, is equivalent to an appearance, and will have the same effect, so far as the waiver of irregularities is concerned. So held, as to obtaining an order for further time to answer. *Quin* vs. *Tilton*, 2 Duer, 648. So also, even where a general notice of motion to set aside the summons had been given and signed by the defendant's attorney, without any limitation that such appearance was for that specific purpose only. *Baxter* vs. *Arnold*, 9 How., 445; *Dole* vs. *Manley*, 11 How., 138. The contrary, and that a notice of appearance, when served with motion papers to set a judgment aside, is not a waiver, is held in *Bierce* vs. *Smith*, 2 Abb., 411. The objection, however, in that case, was that the service made was void by statute. Where the defendant in his answer had specially protested against the jurisdiction of the court, founded on personal reasons, it was held, nevertheless, that by such answer the objection was waived. *Mahaney* vs. *Penman*, 4 Duer, 603; 1 Abb., 34.

It has been considered that, where the summons only has been served, a general appearance and demand of copy of complaint, does not preclude the defendant from taking the objection, that the latter, when served, is a departure from the summons, and therefore irregular; and this view seems to be well grounded. See, heretofore, section 51, and *Voorhies* vs. *Scofield*, 7 How., 51; *Shafer* vs. *Humphrey*, 15 How., 564, and *Tuttle* vs. *Smith*, 14 How., 395; 6 Abb., 329, there cited and commented upon.

§ 60. *Notice of Lis Pendens.*

The last amendment (1862) being a mere addition to section 132, leaving the section itself unaltered, the plaintiff must still file his complaint, in real estate cases, prior to or simultaneously with this proceeding; the legislature, if they intended, having omitted to relieve him from this restriction. The notice may, however, be filed, in all cases, before service of the summons, provided only the latter be subsequently served as there prescribed, viz., either by publication, or by personal service upon a defendant within sixty days after its filing. It is in fact expressly declared to be a commencement of the action, for the purposes of section 132, as it now stands.

In the case of foreclosure, it is an indispensable prerequisite to the obtaining of judgment. See *Brandon* vs. *McCann*, 1 C. R., 38. This provision is, in effect, a continuance of the former practice. *Vide* 2 R. S., 174, section 43. See also chapter 342 of 1840, sections 8 and 9, amended by chapter 360 of 1844, section 5.

In other actions affecting real estate, the filing of this proceeding is not obligatory but permissive; but, wherever the title of such estate is sought to be affected, directly or indirectly, no prudent practitioner will neglect taking it, and taking it at the outset; nor will such a practitioner neglect doing so in every county in which property, so affected, may be situate. By doing so, he places a stop upon the property, and prevents it from being subsequently dealt with, in prejudice of his client's rights. By omitting to do so, he leaves those rights still liable to be defeated by subsequent acts, notwithstanding the steps taken in the suit for their actual assertion.

The provisions of the section, empowering the filing of such a notice, in cases where an attachment shall be issued, and real estate sought to be charged under that attachment, are comparatively recent, and date, as before shown, from the amendment of 1857. They are, however, foreshadowed, and the practice suggested as necessary, in *Learned* vs. *Vandenburgh*, 7 How., 379. The practice on filing such a notice is defined in *The People* vs. *Conolly*, 8 Abb., 128.

The notice is only available as against actual parties to the action, or purchasers, or incumbrancers, subsequent to the lien sought to be enforced. Prior purchasers, or incumbrancers, not proper parties, cannot be charged by it, nor is it proper to index or insert their names. *The People* vs. *Conolly*, *supra*.

Under the section, the filing is constructive notice to purchasers or incumbrancers of the property affected. This provision does not, however, derogate from the effect of actual notice to such a purchaser or

incumbrancer, where chargeable with it. See *Griswold* vs. *Miller*, 15 Barb., 520, as to the nullity of a purchase from an habitual drunkard, with knowledge that a commission against him had been issued, and was then in course of execution.

The amendment of 1862 has removed the difficulty previously felt as to the effect of filing such a notice, before the service of summons, on the defendant.

It was before laid down that such filing of the notice could have no effect at all, before the service of summons on the party sought to be affected. *Burroughs* vs. *Reiger*, 12 How., 171; 12 Abb., 393, note; *Farmers' Loan and Trust Company* vs. *Dickson*, 17 How., 477; 9 Abb., 61. It was held, however, that subsequent service gave a notice so filed a prospective operation. *Tate* vs. *Jordan*, 3 Abb., 392. And also that a subsequent filing of the complaint, gave a notice, filed after service of summons, an effect, running from the day when the proceeding was completed. *Benson* vs. *Sayre*, 7 Abb., 472, note; *Waring* vs. *Waring*, 7 Abb., 472 (473).

Inasmuch as a full description of the suit in general, and particularly of the property affected, is a necessary incident to the validity of a notice of this description, it seems to follow, as a necessary consequence, that, if the plaintiff, after filing his notice, subsequently amend his complaint in substantial matter, either as regards the parties to the action, the premises affected, or the relief claimed, a new notice should be filed, in accordance with the fresh matter pleaded; and such is the general practice. Where, however, the amendment made consisted merely in the addition of the names of parties, and the names of the defendants so added were subsequently stricken out, and nothing was claimed against them, nor did it appear that their interests were material to the title of purchasers, under a decree, it was held that the original notice was sufficient, and an order was made that such purchasers complete their purchases. *Waring* vs. *Waring*, *supra*.

A purchaser, "*pendente lite*," is bound by the decree, whether he be or be not made a party. *Harrington* vs. *Slade*, 22 Barb., 161. And such is the case as to all parts of the property affected by the suit, and as to all equities arising out of the rights or liabilities of the defendant. *Chapman* vs. *West*, 17 N. Y., 125. Notice filed against his vendor, has been held to discharge a vendee from specific performance of a contract for purchase. *Earl* vs. *Campbell*, 14 How., 330. See, however, *Zeiter* vs. *Bowman*, 6 Barb., 133, as to the right of a party sought to be charged, to be heard, in respect of collateral proceedings in the action relating to the income of the subject-matter, by which his interests may be affected.

Since the amendment of 1858, the question as to the parties who are

bound by such a notice, is specifically provided for. Before that amendment, it was held that where the deed of a purchaser, though not recorded until after the filing of the notice, was previously executed, he was a necessary party. *Hall* vs. *Nelson*, 23 Barb., 88; 14 How., 32. See also *Griswold* vs. *Fowler*, 6 Abb., 113. N. B. The report of this last case is mispaged, which creates considerable confusion. As to the effect of the section as now amended, see *Earls* vs. *Barnard*, 22 How., 437.

A substantial compliance with the statute will be sufficient, and a judgment, when given, cannot be collaterally impeached, on the ground of mere irregularity in the notice, or proof of filing. *Potter* vs. *Rowland*, 4 Seld., 448. As to the disregard of mere amendable irregularities, see also *Waring* vs. *Waring*, 7 Abb., 472.

A notice containing a superfluous initial in the name of the defendant, has been held sufficient to put a purchaser, "*pendente lite*," on inquiry, and to charge him with the knowledge to which such inquiry would have led. *Weber* vs. *Fowler*, 11 How., 458.

A notice, when filed, cannot be vexatiously continued, in the absence of a suit actually and regularly commenced and prosecuted. Where, therefore, the plaintiff, after filing notice, took no steps to serve the defendants for two months, and where his initial proceedings were otherwise irregular, the notice, on motion of one of the defendants, was vacated. *Lyle* vs. *Smith*, 13 How., 104. See also recent amendment of the section itself, specially authorizing an application for that purpose, in a case where the action has abated, and has not been duly revived.

But a notice, regularly filed, cannot, pending the action, be taken from the files of the court, on any suggestion of inconvenience, even though security has been collaterally given by the defendant. *Pratt* vs. *Hoag*, 5 Duer, 631; 12 How., 215.

An index of the notices so filed is directed by the statute to be kept by the county clerk, *vide* 2 R. S., 174, section 43; chapter 342 of 1840, section 8. In the County of Kings, such notices are by statute to be recorded, and the county clerk is entitled to a fee of six cents per folio for that service; *vide* chapter 212 of 1859, sections 1 and 2.

The due filing of the notice may be proved, either by affidavit, or by the certificate of the county clerk with whom it is filed. In all cases, therefore, a duplicate copy should be kept, on which that certificate may be indorsed, or which may be annexed to the required affidavit, where that form is adopted—see rule 71. Such proof must show that such filing has taken place at least twenty days before such application for judgment, and at or after the time of filing the complaint, as still required by the section.

§ 61. *Mechanics' Liens.*

It is not proposed to enter into any detailed consideration of the statutory remedies provided for this purpose. They fall strictly under the head of special proceedings, and, as such, will be hereafter adverted to.

It may be convenient, however, to notice them in connection with the matters treated of in the present chapter. At a certain stage of the proceedings they assume, and thenceforward, down to the conclusion of the controversy, retain, the characteristics of an ordinary suit seeking relief *in rem*. See *Ogden* vs. *Bodle*, 2 Duer, 611.

The original filing of the lien bears in some of its features a close analogy to a notice of *lis pendens*, except only that its operation is limited to the period prescribed by the statute. It goes beyond that proceeding, however, in that it not merely gives notice of, but actually creates, a charge on the property sought to be affected, ranking in priority from the date of that filing, and affecting all subsequent purchasers or incumbrancers, with constructive notice of the charge so created.

The notice to the owner to appear and submit to an accounting or settlement has, to all practical intents and purposes, the effect of a summons. See *Smith* vs. *Maince*, 1 C. R. (N. S.), 230; *Brown* vs. *Wood*, 2 Hilt., 579. If the owner appears on the return of such notice, a complaint must then be filed by the claimant, which complaint must be answered by the owner, in the usual manner. The cause then proceeds like any other action, and, in relation to the pleadings and proceedings, will be treated of hereafter.

The owner is not, however, remediless, in the event of a delay by the claimant in the assertion of his rights. He possesses the power of compelling the latter to assert and enforce those rights within a limited period, on service of a notice to that effect. If the latter fail to do so, the lien will be discharged.

CHAPTER IV.

OF THE APPOINTMENT OF GUARDIAN AD LITEM, AND HIS DUTIES.

§ 62. *General Remarks.*

Before entering upon the general proceedings in a suit, the appointment of a guardian *ad litem*, and his duties, may advantageously be

considered at the present juncture. Where suit is brought in the name of an infant, such appointment must, of necessity, take place, as a preliminary to any other proceeding in the action, and, in fact, to the bringing of the action itself; and the considerations as to a similar appointment on behalf of an infant defendant are so essentially analogous, that the convenience of considering both in the same chapter, as one connected whole, is self-evident.

The subjects of the appointment of a general guardian on behalf of infants, irrespective of the prosecution or defence of a suit, or of a special guardian for the sale of such infant's real estate, both belong to the class of special statutory proceedings, and fall, as such, beyond the province of the present work. The Code contains no provision upon either subject, though rules 63 to 70, inclusive, of the Supreme Court, prescribe the practice to be pursued.

§ 63. *Statutory and other Provisions.*

The sections of the Code bearing on this subject are numbers 115 and 116. These sections have already been cited *in extenso*, and the amendments in them noticed, in section number 31 of this work, under the head of *Parties*, to which the reader is referred. It may be convenient, however, to give here a short recapitulation of their effects.

Section 115 provides, that when an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a county judge.

Section 116 prescribes the course to be pursued on such appointment.

When the infant is plaintiff, the infant himself is the proper applicant, if of the age of fourteen years. If under that age, the application should then be made by his general or testamentary guardian, if he has any, or by a relative or friend. If made by a relative or friend of the infant, notice must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

When the infant is defendant, he is himself the proper applicant in the first instance, if of the age of fourteen years. He is allowed twenty days after service of the summons to make such application.

If he neglect to do so within that time, or if he be under fourteen, then, any other party to the action, or any relative or friend of the infant, may so apply. Notice of such application must, however, be given:—1. To the general or testamentary guardian of such infant, if he has one within this state. 2. If he has none, then to the infant himself, if over fourteen, and within the state. 3. If he be under that age, and within the state, then to the person with whom such infant resides.

The case of an infant defendant in foreclosure or partition, resident out of the state, is now provided for by the amendment of 1862.

In such case, the plaintiff may take an order appointing a guardian *ad litem*, unless the infant himself, or some one on his behalf, procures such an appointment, within a specified time after service of the order, the mode of which service is to be thereby prescribed.

The provisions above referred to, appear to be mainly in substitution for those of title II., chapter VIII., part III., of the Revised Statutes (2 R. S., 445 to 447), now repealed by the conjoint operation of sections 468 and 471 of the Code.

The practice is further provided for by rules 60 to 62, inclusive, of the Supreme Court. They run as follows:—

Rule 60. (53 of 1854.) No person shall be appointed guardian *ad litem*, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence in the defence or prosecution of the suit.

This rule shall not apply to actions for the recovery of money only, or of specific real or personal property, as specified in section 253 of the Code.

N. B.—This last sentence would seem to remove all restrictions whatever as to the qualifications of the party to be appointed, in the class of actions here designated, except such as the court or judge may think fit to prescribe. This relaxation of the ancient practice dates from the revision of 1854. Prior to that of 1858, the former portion of the rule prescribed that the appointment should be either of the general guardian, or of "an attorney or officer of the court who is fully competent," &c. Any person is, however, now competent to act.

Rule 61. (52 of 1854.) It shall be the duty of every attorney or officer of this court, to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defence, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services, as the court may deem reasonable.

N. B.—This rule, as left unaltered on the revision last referred to, seems to contemplate that in the case of a guardian for an infant defendant, the former practice of appointing an attorney or officer of the court, will still be usually, if not necessarily, pursued.

Rule 62. (54 of 1854.) No guardian *ad litem* for an infant party, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court, to the guardian, out of the fund, or recovered by the

infant in the suit. Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to such infant, sold under a decree, judgment, or order of the court, until the guardian has given such further security for the faithful discharge of his trust, as the court may direct.

This last rule carries out the provisions of section 420 of the Code, which are imperative upon the same subject, and extend not merely to a guardian *ad litem*, but to any person acting in that capacity, however appointed.

That section runs as follows:

§ 420. (381.) No guardian appointed for an infant, shall be permitted to receive property of the infant, until he shall have given sufficient security, approved by a judge of the court, or a county judge, to account for, and apply the same, under the direction of the court.

The above provisions and rules apply to the subject of guardianship *ad litem*, generally considered.

In partition, the practice is still regulated by the provisions of the Revised Statutes, on the same subject, saved and kept in force under sections 448 and 455 of the Code; the former specially applying that reservation to actions for partition; the latter, generally, to actions concerning real property, brought under the Code, according to the subject-matter of the action, and without regard to its form.

The provisions as to guardianship in partition will be found at 2 R. S., 317, sections 2, 3, and 4.

By section 2 it is thus provided: "That, if it shall be represented to the court by any party intending to make application for a partition, that there are any minors who should be parties to the proceedings thereon, and it shall be satisfactorily proved to the court that at least ten days' notice has been served on such minors as reside in this state, or upon their general guardian, of an intention to apply, such court shall thereupon appoint a suitable and disinterested person to be guardian for one or more of such minors, whether the said minors shall reside in or out of the state, for the special purpose of taking charge of the interests of such minors, in relation to the proceedings for a partition."

Under section 3, the guardians so appointed shall represent the minors in the proceedings, "and their acts in relation thereto shall be binding on such minors, and shall be as valid as if done by such minors after having arrived at full age."

Under section 4, such a guardian, before entering on his duties, is bound to give security for the due performance of his trust.

In a case of partition by suit, the Court of Chancery was authorized by chapter 277 of 1833, to appoint one of its own officers as guardian

ad litem for an infant defendant, for whom no suitable and disinterested person should volunteer to appear and give the security above required; and there can be no doubt that this power is now possessed by the Supreme Court, but probably not by any of the tribunals of inferior or limited jurisdiction.

An analogous general provision is made as to actions relating to real property, at 2 R. S., 341, section 12, where it is provided that the plaintiff's proceedings in such an action shall not be suspended by reason of the infancy of any defendant, but that guardians to defend the rights of infant defendants, shall be appointed as in personal actions. In such actions, if the infant does not procure the appointment of a guardian within the time limited for his appearance, the plaintiff may proceed to have such guardian appointed, as in personal actions.

By chapter 277 of 1852, p. 411, power is expressly given for the institution of proceedings for partition by an infant plaintiff, and under section 2 he is, in such proceedings, to be represented by a competent next friend. It is evident from the remainder of the section, that such next friend is to be appointed precisely in the same manner, and under the same conditions, as a guardian for an infant defendant, under the provisions of 2 R. S., 317, sections 2, 3, 4, though the reference to the chapter containing those provisions is erroneous, standing as chapter I., but being in fact chapter V. of part III. of those statutes.

By section 3, power is given to the court, or a judge, to authorize and direct the filing of the bond, imposed as a condition by section 4 of the above provisions of the Revised Statutes, "*nunc pro tunc*," so as to validate all the proceedings, in the event of such bond having been omitted to be given in due time, or of its not being found on file. Such power is made exercisable before judgment, in all cases, and, after judgment, in cases of actual partition.

By chapter 679 of 1857, vol. II., p. 504, the full powers of amendment, given by section 173 of the Code, are made applicable to proceedings under the provisions of the Revised Statutes, last above referred to.

Under section 316 of the Code, the following provision is made on the subject of costs:

§ 316. When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor, and payment thereof may be enforced by attachment.

This provision is analogous to that at 2 R. S., 446, section 2, now repealed, under the operation of sections 468 and 471 of the Code.

§ 64. *General Observations.*

By the measures of 1848 and 1849, petition was prescribed, as the proper form for obtaining preliminary relief of this nature. On the amendment of 1851, the word "petition" was stricken out, and the more general term, "application," substituted. Where, however, the application is made in the case of an infant plaintiff, in which case (the suit being as yet non-existent) it is necessary to lay substantive ground for any interference by the court; or where, if made in relation to an infant defendant, the substantive facts on which that application is grounded do not appear upon the face of the complaint, petition seems still the preferable course, because, by the adoption of that mode, the allegation of those facts becomes, as it were, a substantial portion of the record.

A motion on notice and affidavit, is, however, clearly admissible under the section as it stands, in all cases, and especially in those where, on application for a defendant, such substantive facts are already apparent upon the record, and the supplementary statements necessary to bring the case within the strict purview of the section, are merely collateral.

It will be observed, that there is a distinction to be drawn between applications in partition and in other cases. In the latter, any judge of the court, or a county judge, is competent to act; in partition, such application can only be made to the court, as such. Neither a county judge, nor even a judge at chambers, in any district, except the first, is competent to make the order; which, if so obtained, will be a nullity, and renders the whole proceeding void. *Lyle* vs. *Smith*, 13 How., 104.

In the first district, however, such an order may be made at chambers, and operates as an order of the court, under the special authority conferred by section 401. *Disbrow* vs. *Folger*, 5 Abb., 53.

The course to be pursued is simple and easy. If the application be made by petition, all the facts necessary to show the applicant's or infant's interest, and to bring the application clearly within the provisions of section 116, must be distinctly stated upon its face. It must then be signed and verified by the petitioner, and his signature proved in the usual form. (See next book, under the head of *Formal Proceedings.*) If grounded on affidavit, the same facts must appear on the face of that affidavit. In either case, the written consent of the proposed guardian to serve must be subjoined. When the action does not fall within the classes specified in section 253 of the Code, the particulars required by rule 60 must appear clearly, either upon the face of the moving affidavit, or by affidavits supplementary to the petition, if the application be so made. If it does fall within either of those classes,

this supplementary proof seems not to be necessary. It may be advisable, however, to give it, and certainly, if done, the application must be more satisfactory to the officer to whom it is made.

The proceeding is almost necessarily *ex parte*, though where there is any contest or doubt on the subject of the appointment, the court or judge applied to may, of course, prescribe that notice be given, in which case that proceeding will assume the shape of an ordinary motion.

As a general rule, it is not necessary, though competent to serve a copy of the order upon the adverse party. The fact of the appointment must, of course, be alleged in either the title or on the face of the pleading of the infant so represented.

But where the application is for the appointment of a guardian for a non-resident infant defendant, in foreclosure or partition, the order must, as expressly prescribed by section 116, be served, and the mode of service must also be prescribed upon its face.

When the infant is plaintiff, and money or property is sought to be recovered, it may, if practicable, be often expedient to prepare and submit to the judge, with the other papers, a bond as prescribed by rule 65, in relation to security by a general guardian. This is not, however, necessary, as regards the commencement or prosecution of the suit in the first instance.

But on a recovery being had, either by plaintiff or defendant, the guardian *ad litem* cannot receive such money or property, save only costs in the cause, and any expenses allowed him by the court, "unless he has given security to the infant according to law." See rule 62, *supra*. What this security should be, may be gathered from rule 65, prescribing that to be given by a general guardian. It should consist of a bond, with two sureties, in double the amount of such money or property, or security by way of mortgage on unincumbered real property. Of course, where there is a general guardian of the infant, and such guardian has given general security under rule 65; and, when real estate of the infant is sold, has also given the additional security required by rule 62, as above cited, the general guardian, and not the guardian *ad litem*, will be the proper person to receive and apply the fund, save only as regards the latter's costs and expenses.

It is absolutely essential to the validity of all subsequent proceedings, that the guardian for an infant plaintiff should be appointed before the commencement of the action. Where, accordingly, such appointment had been made, after issuing, but before service of summons and of complaint, the latter were set aside as irregular. *Hill* vs. *Thacter*, 3 How., 407; 2 C. R., 3.

A judgment against an infant defendant by default, without the previous appointment of a guardian *ad litem*, was set aside on mo-

tion, without imposing terms, and with costs, in *Kellogg* vs. *Klock*, 2 C. R., 28.

It is competent for the appellate tribunal to make an appointment of this nature, pending an appeal, where that precaution has been neglected or omitted in the court below. *Fish* vs. *Ferris*, 3 E. D. Smith, 567.

In *Cook* vs. *Rawdon*, 6 How., 233; 1 C. R. (N. S.), 382, it was considered that the restrictions imposed by the present rule 60 (56 of 1849), were not applicable to a guardian for an infant plaintiff, but only as regards a defendant. The correctness of this conclusion seems questionable, there seeming to be nothing in the wording of the rule itself, from which it can be legitimately drawn.

It is, however, laid down clearly that, in such a case, such guardian ought to be shown to be a responsible person, as, under section 316, he is liable for costs. The same principle, and that it is the duty of the court, to insist that such a guardian should be both a competent and a responsible person, though the Code is silent upon the subject, is laid down in *Ten Broeck* vs. *Reynolds*, 13 How., 462. These cases were both before the revision of the rule in 1858. It seems, however, to be still competent and highly expedient for a judicial officer to make the same requisition in similar cases, notwithstanding the relaxation of that rule then introduced.

The old practice as to an infant plaintiff suing by a next friend is abolished. Whether plaintiff or defendant, he can now only appear by guardian. *Hoftailing* vs. *Teal*, 11 How., 188; *Hulbert* vs *Young*, 13 How., 413. See, however, an exception to this rule, in the case of an infant plaintiff in partition, under chapter 277 of 1852, above cited. See also *Clark* vs. *Clark*, 21 How., 479. Nor does it apply to the special statutory proceeding for sale of an infant's real estate, in which the matter is still to be originated by a next friend. *Vide Matter of Whitlock*, 32 Barb., 48; 19 How., 380; 10 Abb., 316.

In the single case of husband and wife, however, the practice of a married woman suing by a next friend was continued, by section 114 of the Code, until the amendment of 1857. Since that amendment, "in no case need she prosecute by her guardian or next friend." See section as it now stands. This modification of the original provision would seem to relieve her from the necessity of suing or defending by a guardian, when suing or being sued alone, even where she is an infant. In rule 60, as it stood in 1854, it was provided that a next friend for a married woman might be appointed in the same manner as a guardian *ad litem*, on the application of an infant, but this provision was stricken out in 1858.

Whilst this practice continued, it was held that where husband and wife sued jointly for joint property, no guardian *ad litem* need be ap-

pointed for the wife, though an infant, the husband being responsible for the costs. *Cook* vs. *Rawdon*, 6 How., 233; 1 C. R., N. S., 382. See also *Hulbert* vs. *Newell*, 4 How., 93. The rule was otherwise, however, where she sued alone. *Vide Coit* vs. *Coit*, 6 How., 53; 4 How., 232; *Cook* vs. *Rawdon*, *supra*.

A guardian *ad litem* cannot, it seems, be properly appointed for an infant, over fourteen years of age, without such infant's consent. *E. B.* vs. *C. B.*, 28 Barb., 299; 8 Abb., 44.

Although, after the expiration of the twenty days allowed to an infant defendant over the age of fourteen, by subdivision 2 of section 116, it is competent to any other party to make the application, this does not deprive the infant himself of that power, at any subsequent time, until he has been so forestalled. *McConnell* vs. *Adams*, 3 Sandf., 728; 1 C. R. (N. S.), 114.

A guardian, whether general or *ad litem*, cannot, on a judicial sale, become purchaser of the property of the infant, unless for that infant's benefit, either as principal, or even as agent for another party (*vide* 2 R. S., 326, § 62); and it is the duty of the court, on the fact coming in any manner to its knowledge, to order a resale at once, without waiting for an application to be made on behalf of the infant himself. A guardian stands in this respect on the same footing as any other trustee. *Lefevre* vs. *Laraway*, 22 Barb., 167.

A guardian for an infant defendant stands, as to his liability for costs, in the same category as other mere representatives. He falls clearly, as "a person expressly authorized by statute," within the purview of section 317, which provides that, in an action so defended, costs may be recovered, but such costs shall be chargeable only upon, or collected out of, the estate, fund, or party represented, unless the court shall direct the same to be paid by the defendant personally, for mismanagement or bad faith in the defence. This provision is similar to that at 2 R. S., 447, section 12, now repealed by the Code.

Although a guardian *ad litem* is entitled to reimbursement of his expenses, out of the recovery, when obtained, he must apply for that purpose at once, and before that fund has been paid over to the ward; otherwise the court will not enforce his right, by way of lien on the amount, but will leave him to his remedy by action. *Leopold* vs. *Meyer*, 2 Hilt., 580; 10 Abb., 40.

If the court clearly discovers that the interests of the infant are committed to a guardian who is not likely to protect them, he should be removed, and a proper one appointed. *Litchfield* vs. *Burwell*, 5 How., 341; 9 L. O., 182; 1 C. R. (N. S.), 42.

No consent of a guardian, on behalf of infants, will render valid a judgment against them, in the absence of legal proof, or any other

irregular proceeding in the cause. *Litchfield* vs. *Burwell*, above cited. Nor is the responsibility of the guardian to the infant, any answer to the objection.

As to the total want of validity of any proceeding founded upon consent, in cases in which an infant is interested, and the want of power in the court to appoint or sanction the action of a guardian under such circumstances, *vide Fisher* vs. *Stillson*, 9 Abb., 33.

As to the power of an infant joint defendant who has not been served, to appear voluntarily, and procure the appointment of a guardian on his own behalf, in order to interpose the defence of infancy, see *Wellington* vs. *Classon*, 18 How., 10; 9 Abb., 175.

(*a.*) Guardian in Partition.

A guardian may, under the special statute, be appointed for infant defendants in partition, before the commencement of the proceeding. On filing the security prescribed, and giving notice to the intended plaintiff, such guardian will be held to have accepted the appointment. Service of the summons and complaint may then be made on him instead of on the infants, and his acts and omissions will thenceforth bind them in the cause, the same as if made or done by themselves, after arriving at full age. *Althause* vs. *Radde*, 3 Bosw., 410; *Varian* vs. *Stevens*, 2 Duer, 635. See likewise, as to the appointment of a guardian for an infant lunatic defendant, *Rogers* vs. *McLean*, 11 Abb., 440; reversing *same case*, 31 Barb., 304; 10 Abb., 306.

As before noticed, the appointment cannot be made, under any circumstances, by a county judge, nor even by a judge out of court, except in the first district.

It is competent for the court to allow the bond prescribed by section 4 of 2 R. S., 317, to be filed, *nunc pro tunc*, after judgment, and even after a sale under judgment, notwithstanding the apparent restriction contained in the statute of 1852, in the latter case. *Croghan* vs. *Livingston*, 17 N. Y., 218; 6 Abb., 350; affirming *same case*, 25 Barb., 336. This case necessarily overrules *Jennings* vs. *Jennings*, 2 Abb., 6, holding the contrary. The act of 1857, before cited, gives, indeed, special authority to this effect. See *Waring* vs. *Waring*, 7 Abb., 472; but the decision in *Croghan* vs. *Livingston* is based upon a broader view as to the general powers of the court to grant amendments of this or an analogous nature, in order to sustain the proceeding. See also, generally, *Rogers* vs. *McLean*, 11 Abb., 440; reversing *same case*, 31 Barb., 304; 10 Abb., 306.

Such a bond is amendable, but all the obligors must concur in the application for that purpose. *Vide* 2 R. S., 556, §§ 33, 34. Such application should be upon petition duly verified, specifying the proposed

alterations, and should contain an express consent to the amendment, and an agreement to execute and acknowledge the bond as amended. A new surety may be united, with his consent, and that of the original obligors. *Shaw* vs. *Lawrence*, 14 How., 94.

As to the necessity of its being shown that the interests of infants cannot be sold for their value without the institution of a suit, on an application for leave to commence one on their behalf, under the statute of 1852, *vide In re Marsac*, 15 How., 383. See generally, as to the necessity of such an application, *Clark* vs. *Clark*, 21 How., 479.

As to the total disqualification of a guardian in partition to become purchaser, either as principal or agent, of any portion of the subject-matter of the suit, see *Lefevre* vs. *Laraway*, 22 Barb., 167, above cited.

BOOK IV.

FORMALITIES AND INTERLOCUTORY PROCEEDINGS.

§ 65. *General Observations.*

Proceedings in a suit, when commenced, may be classified under two grand divisions:

1. Ordinary proceedings, directly and necessarily conducing to the ultimate result.

2. Interlocutory or collateral proceedings, not strictly necessary, though expedient, and adoptable or not, at the option of the parties.

The essential characteristics of both will be treated of hereafter; but those incidents which are common to all, or which bear upon mere form, without regard to the substance of an application to the court when made, will be preliminarily treated.

To this branch of the subject the present book will be devoted, considering, in their order—

1. Mere formalities, incident to all proceedings whatever, whether direct or collateral.

2. The forms and course of interlocutory applications, as distinguished from their substance.

§ 66. *Notices and Service of Papers.*

Written notices to the adverse party are, in the first place, necessary in connection with almost every proceeding, in every stage of the cause; and, as a general rule, all papers conducing to, or consequent upon, an application for relief, or necessary with a view to the progress of the cause, must be served upon the adverse party.

(*a.*) Statutory and other Provisions.

The provisions of the Code connected with this branch of the subject will be found in chapter XI., part II. They run as follows:

§ 408. (369.) Notices shall be in writing; and notices and other papers may be served on the party or attorney, in the manner prescribed in the next three sections, where not otherwise provided by this act.

§ 409. (370.) The service may be personal, or by delivery to the party or attorney on whom the service is required to be made; or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or, if it be not open, so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

§ 410. (371.) Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

§ 411. (372.) In case of service by mail, the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

§ 412. (373.) Where the service is by mail, it shall be double the time required in cases of personal service, except service of notice of trial, which may be made sixteen days before the day of trial, including the day of service.

The conclusion, with reference to notice of trial, was added in 1859. The former portion dates from the original Code, with an improvement in the phraseology, in 1849.

§ 413. (374.) Notice of a motion, or other proceeding before a court or judge, when personally served, shall be given at least eight days before the time appointed therefor.

Dates as it stands from 1849. In 1848, the provision was more specific, prescribing different periods of notice, in different cases.

§ 414. (375.) Where a defendant shall not have demurred or answered, service of notice, or papers, in the ordinary proceedings in an action, need not be made upon him, unless he be imprisoned for want of bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.

In 1848, the section stopped at "for want of bail." The additional clause was subjoined on the amendment of 1849.

§ 415. (376.) Where a plaintiff, or a defendant who has demurred, or answered, or gives notice of appearance, resides out of the state, and has no attorney in the action, the service may be made by mail, if his residence be known; if not known, on the clerk for the party.

In 1848, the section merely prescribed that the service might be made "on the clerk for the party." In 1849, it was altered as it now stands.

Section 416 relates to the filing of papers, and will be considered under the next head.

§ 417. (378.) Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney, instead of the party.

§ 418. (379.) The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

The following provision as to service in general, is made by rule 10 (5):

On process or papers to be served, the attorney, besides subscribing his name, shall add thereto his place of business; and, if he shall neglect to do so, papers may be served on him at his place of residence through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

General Observations.

(*b.*) SERVICE ON PARTY OR ATTORNEY, AND ITS PROOF.

The mode in which service is to be made is so clearly prescribed by section 409, that it seems unnecessary to add any more specific directions upon the subject.

With reference to rule 10, as above cited, it is clear that, when an attorney, or party acting in person, changes his office or residence, pending the suit, he ought to notify the opposite party, and such is the usual practice.

When the attorney is changed during the progress of the action, notice of the substitution must of course be served on his opponent as heretofore. This notice must be in writing, and must state the place of business of the substituted party, in compliance with the above rule. No particular form need however be observed. It need not be explanatory as to how the substitution was effected, the bare fact being all that is necessary to be shown. *Dorlon* vs. *Lewis*, 7 How., 132; *Bogardus* vs. *Richtmeyer*, 3 Abb., 179.

The following points may be stated as essential to be attended to, on proof of service of this nature: The time and place of the service, the person on whom and the mode in which it is made, must be distinctly shown, so as to bring it clearly within the purview of the section. In all cases the paper must be stated as being not merely delivered to, but left with the recipient.

When the service is made on a clerk or person in charge, in the absence of the attorney from his office, that absence should appear; if not,

it may be questionable whether service upon any other person will be strictly regular. It is clear that a notice cannot be properly served when the office is not open, by passing it under the door, or otherwise; and clear also that service upon a clerk, or person in charge, is not regular, if made elsewhere than in the office itself. The limitations as to hours, in cases of service at the residence of either party or attorney, should likewise be carefully noted.

If the paper be left in a conspicuous place, it should be then shown that no person competent to receive it was in the office; and where the paper is so left, the fact that service was between the hours prescribed by the section, must also be stated. If left at the attorney's residence, a statement that his office was not open so as to admit of service there, that the paper was there left within the hours prescribed, and that the recipient was of suitable age and discretion, must be made. If made at the party's residence, the suitableness of the recipient, and that the service was within the prescribed hours, should in like manner appear. It would be as well, in such case, to state incidentally that the party has appeared in his own behalf, and has no attorney. In all cases the affidavit should speak positively to the identity of the party or attorney. Rule 11 as to service of summons may be taken generally as a safe guide. As to the necessity of a full and particular statement of the mode of service in the proof, when sought to be impeached, *vide* *Van Wyck* vs. *Reid*, 10 How., 366.

The statute of 1853, enabling substituted service on the part of a plaintiff, where a defendant cannot be found, or, if found, avoids or evades ordinary service, has been already considered in connection with the subject of summons. The provisions of that statute are equally applicable to service of every description, when sought to be made upon a defendant. Its terms will be found heretofore, in section 49; the cases relating to it, in section 55. It is needless to do more, on the present occasion, than to make this reference, as none of those cases are specially applicable to the service of papers, as contradistinguished from process. In section 54 various other matters are treated in connection with the service of summons, which are equally applicable to that of notices or other papers, and should be referred to accordingly. See also, as to service of papers on a Sunday, being void, *Field* vs. *Park*, 20 Johns., 140.

By 2 R. S., 285, sections 55 to 57, express provision is made, enabling service of notices or other papers on the sheriff, by leaving them at an office which he is bound to provide for such purpose, or on default of his making such provision, then at the office of the county clerk.

As to the reception of the affidavit of a person dead or insane, as presumptive evidence of service of a notice, *vide* chapter 244 of 1858, p. 394.

Where an admission of due service can be obtained from the party or attorney, it will, of course, dispense with the necessity of more formal proof. To obtain such an admission is, therefore, an usual and convenient practice. It must be borne in mind, however, that when signed by a party, not an attorney, that admission will require extrinsic proof to make it available as the ground of any further proceeding. Of an attorney's signature the court will, on the contrary, take judicial notice. See before, section 58, under the head of *Proof of Service of Summons.*

The imperative provisions of rule 20, as to marking and numbering the folios on papers for service, their indorsement with the title of the cause, and their being fairly and legibly written, must in all cases be strictly attended to. See that rule, below cited and considered, in section 67.

A notice must, when given, be properly signed and authenticated, or it will be unavailable. Thus, a notice of judgment served by an attorney, without his signature or mention of his place of business, was held a nullity in *Yorks* vs. *Peek*, 17 How., 192.

See also, generally, as to other notices, *Demilt* vs. *Leonard*, 19 How., 182; *People* vs. *Gray*, 10 Abb., 468.

Any irregularity in service, whether made personally or by mail, will, however, be waived, if the paper, so served, is retained and acted upon. If irregular, it should be returned forthwith, within the same day at farthest, with a statement of the irregularity complained of. See this subject more fully treated in a subsequent chapter (ch. II., book VI., § 127). See also, *Georgia Lumber Company* vs. *Strong*, 3 How., 246; *Gilmore* vs. *Hempstead*, 4 How., 153; *The Chemung Canal Bank* vs. *Judson*, 10 How., 133; *Wright* vs. *Forbes*, 1 How., 240; *McGown* vs. *Leavenworth*, 2 E. D. Smith, 24; 3 C. R., 151; *Taylor* vs. *Mayor of New York*, 11 Abb., 255.

(*c.*) Service on Attorney.

The attorney on whom papers are served must be the attorney of record. Service on a mere agent will be wholly unavailable. *Weare* vs. *Slocum*, 3 How., 397; 1 C. R., 105. On the other hand, service on a person not an attorney, and not authenticated as having authority to act, will be null, and no order can be founded on it. *Buckman* vs. *Carnly*, 9 How., 180.

Service on the party of the ordinary papers in a suit, after an attorney has appeared for him, will not be good. In *Trip* vs. *De Bow*, 5 How., 114; 3 C. R., 163, a notice of appeal, served on the party, instead of the attorney, was decided to be bad, and such appeal was accordingly held to be a nullity. It was also held that the objection might be taken

advantage of at any time, provided the party served had not appeared and answered, or proceeded in such a manner as to waive the defect, and give the court jurisdiction.

In *Mercier* vs. *Pearlstone*, 7 Abb., 325, judgment grounded on service of amended complaint on the party, instead of his attorney, after appearance, was set aside as irregular.

In *Lord* vs. *Vandenburgh*, 6 Duer, 703; 15 How., 363, it was held that, where an attorney resides in one town or city, and has his office in another, the adverse party is not bound to follow him to that residence, if his office be closed. The attorney, will in such case, be concluded by the designation given by him in compliance with the 10th rule, and if service at his actual residence be necessary, it may be made by mail. A party is not bound to make an impracticable service, and if the office, under such circumstances, be closed, an endeavor to serve at such office within due time, followed by actual service within a reasonable time afterwards, when the office is open, will be regarded as sufficient.

The latter of the above conclusions is also come to in *Falconer* vs. *Ucoppell*, 2 C. R., 71, where the party endeavored to serve his pleading within due time, at both the attorney's office and dwelling, and, failing to effect either, served it personally the next day, with notice of the attempted service of the day before. See also, *Watkins* vs. *Stevens*, 3 How., 28.

Of course this doctrine is only adapted to extreme cases, where full diligence has been used, and the conduct of the other side has been evidently evasive. Unless the moving party has made every possible effort, and fails, not from want of any exertion of his own, but from the absence or bad faith of the opposite party, it would, on the contrary, be most unsafe for him to rely on obtaining relief of this description. *Vide Watkins* vs. *Stevens*, *supra*. See also, *Ferriss* vs. *Morrill*, 3 How., 20.

In complying with rule 10, the attorney has the right to designate his own residence or office for the purposes of service, and, when he has so decided by a proper subscription, the adverse party is bound to conform thereto. *Rowell* vs. *McCormick*, 5 How., 337; 1 C. R. (N. S.), 73; *Hurd* vs. *Davis*, 13 How., 57.

It is irregular to serve papers upon an attorney, after he becomes a non-resident of the state. In such a case the proper practice would seem to be that prescribed at 2 R. S., 287, section 67, where it is provided that, in the event of the death, removal, or suspension, or ceasing to act of an attorney, the person for whom he was acting shall be notified to appoint another attorney or solicitor, in such manner as the court shall direct, at least thirty days before any proceeding shall be had against such person. *Diefendorf* vs. *House*, 9 How., 243. An appli-

cation to the court would, therefore, seem necessary in this state of things. Notice of a consequent application must also be given to the party, if he neglects to appear pursuant to the notice. *Jewell* vs. *Schouten*, 1 Comst., 241.

In *Hoffman* vs. *Rawley*, 13 Abb., 399, it is held that, after due notice has been served as above, service may be made upon the party in person, if he neglects to appoint another attorney.

When an attorney has once been appointed, the adverse party will be justified in continuing to treat him as such, until another has been regularly substituted, and he has received notice of that substitution. *Parker* vs. *The City of Williamsburgh*, 13 How., 250. See also *Dorlon* vs. *Lewis*, and *Bogardus* vs. *Richtmeyer*, *supra*.

Where a paper has been refused by an attorney, as served out of due time, a subsequent service on his clerk, in ignorance of the refusal of his principal, was held of no avail. *O'Brien* vs. *Catlin*, 1 C. R. (N. S.), 273.

(*d.*) Service on Party.

It will be seen above that, under section 418, service of summons, or process, or of any paper to bring a party into contempt, must be on such party personally, and cannot be made on the attorney. See below, under the head of *Contempts* and *Enforcement of Orders*.

The following cases refer to personal service generally. Where a statute prescribes service on an individual, it means personal service, and a notice by mail, though it reaches the party, is ineffectual. *Rathbun* vs. *Acker*, 18 Barb., 393. Service of appeal from a justice's judgment in New York cannot be made on the attorney, where the party is a resident. *Earll* vs. *Chapman*, 3 E. D. Smith, 216.

See, as to service on the party being admissible, where, after the death of his attorney, and due notice being given to him, pursuant to the statute, he neglects to appoint another, *Hoffman* vs. *Rowley*, 13 Abb., 399.

(*e.*) Service by Mail.

The decisions in relation to service of this description, admissible, as will have been seen, in those cases where the attorneys or parties prosecuting or defending in person do not reside in the same place, are more numerous.

The dominant principles in the subject, where the party serving appears by attorney, are thus laid down in *Schenck* vs. *McKie*, 4 How., 246; 3 C. R., 24. Where he appears in person, the modifications to be made in the rule, as laid down, are self-evident.

1. Such service must be made by the attorney. If made by the party, or by the party's agent, it will be unavailing.

2. The paper must be posted at the residence of the attorney, and not elsewhere; properly addressed, and the postage paid.

3. If these requisitions be duly complied with, the service will be deemed regular, and the party to whom the notice is addressed will then take the risk of the failure of the mail.

It will be observed that the fact that there is a regular communication by mail between the residences of the attorneys or parties acting is also, by section 410, made a prerequisite to the validity of this description of service.

Where the defendant's attorney has named his place of residence, on his notice of appearance, or otherwise as required by rule 10, any papers served on him by mail must be directed in accordance with the address so given, or the service will be void. The words "place of residence," in the rule in question, must, in such cases, be understood with reference to the post-office to which the papers are to be directed. *Rowell* vs. *McCormick*, 1 C. R. (N. S.), 73; 5 How., 337. Service of papers directed to another post-office in the same town was there held to be irregular.

It has been held that an address to "the place of residence" of the attorney, pursuant to section 411, was satisfied by addressing the letter to the post-office of that place, although a fuller designation was given upon the notice of appearance, and the paper required to be so served. *Oothout* vs. *Rhinelander*, 10 How., 460. This view seems somewhat doubtful. The practice is certainly inexpedient, and the address should in all cases be given as full as practicable. See also *Hurd* vs. *Davis*, 13 How., 57. The view taken in *Schenck* vs. *McKie*, that the party or attorney, serving by mail, can only do so from his own place of residence, is also supported in the latter case. This strict rule is, however, qualified in *Peebles* vs. *Rogers*, 5 How., 208; 3 C. R., 213, wherein it is held that if the papers so mailed are actually received by the adverse attorney in due time, he cannot then take advantage of the objection. The attorney so serving takes, in such a case, the risk of the papers actually arriving, and if they so arrive, that risk is discharged.

The mailing may take place on the very last day allowed for service, and even after the mail for that day has left. *Noble* vs. *Trotter*, 4 How., 322; 3 C. R., 35; *Schuchardt* vs. *Roth*, 10 Abb., 203. By these decisions, *Maher* vs. *Comstock*, 1 How., 87, to the contrary effect, is overruled; and the cases of *Brown* vs. *Briggs*, 1 How., 152; *Radcliff* vs. *Van Benthuysen*, 3 How., 67; and *Jacobs* vs. *Hooker*, 1 Barb., 71, under the old practice, are cited in *Noble* vs. *Trotter*, in support of the view so taken.

The rule that the party to whom a paper so served is addressed takes the risk of the failure of the mail; that the service will be good even

although that paper fails to reach him in due time, and that any action which he may take under the supposition of a default, will nevertheless be set aside, is fully maintained in *Noble* vs. *Trotter* and *Schuchardt* vs. *Roth*, *supra*. Also in *Chadwick* vs. *Brother*, 4 How., 283; *Gibson* vs. *Murdock*, 1 C. R., 103; *Lawler* vs. *Saratoga Mutual Fire Insurance Co.*, 2 C. R., 114; *Crittenden* vs. *Adams*, 5 How., 310; 3 C. R., 145; 1 C. R. (N. S.), 21.

In this last decision it is, however, held that the above provision does not extend to service of a notice of appeal, on the clerk of the court as such.

The time of service by mail dates from the time the letter is mailed, not from that on which it is received, and such former date will be binding on the adverse party. *Van Horne* vs. *Montgomery*, 5 How., 238; see also *Hornby* vs. *Cramer*, 12 How., 490.

The principle laid down in *Peebles* vs. *Rogers*, *supra*, that service by mail, though unduly made in the first instance, may nevertheless be effectual, if the papers are actually received by the adverse party in time, and that the real effect of such irregular service will be merely to shift the risk of failure of the mail, is supported by *Van Benthuysen* vs. *Stevens*, 14 How., 70. In that case, the papers on a motion were mailed only eleven days previous to the hearing, but a fresh notice, referring to those papers, was personally served on the attorney in due time. Under these circumstances the papers so mailed, were allowed to be used, as having, by some means, come to hand before due service of the notice.

The necessity of a notice served by mail being for double the usual time, is acted upon in *Dresser* vs. *Brooks*, 5 How., 75. In *Dorlon* vs. *Lewis*, 7 How., 132, it was even held that this double time had the effect of enlarging the time to appeal, where notice of judgment had been so served. This view is, however, more than doubtful; see hereafter under the head of Appeals. In the same case, it is held that service of a complaint in this mode has the same effect, as regards the defendant's time to answer. *Washburn* vs. *Herrick*, 4 How., 15; 2 C. R., 2, and *Cusson* vs. *Whalen*, 5 How., 302; 1 C. R. (N. S.), 27, are to the same effect. This view will be more fully considered hereafter, in connection with the subject of time to answer.

The omission to pay the postage on a service of this nature, would seem to be a fatal defect, and that the opposite party may, in such case, return the pleading, which will be a nullity. *Van Benthuysen* vs. *Lyle*, 8 How., 312.

(*b.*) Service on Absent Party.

In section 415, provision is made for the case of a party who has appeared in the action, but who resides out of the state, and has no

attorney within it. In this case, the service may be made by mail, if his residence be known; if not, on the clerk, for the party. This last mode of service is however rarely, if ever, adopted, as the Code itself expressly provides that, as regards the summons on the one hand (section 128), or the notice of appearance on the other (section 130), a place for service within the state must be named; service at which place would doubtless, under such circumstances, be held regular, both generally, and under rule 10.

§ 67. *Preparation and Filing of Papers.*

(*a.*) Preparation.

This subject is expressly regulated by rule 20 (41), of the Supreme Court, which runs as follows:

Rule 20. (41.) The attorney, or other officer of the court, who draws any pleading, deposition, affidavit, case, bill of exceptions, report, or other paper, or enters any judgment, exceeding two folios in length, shall distinctly number and mark each folio in the margin thereof; and all copies, either for the parties or the court, shall be numbered or marked in the margin, so as to conform to the original draft or entry, and to each other, and shall be indorsed with the title of the cause. And all the pleadings and other proceedings, and copies thereof, shall be fairly and legibly written; and if not so written, and folioed, and endorsed, as aforesaid, the clerks shall not file such as may be offered to them for that purpose, nor will the court hear any motion or application founded thereon. The party upon whom the paper is served, shall be deemed to have waived the objection, unless, within twenty-four hours after the receipt thereof, he return such papers to the party serving the same, with a statement of the particular objection to its receipt.

This rule was increased in its stringency and extent, on the revision of 1858. The concluding sentence added on that occasion, effects, however, a considerable modification in that stringency, and renders it practically of little, if any, hardship. This alteration was, doubtless, made in view of the principles laid down in the following cases, viz.:

Sawyer vs. *Schoonmaker*, 8 How., 198; *Strauss* vs. *Parker*, 9 How., 342; *Broadway Bank* vs. *Danforth*, 7 How., 264; *The Chemung Canal Bank* vs. *Judson*, 10 How., 133; *Chatham Bank* vs. *Van Vechten*, 3 Duer, 628. See strict view taken in *Henry* vs. *Bow*, 20 How., 215.

The remedy for a defect of this kind, is by motion to set aside the pleading or paper; the objection is not raiseable by way of demurrer. *Dorman* vs. *Kellam*, 14 How., 184; 4 Abb., 202. See also several cases below cited, on the analogous question of an omission, to separate and number several causes of action or defence in the same pleading.

There can be no question as to the expediency of strictly conforming to the above regulations, or that the party who neglects them, does so at his peril. At the same time, the objection is not one which the courts will favor, and the party objecting must take care that his own practice is strictly and technically regular, or it will fail. *Vide Sawyer* vs. *Schoonmaker*, and *Broadway Bank* vs. *Danforth*, *supra*.

All writs, process, proceedings, and records whatsoever, in any court, shall be in the English language (except that the proper and known names of process and technical words, may be used as heretofore). They must be made out on paper or parchment, in a fair, legible character, in words at length, and not abbreviated, except abbreviations in common use, and numbers may be expressed by Arabic figures or Roman numerals, in the customary manner. *Vide* 2 R. S., 275, § 9.

(*b.*) Filing of Papers, Statutory and other Provisions.

The Code itself makes provision on this subject, in the following sections:

§ 416. (377.) The summons, and the several pleadings in an action, shall be filed with the clerk, within ten days after the service thereof respectively, or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed, within a time to be specified in the order, or be deemed abandoned.

§ 422. If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

Not in the original Code; inserted in 1849. Copies of the summons and pleadings may also be used in making up a judgment-roll, under section 281.

§ 423. The various undertakings required to be given by this act, must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for by the chapter on the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriff to the parties respectively, for whose benefit they are taken.

Dates also from 1849.

Provisions are also made as to the filing of papers by rules 3, 4, 7 and 9, which run as follows:

Rule 3. Papers shall be filed in the office of the clerk of the county specified in the complaint as the place of trial, or in the county to which the place of trial has been changed; and in case the place of trial is changed for the reason that the proper county is not specified, as required by section 129 of the Code, papers on file at the time of the order making such change, shall be transferred to the county specified in such order; and all other papers in the cause shall be filed in the county so specified.

When the affidavits and papers upon a non-enumerated motion, are required by law to be filed, and the order to be entered, in a county other than that in which the motion is made, the clerk shall deliver to the party prevailing on the motion, a certified copy of the rough minutes, showing what papers were used or read, together with the affidavits or papers used or read upon such motion, with a note of the decision thereon, or the order directed to be entered, properly certified. And it shall be the duty of the party to whom such papers are delivered, to cause the same to be filed, and the proper order to be entered in the proper county, within ten days thereafter, or in default thereof he shall lose the benefit of said order.

Rule 4. It shall be the duty of the plaintiff's attorney forthwith to file with the clerk of the proper county, all undertakings given upon procuring an order of arrest, an injunction order, or an attachment, with the approval of the justice or judge taking the same indorsed thereon; and, in case such undertakings shall not be filed within five days after the order for arrest or injunction or the attachment has been granted, the defendant shall be at liberty to move the court to vacate the proceedings for irregularity, with costs, as if no undertaking had been given. It shall also be the duty of the attorney to file within the same time, and under the like penalty, the affidavits upon which an injunction or attachment has been granted, and also the affidavits upon which an order for the service of a summons by publication, or an order for a substituted service of a summons has been granted, together with the order for such service.

Rule 7. (88.) The sheriff shall file with the clerk the affidavits on which an arrest is made, within ten days after the arrest.

Rule 9. (4.) The several clerks of this court shall keep in their respective offices, in addition to the "judgment-book," required to be kept by section 279 of the Code of Procedure, a book, properly indexed, in which shall be entered the title of all civil actions and special proceedings, with proper entries under each, denoting the papers filed and the orders made, and the steps taken therein, with the dates of the several proceedings; an index of all undertakings filed in the office, stating in appropriate columns the title of the cause or proceeding in which it is given, with a general statement of its condition, or a reference to the statute under which it is given, the date when, and before whom acknowledged or proved, by whom approved, and when filed, with a statement of any disposition of or order made concerning it: and such books, properly indexed, as may be necessary to enter the minutes of the court; docket judgments; enter orders and all other necessary matters and proceedings; and such other books as the courts of the respective districts, at a general term, may direct.

Judgments shall only be filed and entered or docketed, in the offices of the clerks of the courts of this State, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business.

The provisions of rule 20, before cited, under which the clerks are

enjoined not to file any papers offered to them, not legibly written, and not folioed or endorsed, as thereby directed, will not either have escaped attention.

The Superior Court has also made the following special rule on the subject of filing papers on a motion, of date of the 11th of April, 1857:

1st. The attorneys of the parties must file immediately every paper read by them on a motion.

2d. Every order hereafter entered, must specify the papers on which it was granted or opposed; and the clerk is directed not to enter any order, unless such papers are exhibited to him and filed, or unless they have been previously filed.

The above rules substantially carry out the previous directions as to the filing of pleadings and papers, in suits in equity, contained in the judiciary act, chapter 280 of 1847, section 50, only they are now made equally binding in all cases, and in every description of action.

(*c.*) Filing of Papers Continued.—General Observations.

Where the venue in an action had been changed for the convenience of witnesses, a commission subsequently issued, and directed to be returned to the clerk of the original county of venue, was held regular, and that the return was properly filed in the office of the latter. *Whitney* vs. *Wyncoop*, 4 Abb., 370. N. B.—This decision was prior to the last revision of rule 3, which seems to make the filing in either county optional in such a case; and the filing in the county of actual trial, only obligatory, when that change is on the ground that the proper county was not originally specified.

Judgment on an appeal ought to be entered, and the papers filed in the county of venue or trial, and not in that in which the appeal is heard: in the latter case it will be irregular. *Andrews* vs. *Durant*, 6 How., 191.

The court may permit a mistake in filing a pleading, required to be filed under section 416, to be corrected. The provision that it be otherwise deemed abandoned, has been held to be merely directory, and not imperative, so as to preclude relief, on the omission being explained. *Short* vs. *May*, 2 Sandf., 639.

A party filing a pleading in obedience to such an order is not bound to notify his adversary. *Douoy* vs. *Hoyt*, 1 C. R. (N. S.), 286.

With respect to the necessity of an undertaking being duly filed in an injunction case, *vide Cook* vs. *Dickerson*, 2 Sandf., 691. It seems that, under the Code, an undertaking of this description need not of necessity be delivered up to the party entitled to enforce it, with a view to that enforcement, as an inspection and the production of it on the trial

will be all that is really requisite for that purpose. *Wilde* vs. *Joel*, 6 Duer, 671; 15 How., 320.

§ 68. *Consents and Admissions.*

The giving of consents or admissions is a matter of frequent occurrence in the ordinary proceedings in a cause, when carried on between the opposite attorneys in a fitting and proper spirit.

The practice in relation to them is thus regulated by Rule 13 (37):

No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered; or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

The consent of the party himself, regularly reduced to writing and signed, is as obligatory as that of the attorney, and the acts of the latter contrary to that consent, even though done in ignorance of it, will be irregular. *Braisted* vs. *Johnson*, 5 Sandf., 671.

As to the disposition of the courts to disregard parol agreements, and to hold the parties and their attorneys to a strict observance of this rule, *vide Mulligan* vs. *Brophy*, 8 How., 135; *Brome* vs. *Wellington*, 1 Sandf., 664; *Cobb* vs. *Lackey*, 6 Duer, 649.

A party subsequently seeking to disregard or avoid a written stipulation, on the ground of fraud or otherwise, does so at his peril, and at the risk of his proceedings being set aside as irregular, with costs, if the question be decided against him. *Fitch* vs. *Hall*, 18 How., 314.

An admission of due service of a paper, waives all objections as to the regularity of that service. *Struver* vs. *The Ocean Insurance Company*, 9 Abb., 23. It would seem too, that a mere waiver of service is not an agreement, and does not come within the rule, and may therefore be proved by parol. *Vide* 8 Cow., 119.

The above regulation does not apply to agreements made in the presence of the court or a referee, and certified to be so made, but such an agreement may stand, though not reduced to writing and signed in regular form. And, where such an agreement exists, the technical objection that it is not reduced to writing, will be waived by acts amounting to a deliberate recognition, and a submission to act under it. *Vide Corning* vs. *Cooper*, 7 Paige, 587; and cases collected in note at 3 Abb., 171.

Where, too, a verbal agreement between attorneys has been relied upon, and action taken by the opposite party in consequence of such reliance, the courts will not hold this rule to be applicable, but will

compel the party who has obtained an advantage by means of the verbal stipulation, to perform it on his part. *Montgomery* vs. *Ellis*, 6 How., 326.

A stipulation, given under a mistake as to its real legal effect, may be relieved against. *Becker* vs. *Lamont*, 13 How., 23. The same rule holds good, of course, as to one obtained by fraud or misrepresentation of any description.

And, in order to conclude the adverse party on a motion, a stipulation, if relied on, must be produced or proved. *Staring* vs. *Jones*, 13 How., 423.

§ 69. *Undertakings.*

In various proceedings in the course of a cause, undertakings by way of security, are required by the Code, or may become necessary.

The essentials of these documents will be considered hereafter, in connection with the proceedings to which they relate.

Their disposition, when executed, is prescribed by section 423, and rules 4 and 7, already cited in section 67, under the head of *The Filing of Papers.*

All, of whatever nature, must be duly proved or acknowledged. The following are the provisions of rule 6 (71) on that subject, and generally as to the justification of sureties:

Rule 6. (71.) Whenever a justice, or other officer, approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security offered is by way of mortgage on real estate, to require proof of the value of such estate. And all bonds and undertakings, and other securities in writing, shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

Prior to the revision of 1858, this rule went on to prescribe the form of the report or certificate of approval; but, on that occasion, this part of it was stricken out. The subject of justification will be hereafter considered, under the different heads of proceedings, and especially under that of *Bail on Arrest.*

The residence of the sureties ought properly to appear on the face of the undertaking. *Blood* vs. *Wilder*, 6 How., 446.

If the essentials of the statute or order which require the giving of a bond or undertaking be complied with, it will be good, if given in either of those forms, though such statute or order may, in terms, require the other. *Conklin* vs. *Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49; *The People* vs. *Lowber*, 7 Abb., 158. See also provision to the same effect as to

bonds required by law, at 2 R. S., 556, section 33. But an undertaking not complying with the proper statutory requirements was held void, as expressing no consideration on its face, in *Robert* vs. *Donnell*, 10 Abb., 454.

A bond or undertaking, once given, cannot be altered in substance, or by substituting another surety, without the consent of the surety continuing. *Cobb* vs. *Lackey*, 6 Duer, 649. A statutory bond, if defective, is amendable on the application of all the obligors, under 2 R. S., 556, section 34; but the statute must be strictly complied with. *Shaw* vs. *Lawrence*, 14 How., 94.

As to the subsequent insolvency of the sureties in an undertaking, rendering it necessary to give fresh security, see hereafter, under the different heads in which it may be required. See also generally, *Webber* vs. *Moritz*, 11 Abb., 113.

§ 70. *Affidavits.*

The proof of collateral matters, either with reference to points of form, or to the establishment of a title to collateral relief, is a matter of continual necessity, pending the progress of an action. This proof is supplied by means of an affidavit.

The essentials of the affidavits required in different cases, will be considered under the heads with which they are connected.

The officers before whom affidavits may be taken, and the powers of those officers, have been already defined, and the subject fully gone into in book I., chapter VII., section 27, to which the reader is therefore referred.

The signatures both of the party and of the officer taking the affidavit are essential, and, without either, the document will be a nullity. *Vide Laimbeer* vs. *Allen*, 2 Sandf., 648; 2 C. R., 15; *Graham* vs. *McCoun*, 5 How., 353; 1 C. R. (N. S.), 43; *George* vs. *McAvoy*, 6 How., 200; 1 C. R. (N. S.), 318, and various other cases subsequently cited, under the head of *Verification of Pleadings.*

An affidavit, when made, should be free from erasures and interlineations. *Didier* vs. *Warner*, 1 C. R., 42; or, if made, they should, according to the English practice, be noticed and identified, as made before it is sworn, by the officer's initials, or otherwise.

When the affidavit is taken before a commissioner of deeds, it is essential that the venue should be stated, to show that he had jurisdiction to take it. If omitted, it will be a nullity. *Lane* vs. *Morse*, 6 How., 394; *Cook* vs. *Staats*, 18 Barb., 407. The same rule, of course, holds good as to other officers, whose jurisdiction to administer an oath is limited as to place.

The mere omission of the date of the jurat has, however, been held not to be a fatal objection. *Schoolcraft* vs. *Thompson*, 7 How., 446.

Where an affidavit in a statutory proceeding, is prescribed by the statute to be made before a particular officer, the direction must be strictly complied with; if not, jurisdiction will not be acquired. *Small* vs. *Wheaton*, 2 Abb., 175. In respect to the statements made it will, however, be different, and, if such an affidavit clearly establishes the facts required by the statute, it will be sufficient, though it does not follow the exact wording. *Johnson* vs. *McDonald*, 2 Abb., 290.

The statements in an affidavit, when made, should be clear, direct, and to the purpose, stating the facts deposed to, as facts, and not by way of innuendo or inference. Arguments, and statements of conclusions of law, should also, as a general rule, be strictly avoided. The object of an affidavit is to supply the proof of facts, and nothing more; the conclusions to be drawn from, or any reasoning to be based upon those facts, fall within the province of the counsel, and not of the deponent.

Where an affidavit refers, either wholly or partially, to any document, in relation to which the witness testifies, it is usual, and is clearly advisable, if not necessary, to identify that document, by marking it with some letter or number, and referring to that designation in the affidavit itself. If the proving of the document be a matter of importance, it will be prudent to add to that identifying mark, the initials or signature of the officer before whom the affidavit is taken, and, in special cases, an express reference to the affidavit itself, as thus: "This is the paper writing marked A., referred to in the affidavit of B. C., sworn this —— day of ——, before me." The document thus becomes what is termed an exhibit, and may then be read in evidence with, and as forming part of, the affidavit.

When made in an existent action or proceeding, it is the usual, and unquestionably by far the better course, to entitle the affidavit in that proceeding.

It is not, however, essential to do so: the Code, in chap. IX., title XII., of part II., making the following provision on the subject:

§ 406. (367.) It shall not be necessary to entitle an affidavit in the action; but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

To bring an affidavit within this section, there must, however, be a reference, and that an intelligible reference, to the action or proceeding in which it is to be used. Where, therefore, an affidavit for an attachment omitted to state whether the deponent was plaintiff or de-

fendant, and did not in any part of it state who was either, it was held to be entirely insufficient. *Burgess* vs. *Stitt*, 12 How., 401.

It has been doubted by the Court of Appeals whether the omission of the name of the court, in which the affidavit is to be used, was remedied by the above section; and, the papers in general being entitled in the Supreme Court, a motion in the Court of Appeals to dismiss the appeal was denied, on that ground. *Clickman* vs. *Clickman*, 1 Comst., 611; 1 C. R., 98; 3 How., 365.

In *Blake* vs. *Locy*, however, 6 How., 108; 1 C. R. (N. S.), 406; the same objection, *i. e.*, that the affidavit and notice were entitled in the wrong court, was disregarded. The opinion refers in terms to this section, which clearly refers to the affidavit alone, and to no other; but section 176 seems as clearly to sustain the decision. See *Williams* vs. *Sholto*, 4 Sandf., 641. See also *The People* vs. *Townsend*, 6 How., 178.

In *Pindar* vs. *Black*, 4 How., 95; 2 C. R., 53, an affidavit, entitled in an action not yet commenced, and referring to an unknown party, designated under section 175, as the "real defendant," was sustained as sufficient.

In *Bowman* vs. *Sheldon*, 5 Sandf., 657; 10 L. O., 338, the *dictum* in *Clickman* vs. *Clickman* is questioned, though the correctness of the decision is admitted, and it was held that the name of the court is part of the title. The notice of motion being, however, correctly headed, the case was held as coming within the section, and the error disregarded, as one by which the adverse party could not have been misled.

In *The People* vs. *Dikeman*, 7 How., 124, it was considered that the above section did not apply to proceedings on *mandamus*, and that in such cases, an affidavit wrongly entitled, or, as was there the case, entitled in a suit, when in fact there was none pending, could not properly be received. The ground is also taken there, under section 471, that proceedings upon *mandamus* are excepted from the operation of the Code.

§ 71. (*a.*) *Computation of Time.*

The computation of time in the different proceedings in a suit, as regards the service of notices, pleadings, and the performance of any conditions whatever, is thus specially provided for by the Code, in chapter X., title XII., of part II.

§ 407. (368.) The time within which an act is to be done, as herein provided, shall be computed, by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

That as to the time of publication of legal notices, is thus regulated in chapter XV. of the same title and part.

§ 425. The time for publication of legal notices shall be computed so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication.

This section dates from 1849.

In *Judd* vs. *Fulton*, 4 How., 298; 10 Barb., 117, the practice of the courts, with reference to the former section, is laid down as follows:

"The rule is well settled, that, in computing time, the first day, or the day when the time begins to run, is to be excluded. If the defendant had been required to do an act, within thirty days from the happening of an event, which had occurred on the 26th of August, he could have had the whole of the thirtieth day, that is, of the 25th of September, for that purpose. But, if he was prohibited doing an act until after the expiration of the thirty days, he could not do it until the next day, that is, the 26th of September."

In *Phelan* vs. *Douglass*, 11 How., 193, the general principle is thus stated:

The legal rule of computing time is, that whenever the whole day and every part of it can be counted, then it should be; whenever, if counted, the party would in fact have but a fractional part of it, then it should not be counted; the party bound to perform, should have the whole number of full and entire days given him for that purpose.

See likewise generally, *Westgate* vs. *Handlin*, 7 How., 372.

A notice of trial, served on the 9th for the 19th of the same month, was held to be good, in *Easton* vs. *Chamberlain*, 3 How., 412, and *Dayton* vs. *McIntyre*, 5 How., 117; 3 C. R., 164.

In *Truax* vs. *Clute*, 7 L. O., 163, the doctrine of the exclusion of Sunday was fully carried out in practice. Service of an affidavit on the 12th of March, under an order extending the time to do so to ten days from the first, was held to be sufficient; the eleventh, in strictness the last of the ten days allowed, having fallen on a Sunday. See also *Broome* vs. *Wellington*, 1 Sandf., 664; *Phillips* vs. *Prescott*, 9 How., 430. See likewise the same principle applied generally to the time limited for payments of an insurance premium. *Campbell* vs. *International Life Assurance Society of London*, 4 Bosw., 298.

An order returnable on a Sunday was, on like grounds, held a nullity in the *Arctic Fire Insurance Co.* vs. *Hicks*, 7 Abb., 204. See also generally as to the nullity of any legal proceeding on that day, *Pulling* vs. *The People*, 8 Barb., 384; *Smith* vs. *Wilcox*, 25 Barb., 341.

In *Whipple* vs. *Williams*, 4 How., 28, it was even held, that in notices under any statute, for less than a week, Sunday should be excluded altogether from the computation. This case is, however, clearly over-

ruled by *Easton* vs. *Chamberlain*, above cited; *King* vs. *Dowdall*, 2 Sandf., 131; *Bissell* vs. *Bissell*, 11 Barb., 96; and *Taylor* vs. *Corbiere*, 8 How., 385; in all of which it is held, that, where Sunday is an intermediate day, there is no rule or principle by which it is to be excluded from the computation; though otherwise, of course, when it is the last day of the period.

With regard to the construction of statutes, the rule is however otherwise; and the act must be done within the time thus provided, as appears by the following decisions:

In *The People* vs. *Wood*, 10 L. O., 61, where the defendant was indicted for obtaining money under false pretences, under 2 R. S., 607, which prescribes that the indictment shall be found and filed within three years after the commission of the offence, it was held that the day on which the act is done must be included in the computation: and the indictment, on the 7th of November, 1851, for an offence committed on the 7th of November, 1848, was quashed, as barred by the statute.

So, also, where the last of the four days allowed to a justice for rendering his judgment expired on the following Sunday, a judgment rendered by him on the Monday morning was held to be void. *Bissell* vs. *Bissell*, 11 Barb., 96.

See likewise generally, *The People* vs. *The New York Central Railroad Company*, 28 Barb., 284; *Broome* vs. *Wellington*, 1 Sandf., 664; *Phelan* vs. *Douglass*, 11 How., 193; *McGuire* vs. *Ulrich*, 2 Abb., 28; *The People* vs. *Walker*, 17 N. Y., 502; *Judd* vs. *Fulton*, *supra*.

In *Schenck* vs. *McKie*, 4 How., 246; 3 C. R., 24, it was held that, where additional time to plead is granted by order, such additional time is irrespective of the date of the order itself, and does not commence to run, until the time thereby extended would have expired, had no order been made.

(*b.*) Publication.

As to the time of publication of legal notices, the principles as laid down in section 425 are supported and applied in the following decisions. *Bunce* vs. *Reid*, 16 Barb., 347; *Westgate* vs. *Handlin*, 7 How., 372. As to publication for a given number of weeks, and what will be sufficient in such cases, *vide Howard* vs. *Hatch*, 29 Barb., 297. As to the illegality of advertising in a newspaper published on a Sunday, see *Smith* vs. *Wilcox*, 19 Barb., 581; affirmed 25 Barb., 341.

See generally, as to the time for publication of statutory notices, *Olcott* vs. *Robinson*, 21 N. Y., 150; *People* vs. *Gray*, 10 Abb., 468; *Chamberlain* vs. *Dempsey*, 22 How., 356; 13 Abb., 421.

In relation to notices published in the *Albany Evening Journal*, prior

to 2d July, 1859, deeming it the state paper, *vide* chapter 174 of 1860, page 296.

See also special statutes as to the publication of notices in the counties of Fulton and Hamilton, chapter 95 of 1860, page 168, and chapter 297 of 1860. page 517.

§ 72. *Interlocutory Applications.—Statutory and other Provisions.*

The following are the provisions of the Code upon this subject, as contained in chapter VIII., title XII., of part II.

§ 400. (357.) Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

§ 401. (358 to 362.) [1.] An application for an order is a motion.

[2.] Motions may be made in the first judicial district, to a judge or justice out of court, except for a new trial on the merits.

[3.] Orders made out of court, without notice, may be made by any judge of the court, in any part of the state; and they may also be made by a county judge of the county where the action is triable, or by the county judge of the county in which the attorney for the moving party resides, except to stay proceedings after a verdict.

[4.] Motions upon notice must be made in the district in which the action is triable, or in a county adjoining that in which it is triable; except that where the action is triable in the first judicial district, the motion must be made therein, and no motion upon notice can be made in the first judicial district in an action triable elsewhere.

[5.] In all the districts, a motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions.

[6.] No order to stay proceedings for a longer time than twenty days, shall be granted by a judge out of court, except upon previous notice to the adverse party.

When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpœnaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue. And the fees of such referee, for such service, shall be three dollars per day.

The final clause of the section was first added to it upon the amendment of 1862. The prior portions have undergone considerable changes from time to time.

In 1848, it formed five sections, 358 to 362, inclusive. Their purport was in some respects the same as now, but less extensive.

In 1849, the five sections were consolidated into one, but without subdivisions as at present, the scope of the provisions being extended.

In 1852, it was added to, but still remained unsubdivided in form.

In 1858, it was remodelled and subdivided as at present, the former arrangement being in several respects altered.

In 1859, an addition was made to the third subdivision. Otherwise the section has come down unchanged since 1858.

§ 402. (363.) When a notice of a motion is necessary, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Dates as it stands from 1849. In 1848, the notice was five days.

§ 403. (364.) In an action in the Supreme Court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the Supreme Court at Chambers, according to the existing practice, except as otherwise provided in this act. And in all cases where an order is made by a county judge, it may be reviewed in the same manner as if it had been made by a judge of the Supreme Court.

Dates as it stands from 1849. In 1848, his powers were those of "a judge out of court."

§ 404. (365.) When notice of a motion is given, or an order to show cause is returnable before a judge out of court, and, at the time fixed for the motion, he is absent, or unable to hear it, the same may be transferred, by his order, to some other judge, before whom the motion might originally have been made.

Dates as it stands from 1849. In 1848, the provision was generally similar, but more in detail, giving power to the parties to transfer by notice.

A similar contingency is also contemplated, and more extensive powers attributed, in the case of motions in the Supreme Court, within the first judicial district, in section 27, before cited in book I., under the head of *Supreme Court*, running thus:

§ 27. The judges shall, at all reasonable times, when not engaged in holding court, transact such other business as may be done out of court. Every proceeding commenced before one of the judges of the First Judicial District, may be continued before another, with the same effect as if commenced before him.

§ 405. (366.) The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court, or, if the action be in the Supreme Court, by a county judge. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

Dates as it stands from 1849. In 1848, the power could only be exercised "before judgment."

The following section of the Code, already cited in section 66, under

the general head of *Notices*, is also more especially pertinent to the subject now under consideration.

§ 413. Notice of a motion, or other proceeding before a court or judge, when personally served, shall be given at least eight days before the time appointed therefor.

The review or vacating of orders, is thus provided for by section 324:

§ 324. (272.) An order, made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified, on notice, in the manner in which other motions are made.

The rules of the courts on the subject of motions, are numerous. The citations in the present chapter will be confined to those affecting the practice of the Supreme Court, and the analogous and inferior jurisdictions. Those of the Court of Appeals will be considered hereafter, in connection with the peculiar practice of that tribunal.

The first rule necessary to be cited is number 40, which runs as follows:

Rule 40. (27.) Enumerated motions are motions arising on special verdict; issues of law; cases; exceptions; appeals from orders sustaining or overruling demurrers; appeals from an inferior court; and appeals by virtue of section 348 of the Code.

Non-enumerated motions include all other questions submitted to the court, and shall be heard at special term, except when otherwise directed by law.

Contested motions shall not be noticed or brought to a hearing, at any special term held at the same time and place with a circuit, except in actions upon the calendar for trial at such circuit, and in which the hearing of the motion is necessary to the disposal of the cause; and except, also, that in counties in which no special term, distinct from a circuit, is appointed to be held, motions in actions triable in any such county, may be noticed and brought on at the time of holding the circuit and special term in the county in which such actions are triable.

Enumerated motions, being all in the nature of appeals, will be hereafter treated of under that head, and rules 42 and 45, by which that branch of practice is regulated, cited in the same connection. They are, in fact, regular and necessary proceedings in the cause, and in no wise interlocutory in their nature. Motions of the latter description fall within the non-enumerated class, and to their consideration the rest of the present chapter will be strictly confined.

A few of this class of applications are cognizable by the general term, and are regulated by the following rule:

Rule 48. (33.) Non-enumerated motions made in term-time, at a general term, will be heard on the first day, and Thursday of the first week, and Friday of the second week of the term, immediately after the opening of the court on that day. Except in the first judicial district, a party attending pursuant to notice, to oppose a non-enumerated motion, if the same shall not be made on the day for which it is noticed, may, at the close of that order of business, take a rule against the party giving the notice, for costs for attending to oppose.

Motions in criminal cases may be heard on any day in term.

The practice in the large class of non-enumerated motions cognizable at special term, is thus laid down by rule 49:

Rule 49. (32.) Non-enumerated motions, except in the first district, shall be noticed for the first day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made; and the notice shall not be for a later day, unless sufficient cause be shown (and contained in the affidavits served) for not giving notice for the first day.

The manner in which contested motions shall be brought on, is thus prescribed by rule 39:

Rule 39. (25.) All questions for argument, and all motions, shall be brought before the court on a notice; or, when a notice less than eight days is prescribed by the judge or court, under section 402 of the Code, by an order to show cause; and, if the opposite party shall not appear to oppose, the party making the motion or obtaining the order, shall be entitled to the rule or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the court shall otherwise direct.

Such order to show cause shall only be granted when a special reason for a notice less than eight days appears on the papers presented, and the party shall, in his affidavit, state the present condition of the action, and whether at issue, and the time appointed for holding the next circuit in the county where the action is triable. The order shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a special term appointed to be held in the district in which such judge resides.

No order served after the action shall have been noticed for trial, if served within ten days of the circuit, shall have the effect to stay the proceedings in the action, unless made at the circuit where such action is to be tried, or by the judge who is appointed or is to hold such circuit.

And, when the motion is for irregularity, the notice or order shall specify the irregularity complained of.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to a complaint for a divorce.

A similar rule to the above, so far as regards the not granting orders to show cause without sufficient reason shown for shortening the time

of notice, was made in the second district on the 20th of February, 1857.

Rules 22, 50, 51, 52, 53 and 58, are applicable to special classes of motions, and not to motions generally considered; and, as such, will be hereafter cited in their order.

The renewal of an application on the same state of facts, is thus prohibited:

Rule 23. (82.) If any application for an order be made to any judge or justice, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other judge or justice; and if, upon such subsequent application, any order be made, it shall be revoked; and, in the affidavit for such order, the party shall state whether any previous application for such order has been made.

The entry of a rule by default, is regulated as follows:

Rule 55. (26.) When a rule is obtained, either at a general or special term, by default, the counsel obtaining the same shall indorse his name, as counsel, on the paper containing the proof of notice; and the clerk, in entering the rule, shall specify the name of such counsel.

The former practice, of entering orders of course, without the signature of the judge, is, in the first district, practically abandoned. It has been, however, revived to a limited degree, by the following, forming the first part of the order of the 29th of September, 1859, before cited:

Ordered, Whenever a consent is filed with the clerk of this court for the substitution of the attorney, or for the discontinuance of an action, the clerk may enter on the minutes of the court the substitution of the attorney or the discontinuance of the action, without any order of the judge therefor.

The form of an order to be entered upon petition is specially regulated, as follows:

Rule 56. (38). Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments.

Special provision is made as to the practice to be pursued on entering orders made in another county than that of the venue, by rule 3. The rule itself has already been cited *in extenso* in the present chapter, section 67, under the head of *Filing of Papers*. Unless the order is duly

entered in the proper county within ten days, the defaulting party loses the benefit of it.

The periods for compliance with an order, when made, are fixed by rule, as follows:

Rule 57. (35.) In all cases where a motion shall be granted, on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith, shall have twenty days for that purpose, unless otherwise directed in the order. But, where costs to be adjusted are to be paid, the party shall have fifteen days to comply with the rule, after the costs shall have been adjusted by the clerk on notice, unless otherwise ordered.

Motions in criminal cases may, under rule 48, be brought on any day during a general term. See, however, *Barron* vs. *The People*, 1 Barb., 136. See likewise chap. 37 of 1858, p. 65, prescribing that notice of the day on which it will be so brought on must be given. Cases *in certiorari* are also, under rule 47, entitled to precedence, on the morning of any day during the first week in term.

Special regulations have been made from time to time in relation to motions in the first district of the Supreme Court.

The following rule was made 29th of September, 1859:

"After October, 1859, all motions at special term or chambers must be noticed for the *first and third Mondays* in each term, and for no other time. Such motions will be heard in order on those and the succeeding days, unless otherwise ordered by the judge holding the term, until disposed of.

Motions must be noticed for 12 o'clock, noon. *Ex parte* business will be attended to between 10 and 12 o'clock, each day."

This practice has been continued, and a calendar of motions for each motion day is regularly made out by the clerk.

Several special orders have been made from time to time, in relation to the order of business on this calendar.

That at present pending, runs as follows:

SUPREME COURT—CHAMBERS.

ORDER OF BUSINESS ON THE MOTION CALENDAR.

Ordered that the following classes of motions shall have preference at Chambers in the order herein mentioned, and that all orders heretofore made in relation thereto be and are hereby vacated.

I. Motions to place on special circuit calendars.

II. Motions for extra allowance.

III. Motions for judgment in foreclosure cases, where no answer is put in, and on frivolous answers or demurrers.

IV. Motions for reference and for commissions to take testimony.
V. Motions to discharge from imprisonment.
VI. Motions to punish for contempt.
VII. All other motions to which preference is given by the statute.
VIII. The general call of the calendar.
Motions noticed for 12 o'clock will be heard in the special term room.

By order of the Court.
H. W. GENET, Clerk.

It seems questionable whether, in strictness, this rule does not, to some extent, contravene the express direction contained in section 401, subdivision 5, that "in all the districts, a motion to vacate, or modify a provisional remedy," "shall have precedence above all other motions."

The following provisions, made by a rule of 29th March, 1860, in the same district, are practically continued, though by the terms of that above cited that rule might be deemed vacated :

On written consent of the attorneys, any motion before it is called *will be set down by the* CLERK for any specified day in the term, *but no motion will be heard* before it is REACHED *in its order on the Calendar.*

No contested motions will be heard on Saturdays.

The practitioner should inform himself, however, as to the practice from time to time.

On the 27th March, 1857, the following rule was made as to the entry of orders :

"No order will be entered on a litigated motion except on consent, or at least one day's notice to the opposite party."

The order of business on motion days in Kings County, is thus prescribed by rule of the second district :

1. *Ex parte* motions.
2. Motions to modify, and discharge provisional remedies.
3. Applications for judgment, and other motions on notice in foreclosure and partition cases.
4. Applications for judgment, on notice, in other cases, for want of an answer, or on account of frivolousness of demurrer, answer, or reply.
5. Motions in proceedings against persons brought up by attachment.
6. Motions for commissions and discovery of books and papers, and for the examination of parties.
7. Motions to change the place of trials.
8. Motions to open defaults.
9. Motions to strike out sham and irrelevant pleadings, to strike out irrelevant or redundant matters, and to make a pleading definite and certain by amendment.
10. Motions for allowance of injunction.
11. Other motions.

The following special rules have been made by the Superior Court and the Court of Common Pleas in relation to the above subject.

Rules 5 and 6 of the former tribunal run thus:

Rule 5. Non-enumerated motions will be heard by one of the justices at the special term room and the chambers, daily, at 10 A. M., throughout the year—except on New Year's Day, Good Friday, the Fourth of July, the day of the Annual Election, Thanksgiving Day, and Christmas. For such motions, and for the purpose of hearing any *ex parte* applications, either in an action or otherwise, which are required by law to be made in open court, and for the purpose of making all necessary orders thereon, and giving judgment in causes, under chapter first, of title eight, of the second part of the Code, a special term will be held every day during the year, at 10 o'clock A. M., except on the days above named; and as many special terms may be held at the same time, as there shall be justices of the court attending to hold the same.

Rule 6. The justices designated to hold the general terms, will attend at chambers daily, during their respective terms, from 10 to 11 A. M., to dispose of *ex parte* applications, and of non-enumerated motions in which all the parties are present or represented. All applications for *ex parte* orders, and for judgments upon failure to answer, during the general terms, must be made before 11 o'clock A. M.

The rule of the same court of 11th of April, 1857, prescribing the filing of all papers used on a motion, and directing that every order to be entered must specify the papers on which it was granted or opposed, and directing the clerk not to enter any such order unless such papers be placed on file, either then or previously, has been already cited *in extenso* in this chapter, section 67, under the head of *Filing of Papers.*

In the Court of Common Pleas, contested motions form a part of the special term business provided for by rule 2, as follows:

Rule 2. The special terms for the trial of all issues of fact and law, and hearing of all matters, except business to be heard at the general terms, shall be held on the first Monday of each month except August, shall continue for three weeks, if necessary, and may be continued for the fourth week, by the judge holding the same, when he is not engaged at the general term.

The chamber business is thus regulated:

Rule 4. Motions that may be made out of court, and chamber business, will be heard before a judge at chambers, daily, between 10 and 12 A. M. Appeals from such motions shall be submitted at the Saturday of the general term.

A provision similar to that contained in rule 39 of the Supreme Court, is thus made, by rule adopted on the 24th of March, 1850:

Ordered, That orders to show cause on non-enumerated motions, will not hereafter be granted, except upon affidavit showing the necessity of making the time of notice shorter than is required in the Code; and, where such order is returnable on any other day than the first day of the special term, the reason therefor must be stated in the affidavits on which the motion is founded.

By order of the 22d of March, 1851, a special practice is prescribed by this court, in relation to the review of questions of practice decided by a single judge, which will hereafter be noticed under the head of *Appeals*, to which it properly belongs.

§ 73. *Motions.—General Classification.*

An order is, as above stated, obtainable on motion only.

The distinction between enumerated and non-enumerated motions, has been before drawn. It is with the latter only that the present chapter has concern.

Non-enumerated motions may again be divided into two grand heads, viz.:

1. *Ex parte;*
2. Opposed motions;

which will be treated in their order.

§ 74. *Ex parte Applications.*

(*a.*) By whom and where Cognizable.

In the Supreme Court, orders of this description may be made by any judge of the court, in any part of the state. See as to their duty in this respect, section 27, before cited, under head of *Supreme Court.*

They may also, with the one exception of a stay of proceedings after verdict, be made by the county judge of the county where the action is triable, or by the county judge of the county in which the attorney for the moving party resides. § 401, subd. 3.

In the Superior Court and New York Common Pleas, and other courts of limited or local jurisdiction, a judge of the court itself is alone competent to act. But he may so act wherever found within the territorial limits in which he is authorized to do official acts. *Cobb* vs. *Lackey*, 2 Abb., 158; 4 Duer, 673; 12 How., 200.

This class of applications are of course peculiarly cognizable by the judge to whom they are made, when sitting at chambers, or out of court. See Book I., Chap. III., §§ 15 and 16.

(*b.*) General Characteristics.

The very term "*ex parte*" implies of course an order obtained without notice to the adverse party.

Under this head may be classed:

Orders of course.

Orders entered by consent.

Orders for publication or substituted services.

Orders granting an extension of time, or a modified stay of proceedings.

Any other orders incident to the progress of the cause, to which the applicant is entitled as of right, without power to the adverse party to oppose.

An order to show cause is also *ex parte* on its first granting. And so are, as a general rule, orders for the provisional remedies of arrest, injunction and attachment. These classes, however, if opposed or sought to be vacated, lose thereupon their original character, and pass into that of contested motions.

The essential characters of orders falling under this head, will, as usual, be considered hereafter.

As a general rule they are predicated on affidavit, or on petition, where that form is applicable. See below under that head. Where, however, no extraneous fact is necessary to be proved, whereon to ground the application, the order may of course stand and be obtained alone.

When obtained on affidavit, it is an usual practice to add the order at its conclusion. The title of the cause should, however, always appear, either prefixed to the order itself, or to the preliminary affidavit, according to circumstances.

Where the order is entered by consent, the original of the latter should either be prefixed or annexed to it. If the consent be of the attorney in the cause, no identification will be necessary; if of the party, his signature will require to be proved by affidavit.

The papers, when ready, must be presented to the officer to whom the application is made, who, if the order be a chamber order, affixes his signature. The date should be filled in, either previously or at the time.

Orders by consent are, however, properly special term orders. They must, under Rule 13, before cited, be "entered." If out of the first district, they should therefore properly be presented to a judge of the court when holding such a term. In all cases they should be entitled as special term orders, and the judge, instead of simply signing the paper, when presented, affixes his direction for the entry of the order

by the clerk; and it must thereupon be entered and the papers filed accordingly. In the first district, however, orders for substitution or discontinuance may be entered by the clerk without any signature by the judge, under the rule of 29th September, 1859, as above cited.

A mere chamber order in a pending action need not be entered at all, nor the papers filed with the clerk. *Savage* vs. *Relyea*, 3 How., 276; 1 C. R., 42. *Vernam* vs. *Holbrook*, 5 How., 3.

It may, however, be occasionally prudent to do so, and an order for publication or substituted service must now, under Rule 4, be so filed. An order made on petition, being usually a substantive and independent application, should, as a general rule, be regularly entered, and the papers filed, as in the case of an order of the court. *Ex parte* orders, wherein relief is granted against an adverse party, in an action or proceeding pending, should in all cases be served, accompanied by copies of the papers upon which they are grounded, upon the adverse attorney or party.

Under Rules 37 and 58, orders of course may be entered in the cases there provided for, on filing special affidavits as prescribed. The essentials of these two proceedings will, as usual, be considered in their proper place.

An application to a judge to modify or vacate his own *ex parte* order, under the authority conferred by section 324, if entertained by him, falls clearly within this division. But such an application is cognizable by such judge alone; if made to any other, it assumes the characteristics of an ordinary motion. *Cayuga County Bank* vs. *Warfield*, 13 How., 439. See this subject generally considered hereafter, under the head of *Appeals*.

An application for a writ of assistance, by the purchaser under a judgment of foreclosure, and who has obtained his deed, and been ordered to be let into possession, is an *ex parte* order, to which the applicant is entitled as of right, without notice, and without power for the adverse party to oppose. A grantee of the purchaser is similarly entitled. *New York Life Insurance and Trust Company* vs. *Rand*, 8 How., 35, affirmed 8 How., 352. *The New York Life Insurance and Trust Company* vs. *Cutler*, 9 How., 407.

An application to remove a mere technical difficulty in a special proceeding, is addressed to the discretion of the court, and may be made either *ex parte* or on notice, as the court may direct. *In re Patterson*, 4 How., 34.

(*c.*) Extension of Time.

The subject of the extension of time to plead, and of the restrictions imposed upon an application for that purpose by Rule 22, will be here-

after considered under its proper head. As to the obligatory nature of that rule, see *Ellis* vs. *Van Ness*, 14 How., 313.

The power of any judge in any part of the state to make an *ex parte* order of this description, in a cause pending in the first district, is asserted in *Adams* vs. *Sage*, 13 How., 18. The recent amendments of section 401, have placed this matter beyond a doubt.

To be obtainable *ex parte*, an extension of time must be applied for, before the applicant is actually in default. *Stephens* vs. *Moore*, 4 Sandf., 674. *Doty* vs. *Brown*, 3 How., 375; 2 C. R., 3.

An agreement, signed by the plaintiff in person, extending the time to answer, on payment of part of his demand, was held to be valid and binding, and a judgment, taken by his attorney within the extended period, though apparently without knowledge of the extension, was set aside as irregular in *Braisted* vs. *Johnson*, 5 Sandf., 671.

(*d.*) Stay of Proceedings.

The general power of extension conferred by section 405, is, however, essentially limited by subdivision 6 of section 401, prescribing that no order to stay proceedings for a longer time than twenty days, shall be granted by a judge out of court, without notice to the adverse party.

This prohibition does not extend to orders of the court, or orders of that nature. The judge who tried the cause may, accordingly, of his own knowledge, and without special affidavit, grant an indefinite extension of the time to serve a case or bill of exceptions. *Thompson* vs. *Blanchard*, 3 How., 399; 1 C. R., 105. If made to another judge, the application should be grounded on affidavit.

Although a judge out of court cannot grant a stay, extending beyond the prescribed period of twenty days, it seems he may do so when sitting at special term. The court, as such, is competent to grant the application, though made *ex parte* and without notice. *Harris* vs. *Clark*, 10 How., 415. *The Steam Navigation Company* vs. *Weed*, 8 How., 49.

The same conclusion is more than implied in *Mitchell* vs. *Hall*, 7 How., 490, where, after expressing some doubt as to whether an *ex parte* order for a stay until after the decision on a bill of exceptions, granted some time after the trial, by the then presiding judge, might or might not be good, for the excess beyond the twenty days, the learned judge adds: "The safest and best practice undoubtedly is, when the first order is applied for, to make it an order of the court, which will give it a vitality commensurate with the necessities of the case." Such an order, however, to be effectual, must be regularly entered and acted upon. If the applicant do not enter it in due time, or take a course of proceeding amounting to an election to abandon it, it will not avail him. *Sage* vs. *Mosher*, 17 How., 367. The distinction between an order made by

the judge sitting at chambers or at special term, is maintained to the full in *Wood* vs. *Kimball*, 18 How., 163; 9 Abb., 419. Although made by a judge of the first district sitting at the same time in both capacities, such an order, entitled as a chamber order, and not entered as of special term, was set aside, with liberty to renew the application in proper form.

The mere making or entitling of a chamber order as made at special term, will not however affect its validity. *In re Knickerbocker Bank*, 19 Barb., 602.

Although, in effect, intended to apply to a shorter period than twenty days, an *ex parte* stay cannot be applied for in an indefinite form. An indefinite stay of proceedings until the hearing of a motion, cannot be granted otherwise than on notice, or order to show cause. *Schenck* vs. *McKie*, 4 How., 246; 3 C. R., 24. See also *Mitchell* vs. *Hall*, 7 How., 490, above cited; and *Lottimer* vs. *Lord*, 4 E. D. Smith, 183.

In *Chubbuck* vs. *Morrison*, 6 How., 367, it was held that no judge has properly the right to grant a stay for a given period, or for twenty days, arbitrarily, without sufficient reason shown. Such a stay, if granted, should always be as a means to an end, and should be founded on a case showing, at least, a *primâ facie* right to some relief, and a necessity for arresting the proceedings of the adverse party, until the application for that relief can be made. See also *Sales* vs. *Woodin*, 8 How., 349. Such an order is not, however, void, but voidable, and the proper remedy is a motion to set it aside. *Hempstead* vs. *Hempstead*, 7 How., 8. See also, as to the old practice of staying proceedings, until the next term at which a motion could be heard, *Gray* vs. *Jones*, 3 How., 71.

The same rule is substantially maintained in *Bangs* vs. *Selden*, 13 How., 374. It is held that a judge, anywhere, may make an order out of court, and without notice, staying proceedings, to enable a party to apply for some ulterior relief, provided the time does not exceed twenty days. If he goes beyond that limit, the order is void; he has transcended his jurisdiction. If a longer stay is required, the application must be upon notice. See likewise, as to the extent of the powers of a judge at chambers in this respect, *The Bank of Genesee* vs. *Spencer*, 15 How., 14.

It has been held incompetent for a judge, sitting at chambers, to interfere, by means of a stay, with proceedings pending before another judge or officer having sole or exclusive jurisdiction. Such a power only belongs to the court. So held, as to supplementary proceedings, pending before a county judge. *The Bank of Genesee* vs. *Spencer*, *supra*. Nor has even the county judge himself, before whom the proceedings are pending, the power to make such an order. *Same case*, 15 How., 412.

Rule 39, as last amended, expressly prohibits such an interference, on the part of any other judge, with the proceedings at a circuit, for which a cause has, before the order, been actually noticed for trial. This rule is in accordance with the same doctrine, previously held in *Hasbrouck* vs. *Elrich*, 7 Abb., 76.

Rule 58 expressly provides for the revocation of a stay, granted for the purposes of a motion, by a defendant, to change the venue; on the plaintiff's showing, by affidavit, that, according to the settled practice of the court, he is entitled to retain it. See hereafter under that head.

An *ex parte* stay of proceedings on a partition or foreclosure sale is now expressly prohibited by rule 80, and a notice of at least two days made imperative. Prior to this rule, it was held that a party obtaining a stay of this description acts at his peril, and will not be allowed to take advantage of any irregularity produced by such action. *La Farge* vs. *Van Wagenen*, 14 How., 54.

As to the positive stay effected by the allowance of a common-law *certiorari*, *vide In re Conover* vs. *Devlin*, 14 How., 348.

An order extending the time for a proceeding may be so far valid, and yet, in so far as it effects a stay exceeding twenty days, may, at the same time, be invalid and disregarded for the excess. *Huff* vs. *Bennett*, 2 Sandf., 703; 3 C. R., 139. See also *Mitchell* vs. *Hall*, *supra*.

In *Langdon* vs. *Wilkes*, 1 C. R. (N. S.), 10, it is held that a copy of the affidavits on which a mere stay of proceedings, not involving any extension of the applicant's time to take any proceeding, has been granted, need not be served with the order. This is only necessary when such an extension is sought under section 405.

In the same case, it was held competent for a judge out of court to make successive orders staying proceedings, with a view to the same application, though, collectively, they might effect a stay for more than twenty days. Under the circumstances of the case the order seems sustainable, and, in fact, the period of twenty days had not yet been exhausted by the orders, collectively considered, as will appear from an examination of the case itself, which scarcely bears out the positive proposition enounced in the head-note.

In *Wilcock* vs. *Curtis*, 1 C. R., 96, it was considered that an extension of time to answer was not, in effect, a stay of proceedings, and was not affected by the prohibition in question.

It would be unsafe to rely on this view, or on the practice of obtaining a succession of *ex parte* extensions for twenty days each, which has sometimes been pursued.

The proposition laid down in the head-note of *Langdon* vs. *Wilkes*, *i. e.*, that a judge out of court may make any number of *ex parte* orders staying proceedings, though, collectively, they stay proceedings for

more than twenty days, is expressly overruled, and an *ex parte* application for a second stay denied in *Anon.*, 5 Sandf., 656. The same, and that a second order of this description, may be disregarded as an evasion of the statute, is positively laid down in *Sales* vs. *Woodin*, 8 How., 349. See also *Mills* vs. *Thursby* (No. 2), 11 How., 114; *Marvin* vs. *Lewis*, 12 Abb., 482.

§ 75. *Opposed Motions, where Cognizable.*

The considerations as to the cognizance of interlocutory applications, either by the general term, by the special term, by a judge or justice at chambers, or by a county judge, or other officer performing the duties of a judge out of court, have already been fully entered into, in chapter III., book I., under the head of *The Supreme Court*, especially in sections 13 to 16, inclusive, of that chapter, to which the reader is accordingly referred.

It remains, however, to notice the distinction between applications in the first and in the other districts, as drawn by section 401, subdivisions 2 and 4, as above cited.

(*a.*) First District.

The peculiar characteristics of this district are—

1. All motions in actions there triable must, and,
2. Motions in actions triable elsewhere cannot, be made within it.

This last rule does not, however, extend to purely *ex parte* applications.

It applies, however, in all cases where notice, in any shape, is requisite to be, or is in fact given, to the adverse party, and includes, therefore, an order to show cause. *Baldwin* vs. *The City of Brooklyn* (per Edwards, J., unrep.).

In *The Canal Bank* vs. *Harris*, 10 How., 452; 19 Barb., 587; 1 Abb., 192, this principle was acted upon, and the court refused to entertain a motion to vacate execution issued to the sheriff of New York, on a judgment docketed in that county, on the ground that that motion should have been made at Albany, where the judgment was originally entered. So also a motion, in a suit to foreclose a mortgage on land within the second, but referred to a referee residing within the first district, was denied by a judge of the latter, in *Wheeler* vs. *Maitland*, 12 How., 35.

In *Geller* vs. *Hoyt*, 7 How., 265, it was held that the hearing of a motion, contrary to the above restriction, is not a question of jurisdiction, so as to render an order so obtained "*ipso facto*" void. Any Supreme Court justice, it was there ruled, had jurisdiction to hear the

motion and to make the order, "although, if objection were made, he should not hear the motion; the order, when made, is the order of the Supreme Court."

In *Harris* vs. *Clark*, 10 How., 415, it was held, however, on the other hand, that an order so granted was void, for want of jurisdiction, and should be set aside, on motion of the adverse party.

When the complaint omitted to specify the venue, but the fact that the venue was intended to be laid in the first district was apparent upon the summons, a motion to set it aside, made in the third, was denied. *Davison* vs. *Powell*, 13 How., 287. See, however, *Hotchkiss* vs. *Crocker*, 15 How., 336; *Morrill* vs. *Grinnell*, 10 How., 31.

A county judge has no power whatever to make an injunction order, or any other order, except mere orders of course, in cases pending within this district. *Eddy* vs. *Howlett*, 2 C. R., 76.

As to the extent of the powers of a judge in this district, sitting at chambers, and holding a special term at the same time, *vide Main* vs. *Pope*, 16 How., 271; *Witherspoon* vs. *Van Dolar*, 15 How., 266; *Disbrow* vs. *Folger*, 5 Abb., 53. As to the practice of the Superior Court, in respect of the granting, and especially the taking, of defaults upon motions at special term or chambers, respectively, see *Cobb* vs. *Lackey*, 4 Duer, 673; 12 How., 200; 2 Abb., 158.

The above restriction as to motions in the first district has, however, been held only to extend to motions in the regular course of a suit, and not to those in which purely independent relief is sought. The judges in that district have asserted their power to hear motions of this description, though the actions in which they were made were strictly triable elsewhere. So held on a motion to compel an attorney to give up the papers in a suit. *Cunningham* vs. *Wilding*, 5 Abb., 413. On a motion for a *supersedeas*, for omission to charge an imprisoned defendant in execution, *Wills* vs. *Jones*, 2 Abb., 20. See also, as to an order for taxation of costs under a surrogate's appeal, which was held to be cognizable by any justice of the court, at any place within the state, *Brockway* vs. *Jewett*, 16 Barb., 590.

And this power is acknowledged by the general term of the fourth district, in a case where a prisoner under execution, on a judgment there entered, was released on *habeas corpus*, by order of a justice of the first. See *Caldwell's Case*, 35 Barb., 444; 13 Abb., 405.

(*b.*) Other Districts.

In these districts, the facilities for making motions are increased as to the places, but diminished as to the mode, of making the application, as follows:

1. A motion may be made in any county within the district in which

he action is triable; or, in any county, though in another district (the first excepted), which adjoins the county in which the venue is laid; but,

2. A motion, on notice, cannot be made before a judge, at chambers, or out of court, or otherwise than "at special term." See *Rule* 40. See, also, *Bedell* vs. *Powell*, 3 C. R., 61, and *Schenck* vs. *McKie*, 4 How., 246; 3 C. R., 24. *Disbrow* vs. *Folger*, 5 Abb., 53.

It has been held that the affidavits in support of a motion should show affirmatively that it is made in the proper district, or it may be denied. *Schermerhorn* vs. *Devlin*, 1 C. R., 13; *Dodge* vs. *Rose*, 1 C. R., 123.

In *Peebles* vs. *Rogers*, 5 How., 208; 3 C. R., 213, it was held that the words, "the county where the action is triable," include any county in which, under sections 123 to 125, the plaintiff is at liberty to have it tried. At that time, the question as to whether a change of the place of trial did or did not carry with it a change of the venue, was still left unprovided for. The subsequent amendments have placed this beyond a doubt. The county originally fixed by the plaintiff, now clearly determines the place for interlocutory applications. When that county is changed for another, in another district, the change carries with it a change of the district for this purpose. This principle is fully carried out, and the view taken in *Peebles* vs. *Rogers*, expressly overruled in *Bangs* vs. *Selden*, 13 How., 163; *same case*, 13 How., 374, in which the question is very fully considered, and the different authorities cited and examined. See also *Askins* vs. *Hearns*, 3 Abb., 184.

Where, however, the plaintiff has omitted to specify any county in his complaint, so that the venue is not in fact fixed, the defendant may move in the district of his own residence, the action being in fact there triable, nor does a reference to the summons avail to deprive him of that right. *Hotchkiss* vs. *Crocker*, 15 How., 336. See, also, *Morrill* vs. *Grinnell*, 10 How., 31. The former of these decisions is contrary to *Davison* vs. *Powell*, 13 How., 287, before cited. The doctrine in *Davison* vs. *Powell*, as to disregarding the mere technical defect, seems more consonant, however, with the general spirit of the Code. It is also more consistent with the decisions in *Johnston* vs. *Bryan*, and *Ingleheart* vs. *Johnson*, below cited.

A motion for a commission must be made within the regular district, and the provisions of the Revised Statutes and the Judiciary Act, enabling it to be made to any judge of the court, or a county judge, are inconsistent with the Code, and are therefore repealed. *Sturgess* vs. *Weed*, 13 How., 130.

Where a summons had been served, stating that the complaint would be filed in a particular county, it was held that a motion for judgment for not serving a copy of the complaint, could not be made in another district, unless in a county immediately adjoining the county named.

Johnston vs. *Bryan*, 5 How., 355; 1 C. R. (N. S.), 46; *Ingleheart* vs. *Johnson*, 6 How., 80. Where, therefore, a county is situated in the middle, and not on the borders of a judicial district, the motion cannot be made out of the latter.

The same conclusion is come to in *Blackmar* vs. *Van Inwager*, 5 How., 367; 1 C. R. (N. S.), 80. It is, however, held in that case, that although irregularly made, as being in a wrong county, the order on a motion, by a judge of the Supreme Court, cannot be treated as a nullity and disregarded. It is binding until set aside, and the party aggrieved must proceed accordingly. See also as to this last point, *Geller* vs. *Hoyt*, 7 How., 265; *Hempstead* vs. *Hempstead*, 7 How., 8.

A stricter view on this last subject is taken in *Harris* vs. *Clark*, 10 How., 415, in which it was held that an order, made in the first district, in an action triable elsewhere, was void for want of jurisdiction. The propriety of a motion being made to set it aside, instead of its being merely disregarded, was, however, recognized.

Where a cross action had been brought, in respect of matter originally set up, by way of defence, in another district, it was held that the motion, for the purpose of compelling a consolidation of the two proceedings, could only be made in the cross action, and in the proper district in which such motion was cognizable; and an application of that nature in the original proceeding was accordingly denied, but without prejudice to its renewal in regular form. *Farmers' Loan and Trust Company* vs. *Hunt*, 1 C. R. (N. S.), 1.

Where the plaintiff had brought a number of separate actions against the same defendants, in respect of the same cause of action, but in different counties, all the parties to the action residing, in fact, in one county, it was held that the motion to consolidate was properly made in that county. *Percy* vs. *Seward*, 6 Abb., 326.

By special statute, chapter 35 of 1848, motions arising in the county of Orleans, may be brought to a hearing in Erie, in the same manner as if those counties adjoined.

A county judge cannot hear a contested motion under any circumstances, even though it be to vacate his own order. *Rogers* vs. *McElhone*, 20 How., 441; 12 Abb., 292. See also *Lancaster* vs. *Boorman*, 20 How., 421, there referred to.

§ 76.—*Opposed Motions—Notice of.*

Opposed or opposable motions must be brought on in all cases, on notice to the adverse party. This may be effected either by notice in the ordinary form, or, when the usual period of that notice is required to be shortened, by order to show cause. These two proceedings will accordingly be considered in their order.

(*a.*) Notice of Motion.

The ordinary notice of motion must in all cases be given and served at least eight days before the hearing. See sections 402, 413, of the Code, before cited. When service of it is made by mail, that time must of course be doubled. (Section 412.) See as to the necessity of the full period of notice being given, unless the time is shortened by order of the court, *Rogers* vs. *McElhone*, 20 How., 441; 12 Abb., 292.

In one single case, however, a two days' notice may be given, *i. e.*, on an application to stay a judicial sale, when made to a judge out of court. This is specially provided for by rule 80.

In all the districts, enumerated motions should be noticed for the first day of term. (Rule 42.)

In all except the first, non-enumerated motions should be noticed for the same, and not for any later day, unless sufficient cause for so doing be shown on the affidavits served. (Rule 49.) *Vide Whipple* vs. *Williams*, 4 How., 28.

In such districts, contested motions, not immediately connected with the disposal of a cause on the circuit calendar, are not, as a general rule, to be noticed or brought to hearing at a special term, held at the same time and place with such circuit. Those counties in which no special term, distinct from a circuit, is appointed to be held, are, however, excepted from this regulation. In those, a motion may be noticed, and heard at the circuit and special term in the county of venue. See rule 40, above cited.

In the first district, the practice is less stringent. In the Supreme Court the notice may be given for either the first or third Monday in term. Rule of the 29th September, 1859. In the Superior Court and Common Pleas, there is no restriction as to the day for which notice should be given of chamber or special term motions. Appeal motions to the general term will be heard, and should be noticed for the fourth Saturday of the month in the Common Pleas, and each Saturday during the general terms in the Superior Court.

In respect to one class of motions, *i. e.*, those to correct or render a pleading more definite and certain, a positive restriction is imposed by rule 50. Motions of this class must be noticed, before demurring or answering the pleading, and within twenty days from the service thereof. See *Bowman* vs. *Sheldon*, 5 Sandf., 657; 10 L. O., 338; *Roosa* vs. *The Saugerties and Woodstock Turnpike Road Company*, 8 How., 237; *Rogers* vs. *Rathbone*, 6 How., 66.

In the last case, it was held necessary that the fact that the motion was so noticed, should appear affirmatively on the moving papers. This view is, however, overruled, and the doctrine that such omission,

if made, should be shown as matter of defence, held in *Barber* vs. *Bennett*, 4 Sandf., 705; and *Roosa* vs. *The Saugerties, &c., Turnpike Road Company*, *supra*.

The right to make such a motion will, also, be waived by the service of an answer to the impeached pleading, after notice given, *Goch* vs. *Marsh*, 8 How., 439; or by an extension of time to plead, *Bowman* vs. *Sheldon*, 5 Sandf., 657; 10 L. O., 338; or by service of notice of trial, which admits that a sufficient issue is raised, *Esmond* vs. *Van Benschoten*, 5 How., 44.

As to the inefficiency of a notice of motion, given either prematurely or too late, see hereafter, section 78, under head of *Incidental Points*.

The following are the necessary concomitants of a valid notice of motion:

1. It must be regularly entitled in the cause or matter in which the motion is intended to be made. The entitling it in a wrong court has even been held a fatal and unamendable defect. *Clickman* vs. *Clickman*, 1 Comst., 611; 3 How., 365; 1 C. R., 98. The contrary view, entertained in *Blake* vs. *Locey*, 6 How., 108; 1 C. R. (N. S.), 406, seems not to be maintainable, under the section there referred to. The defect may, doubtless, be disregarded under section 176; but the error is one that ought never to be made.

2. The papers on which the motion is intended to be grounded, should be clearly and unmistakably indicated. What those papers are will be shown in the succeeding section.

Care must be taken to make this indication sufficiently specific; and if the motion is one of general bearing on the pleadings or past proceedings, general words should be used, or subjoined to the more particular specification, so as to place the right to read any of such proceedings beyond a doubt.

Copies of all papers, on which the motion is specially grounded, must, in all cases, be served with it, and referred to in the notice as being so served. The only exception is, when such motion is based, in whole or in part, on papers already served on some previous occasion, or on papers in the possession of, or served by the adverse party. In these cases, the latter may be so referred to, and it will not be necessary to furnish a second set of copies of the one, or copies of the other. When a motion is founded entirely on the papers of the adverse party, a simple notice will be sufficient. *Newbury* vs. *Newbury*, 6 How., 182; 1 C. R. (N. S.), 409. Papers omitted to be served, or referred to as above, cannot, if objected to, be read on the hearing.

When a motion is founded on the pleadings, in whole or in part, a simple reference to those pleadings will be all that is so far requisite, nor will formal proof of their identity, or of the existence of the suit

itself, be required. *Newbury* vs. *Newbury*, 6 How., 182; overruling *Osborn* vs. *Lobdell*, 2 C. R., 77. See also *Darrow* vs. *Miller*, 5 How., 247; 3 C. R., 241.

As to the power of making use of a case and exceptions, when settled, in a motion in the cause, directed to another object, see *Van Bergen* vs. *Ackles*, 21 How., 314.

3. The judge, or officer, before whom the motion is to be made, and the exact time and place at which it is to be so made, must also clearly appear. It is usual to specify the hour at which the court or judge will sit, generally at ten, A. M.

In motions to the general or special term, a notice that the motion will be made "at the sitting of the court," on the day referred to, will, however, be sufficient. It is very usual and proper, though not essentially necessary, to add to the designation of time, the words, "or so soon thereafter as counsel can be heard."

In the first district, the time for which contested motions are to be noticed, is now fixed, by the rule of the 29th of September, 1859, above cited, at twelve M. In the Superior Court, ordinary motions should be noticed for ten; appeal motions, for eleven, A. M. In the Common Pleas, for either ten or eleven. The former is, perhaps, the more regular, but litigated business is rarely taken up before the latter hour.

4. The relief asked for, must be positively and distinctly specified, with sufficient detail and precision to make it unmistakably apparent. When made under any statutory provision, the exact wording of that provision had better, in all cases, be followed. If relief is asked for in the alternative, both alternatives should be clearly presented. See below, as to the demand for further relief, which, in all cases, should close the notice, and decisions there cited. Relief not asked for, cannot be granted. *In re Payn*, 8 How., 220. At the same time, the relief asked for must not be too broad, or the applicant cannot obtain his costs.

5. When the motion is for irregularity, the notice or order (to show cause) shall specify the irregularity complained of. Rule 39.

Before 1852, when this provision was inserted in the rules, the point was a contested one, it having been held in *Burns* vs. *Robbins*, 1 C. R., 62, and *Blake* vs. *Locy*, 6 How., 108; 1 C. R. (N. S.), 406, that, where the errors relied on were sufficiently indicated on the accompanying papers, it was not necessary to state them upon the notice itself; the contrary conclusion being come to in *Coit* vs. *Lambeer*, 2 C. R., 79.

The rule, as made, has since been acted upon in *Whitehead* vs. *Pecare*, 9 How., 35, and *Roche* vs. *Ward*, 7 How., 416. See, likewise, as to the general principle, *The Broadway Bank* vs. *Danforth*, 7 How., 264; *Harder* vs. *Harder*, 26 Barb., 409; *Baxter* vs. *Arnold*, 9 How., 445 (448); *Perkins* vs. *Mead*, 22 How., 476; *Selover* vs. *Forbes*, 22

How., 477. See as to what will be a sufficient statement, on a motion to open a judgment for irregularity, *Hicks* vs. *Brennan*, 10 Abb., 304. The rule does not apply, however, to a motion to set aside a judgment entered on confession, on the ground of a substantial, as distinguished from a formal defect in the statement. *Winebrenner* vs. *Edgerton*, 30 Barb., 185; 17 How., 363; 8 Abb., 419.

A party moving on merely technical grounds, must see that his own papers are not open to the same objection as his adversary's, or his motion may be denied on that ground. *Sawyer* vs. *Schoonmaker*, 8 How., 198.

And, where he moves for irregularity, he must apply at the earliest opportunity at which his motion can, with certainty, be made. *Reddy* vs. *Wilson*, 9 How., 34. As to the waiver of irregularities by a general appearance, *vide Baxter* vs. *Arnold*, 9 How., 445. He must also clearly substantiate the irregularity complained of, if disputed. *Donadi* vs. *New York State Mutual Insurance Company*, 2 E. D. Smith, 519.

6. All the grounds on which the motion is made should also distinctly appear upon the face of the notice, or on the moving papers. If this be omitted, the moving party will be confined to those which are stated. *Bowman* vs. *Sheldon*, 5 Sandf., 657; 10 L. O., 338; *Ellis* vs. *Jones*, 6 How., 296.

Objections to one pleading cannot be split up into several motions; they must all be taken at once, or a second application will be denied. *Desmond* vs. *Woolf*, 1 C. R., 49; 6 L. O., 389. A party cannot bring forward his objections by instalments. *Mills* vs. *Thursby* (No. 2), 11 How., 114.

7. The general demand for such further or other order, or relief, as may be just, should never be omitted.

A highly liberal view of the extent of the powers of the court, under a demand of this nature, has been held in some cases. Thus in *Martin* vs. *Kanouse*, 2 Abb., 390, it was considered as sufficient to support an order for the addition of a new defendant, on a motion to dissolve an injunction. In *Boington* vs. *Lapham*, 14 How., 360, an order setting aside the complaint was so granted, on a motion to set aside the summons for irregularity.

And in *Fosdick* vs. *Groff*, 22 How., 158, an order that the defendant satisfy a demand admitted by the answer, was made on a partial denial of the plaintiff's motion to strike out part of such answer as false, and for judgment upon the remainder as frivolous.

The above cases are, however, somewhat exceptional in their nature. The general rule is, that the further relief so granted must be of a nature analogous, and not extrinsic, to that expressly asked for in the motion. This rule is strictly stated in *Shear* vs. *Hart*, 3 How.,

74, antecedent, however, to the Code. In *Mott* vs. *Burnett*, 2 E. D. Smith, 50, the striking out an entire answer was held not within such a demand, on a motion to strike out parts of that answer. "The relief should not be of such a nature as the adverse party is not by the notice expressly called upon to oppose." The granting of a feigned issue was, in like manner, held not to be within the scope of further relief on a motion to set aside a judgment. *Mann* vs. *Brooks*, 7 How., 449. Nor can judgment be directed, on a notice of motion asking only for an order. *Darrow* vs. *Meller*, 5 How., 247; 3 C. R., 241. Nor is leave to renew a motion, already decided legitimately, within the scope of this demand. A new and substantive motion should be made. *Bellinger* vs. *Martindale*, 8 How., 113. See below as to costs.

8. If costs of the motion be intended to be asked for, they must be demanded in terms. If not, they cannot be given, and the award of them is not within the scope of a demand for further relief. *Northrup* vs. *Van Dusen*, 5 How., 134; 1 C. R., 140. If, on the other hand, they be vexatiously demanded, it will be a reason for denying the motion with costs. *Battershall* vs. *Davis*, 23 How., 383.

They will not be awarded either, if the applicant asks more than he is entitled to, or more than he essentially obtains. *Allen* vs. *Allen*, 14 How., 248; *McKenzie* vs. *Hackstaff*, 2 E. D. Smith, 75.

In *Bates* vs. *James*, 1 Duer, 668, it was held that a notice of motion, once given, cannot be afterwards countermanded by the party who has given it, so as to deprive his adversary of the right to attend on the day specified, and have the application dismissed with costs. In practice, however, this is rarely insisted on, when the countermand is made in due time, and with good faith.

9. The notice must be signed by the attorney for the moving party, or by the party himself, if he appears in person, and be addressed to the adverse attorney or party, as the case may be.

A notice of an application to exonerate the sheriff as bail, signed by a person neither an attorney nor a party to the action, and not authenticated, so as to apprize the plaintiff distinctly that the sheriff himself was seeking relief, was held not to be sufficient notice of a motion on the sheriff's behalf, in *Buckman* vs. *Carnley*, 9 How., 180.

(*b.*) Order to show Cause.

Though assuming the technical form of an *ex parte* order, this proceeding is, in fact, but another form of notice of an adverse application. It possesses all the ordinary incidents of a notice of motion. The party obtaining it is the moving party, and is, as such, entitled to open and to close the argument on the return. *New York and Harlem Railroad Company* vs. *The Mayor of New York*, 1 Hilt., 562. The form of an

ordinary notice should, *mutatis mutandis*, be followed, in an order to show cause, and all the different matters which, as stated in the last division of this section, must necessarily appear on the face of the former, are equally necessary to be attended to in the latter, where adopted. There is no distinction between the two in this respect, save only as to signature and address.

This mode of proceeding is, in strictness, applicable to those cases only in which it is desirable to bring on the motion on a notice shorter than the usual period. Stringent restrictions are imposed upon the practice, by rule 39, as recently revised, in accordance with the analogous regulations previously imposed by the New York Common Pleas and by the Supreme Court in the second district, as cited or referred to above, in section 72.

The exceptional nature of orders to show cause, and that they should not be granted indiscriminately, especially when operating as a restraint on the adverse party, is strictly laid down in *Androvette* vs. *Bowne*, 15 How., 75; 4 Abb., 440.

It has been a frequent practice to give notice in this form, where an intermediate stay of proceedings was considered desirable. Such object can, however, equally be obtained by obtaining a separate order for a stay, grounded on the ordinary notice, and serving it with the moving papers. Care must, however, be taken under these circumstances, that the stay so obtained is not couched in indefinite terms, so as possibly to exceed the prescribed twenty days' period. A party taking an unreasonable stay by order of this description, does so at his peril. *La Farge* vs. *Van Wagenen*, 14 How., 54.

The course to be pursued on obtaining an order to show cause, is to present the moving affidavits and the proposed form of order to a judge out of court. Those affidavits must lay a proper foundation for the motion, as in the case of an ordinary notice. They must show, in addition, some good special reason why a notice, less than eight days, should be given; and, likewise, the present condition of the action, whether it is at issue, and, in the Supreme Court, the time appointed for holding the next circuit in the county of venue. In the Common Pleas, reason why, if so, the order is returnable on any other than the first day of term, should also appear.

The return of the order, in a case pending in the Supreme Court, is now specially provided for by rule 39. It must, in all the districts except the first, be returnable only before the judge who grants it, or at a special term appointed to be held in the district in which such judge resides. This rule somewhat qualifies the strict view previously held in *Merritt* vs. *Slocum*, 6 How., 350, that no judge, out of court, possessed the power of making such an order, returnable in court or out

of court, before any judge other than himself. See also *Hasbrouck* vs. *Ehrich*, 7 Abb., 76. At present, however, such an order cannot be obtained from a judge of any other district than that in which the venue is laid, or from a county judge under any circumstances.

In the first district this regulation does not obtain, and an order to show cause may there be made by one, returnable before another judge of any of the courts in that district, either at special term or at chambers.

An order to show cause, obtained before the suit is commenced, will be wholly irregular, and cannot serve for the basis of a motion. *Kattenströth* vs. *The Astor Bank*, 2 Duer, 632.

This form of procedure is not allowable by way of shortening the time on a motion for judgment on a frivolous pleading, under section 247. The party is entitled to the full period of notice prescribed by that section. *Lefferts* vs. *Snediker*, 1 Abb., 41.

In relation to an order to show cause, obtained under the provisions of the Revised Statutes, in certain cases of abatement of suit, see *Williamson* vs. *Moore*, 5 Sandf., 647; see also *infra*, under head of *Revivor*.

§ 77. *Other Papers and Proceedings before Hearing.*

As a general rule, motions, unless grounded simply on the pleadings, or on the papers of the adverse party, attacked on the ground of irregularity, are based either wholly or in part upon affidavit.

To enter into the essentials of the affidavits to be so used, would be premature. Each application demands its own peculiar mode and essentials of statement. Those essentials must, of course, be fully complied with, and a clear title to the relief demanded shown upon the moving papers. Any material deficiency in that showing will be fatal to the application.

(*a.*) Depositions on Motion.

The above observations are, of course, applicable to voluntary affidavits—the usual course of procedure in such cases. Provision is, however, made by statute, for cases in which such an affidavit, though necessary, cannot be voluntarily obtained.

An unwilling witness may be compelled to make a deposition for such purpose, under the Revised Statutes, as regards actions pending in the Supreme Court, and under special statute, as regards the New York Superior Court and Common Pleas.

The provision of the Revised Statutes will be found at 2 R. S., 554, sections 24, 25. They run as follows:

§ 24. When there shall be any motion or other proceeding in the Supreme

Court, in which it shall be necessary for either party to have the deposition of any witness, who shall have refused voluntarily to make his deposition, the court may direct a commission to be issued to one or more persons, inhabitants of the county in which such witness resides, to take his testimony.

§ 25. Such witness may be subpœnaed to attend and testify before such commissioners, in the same manner as before referees, and with the like effect; and obedience to such subpœna may be enforced in the same manner.

The statutory provision, in relation to similar proceedings, as regards the Superior Court, is contained in section 3, chapter 276, of Laws of 1840, and runs thus:

When there shall be a motion or proceeding in the said Court, in which it shall be necessary for either party to have the deposition of any witness, who may be within the jurisdiction of said court, and who shall have refused to make his deposition voluntarily, the said court may issue a summons, requiring such witness to attend before a judge thereof, to make his said deposition; and obedience to such summons may be enforced, as in case of a subpœna issued by said court.

By section 4 of the same statute, the above powers are likewise given to the New York Court of Common Pleas, in like manner, and to the same extent, as to the Superior Court.

By the concluding sentence of section 401, as amended in 1862, provision is now made for taking an affidavit or deposition of this nature, in all cases, before a referee; and for compelling any person, who may refuse, to attend and make the same before such referee, the same as before a referee to whom it is referred to try an issue.

The same remedy is, therefore, obtainable in all the courts of higher jurisdiction, though with some differences in form. In all those courts, the motion must be grounded on an affidavit to the same effect, viz., that the deposition is necessary, and that the witness has refused to make it; the fact that such witness is within the jurisdiction being further superadded, when the application is in the Superior Court or Common Pleas. The form of order to be applied for is, however, different in the different jurisdictions, unless a reference be ordered, the examination taking place before a judge in the New York tribunals, and before special commissioners in the Supreme Court. In the latter, a subpœna must be issued and served on the witness; in the former, the order itself constitutes the process on which his attendance is compellable. In both, the usual witness's fee ought, as a precaution, to be paid to him at the time of service. The examination then proceeds in the ordinary form of an examination "*de bene esse*," or of that of a party before trial under the Code, and the deposition, when taken, may be used on the motion, and should be filed in like manner.

In *Stake* vs. *Andre*, 18 How., 159, it is held that there is nothing in the Code or the Revised Statutes which authorizes the issuing of a commission for the compulsory examination of the adverse party, for the purposes of a motion. The Code, it was held, does not contemplate such a power, for any other purpose than that of the trial of the cause. See also *Palmer* vs. *Adams*, 22 How., 375, and *Huelin* vs. *Kidner*, 6 Abb., 19. As to the other tribunals above referred to, whether the recent amendment, authorizing process to compel any person to attend, for such purpose, before a referee, the same as upon the trial of an issue, does or does not modify this view, remains yet to be decided.

(*b*) Petitions.

A motion may also be founded upon a verified petition, either instead of or in conjunction with an affidavit.

Where the application is of a nature directly arising out of or collateral to the ordinary proceedings in a suit, or where a provisional or other remedy is sought to be obtained or enforced, under the provisions of the Code itself, affidavit will be the more usual form, and petition will, as a general rule, be inapplicable as the ground of a motion.

In cases of applications under a special statutory proceeding, independent of an action, or where relief sought, auxiliary to a pending suit, is of a direct and not of a collateral nature, and stands upon its own distinct basis, independent of its connection with that suit, petition will often be the more proper form.

Proceedings for the appointment of a guardian *ad litem*, being preliminary to and independent of a suit, are accordingly more usually taken by petition. So also, petition has been held the proper mode of obtaining an order for representatives of a deceased plaintiff, to show cause why suit should not stand revived in their names, or be dismissed as far as their interests are concerned. *Williamson* vs. *Moore*, 5 Sandf., 647. It is doubtless the proper form of application for leave to bring an action. See rule 77, as to commencement of a suit for partition of part of a larger estate held in common, or for sale of an infant's real estate. *Re Bookhout*, 21 Barb., 348. Likewise in applications for a commission in lunacy, or in relation to the management of the property of lunatics, &c., and in a number of analogous proceedings. It must not, however, be prematurely presented. *Vide In re Payn*, 8 How., 220.

Petition is expressly prescribed as the proper form of procedure in an application under section 237, as amended in 1859, for an order that the sheriff sell any portions of property attached by him, which may remain uncollected, after six months from the docketing of the judgment in the same action.

The form and constituents of a petition remain as under the old equity practice. The title of the cause, or a description of the matter in which it is presented, should be prefixed. It must be duly addressed to the court or officer applied to. After the preamble, a statement of the facts on which relief is sought, succeeds, in the ordinary form of allegation in a pleading or affidavit. It concludes with a prayer for the relief sought, to which a general prayer for further or other relief should be subjoined, as in the case of a notice of motion.

Whenever practicable, the petition should be signed by the actual petitioner. If not, then by some fully accredited agent, and the signature, in either case, must be attested by a witness. An affidavit of verification must be subjoined by the party who signs. If made by an agent, such affidavit must also give some good reason why he signs instead of his principal, and explain the nature of his agency and the extent of his knowledge, as in the case of a verification of a pleading. An affidavit of the witness, proving the signature, must also be added.

Thus signed and verified, the petition takes the place of an affidavit, and must be served as such with the ordinary notice of motion, where the application is opposed or opposable. Where the order is *ex parte*, and not adverse in its nature, this need not of course be done.

Whether filed or not, the petition should in all cases be annexed to, and accompany, the order of the court or judge when made. See rule 55 above cited, and hereafter considered, as to the form and entry of such orders.

(*c.*) Service of Papers.

The notice of motion or order to show cause, and all papers whatsoever on which the order has been granted, or referred to in the notice, with the different exceptions before specified, must in all cases be served upon the adverse party, or parties, if more than one, in the usual manner. See heretofore under the head of *Service*. The rule is, that with the exceptions above alluded to, no paper, not served as above, can be read upon the motion, as against a party omitted to be served with it, and this rule will be strictly enforced.

It is the usual course to obtain an admission of such service. If refused or not obtainable, that service must be proved by affidavit. The admission or affidavit is usually, to save trouble, indorsed upon or annexed to the original papers, referring to them accordingly, but of course it may be made separately. Such a reference, and a clear identification of every paper served, is an indispensable part of such proof.

As a general rule, the moving papers must be served upon every party who has been served or has appeared in the case, or is in any wise inter-

ested in the application. It would seem, however, that, as regards parties who have been merely served with process, and have not appeared, this rule will not be insisted upon. Thus, where two defendants had been originally served with process, but neither had appeared, and one of those defendants had subsequently removed from the state to parts unknown, it was held that service on the latter was not necessary, and an order, obtained by service on the other, was sustained by the Court of Appeals, in *Suydam* vs. *Holden*, Court of Appeals, 7 Oct., 1853; Seld., Notes, No. 4, page 16. "After service of the first process upon the party, it was simply a matter of practice whether any, and what, notice should be given to him of any subsequent proceedings in the cause."

(*d.*) Motion Calendar.

In the first district, a regular calendar is made of contested and non-enumerated motions, twice a month, pursuant to the rules of the 29th of September, 1859, and the 29th of March, 1860, above referred to, and they can only be brought on in their order, as they stand on that calendar.

For the purpose of placing it on such calendar, a note of the motion, in the nature of a note of issue, must be filed with the clerk at chambers. This note should contain the title of the cause, the names of the attorneys, and an indication of the nature of the motion, in order to secure its being placed in its proper order. As motions are placed and take their number on such motion calendar, and their precedence between each other, from the actual filing of such note, it is advisable, to save delay and its consequent inconvenience, that it should be done immediately after notice has been served, and not deferred till a later day, or even a later hour.

In other districts, and in the other courts in the first district, this rule does not obtain, and all that is required is the attendance of the moving party, on the day specified in his notice.

Appeals from orders, though strictly non-enumerated motions, must, in the first and second districts, be placed on the general term calendar, by a note of issue filed in the ordinary manner, and are then called in their order, on the days appointed by rule 48. In the New York local tribunals this is not necessary, but such motions are argued or submitted on days specially appointed.

§ 78. *Opposed Motions—Continued.*

(*a.*) Course on Hearing and Incidental Points.

The provisions of sections 404 and 27, under the former of which a motion, noticed to be heard before a judge out of court, may, in the event of his own absence or inability to hear it, be transferred by his

order to some other judge competent for that purpose; and under the latter, a motion commenced before one judge in the first district, may be continued before another, will not have escaped attention.

(*b.*) Default on Motion.

The taking of a default by the moving party is specially provided for by rule 39, as above cited. He is entitled to take it, as of course, on proof of due service of his moving papers, unless the court shall otherwise direct.

The time at which such a default, or a default on the part of the adverse party may be taken, varies, however, according to circumstances.

Defaults on appeal motions, in the first and second districts, and on opposed motions, in the first district, can only be taken on the call of such motion on the non-enumerated or motion calendar respectively. The same will of course be the case elsewhere, whenever a motion calendar is adopted, or motions are placed on the general calendar. This rule equally applies to the moving as to the opposing party. Special provision is however made, by rule 48, as to defaults on non-enumerated motions, when taken by the latter. He is, as there provided, entitled to take his rule on the day for which the motion is noticed, at the close of that order of business. This rule would seem, *primâ facie*, to apply to general term business only. It is, however, generally worded.

Where the time at which a default may be taken is not made the subject of special regulation, the course to be pursued is as follows:

The usual practice of the courts is to wait for some short time, generally half an hour, before the order by default is granted, though this accommodation to the absent party is not a matter of right but of courtesy. At the expiration of that time, the matter is then mentioned to the judge, the form of calling the opposite party (generally by the crier of the court), is gone through, and, on his failing to appear, the order is taken as of course, unless, as provided for by rule 39, the court shall otherwise direct. This power the judge possesses under any circumstances, provided he consider the order applied for to be objectionable in itself, or otherwise improper to be granted, either *per se*, or without a reiterated notice to the opposite party.

In case of the failure of the counsel for the moving party to appear, on the return of his motion, the opposing counsel will, after waiting the usual time, be entitled to take an order dismissing the motion, and usually with costs, the ceremony of a call and failure being gone through, as above noticed.

What the usual time for waiting may be, rests, of course, entirely in the discretion of the judge. At general term, it is clearly governed by

rule 48, as above cited. Where there is a regular order of business adopted, the same principle will doubtless be followed by the judge holding special term, even if the rule itself do not apply. Such is the case in the second district, where defaults in each of the ten classifications made by the rule above cited, are in order, immediately after the making of motions under that class, and before passing on to the next.

If a default be applied for at the regular time, no affidavit will be requisite, the facts of attendance, on the one hand, and non-attendance, on the other, being patent, and within the knowledge of the judge. Should the application be delayed, and the motion to take such default, on either side, be made on any subsequent day, it should be grounded on an affidavit, proving the attendance on the one hand, and the non-appearance on the other, at the time appointed.

With a view to an application of this nature, it seems equally essential, for the opposing as well as for the moving counsel, to be in attendance at the precise hour appointed. If this precaution be omitted, neither party can be assured but that his adversary may have been in court during the period when he himself was absent, and that an application to vacate any order he may take, may not be made and granted, on proof of that fact.

The denial of a motion by default, taken as above, is no bar to its renewal, on that default being duly excused. *Bowman* vs. *Sheldon*, 5 Sandf., 657; 10 L. O., 338.

A motion noticed for a specific day out of an appointed term, must be brought on on that day only. The moving party, if he fail then to attend, in consequence of the known absence of the judge, cannot subsequently take the default of his adversary. *Vernovy* vs. *Tanney*, 3 How., 359. The rule is otherwise, however, in the first district, where motions are continually in order, and, if not heard on the day of notice, stand over, as of course, until the next. *Mathis* vs. *Vail*, 10 How., 458.

It is essential, under rule 55, that the counsel who takes his adversary's default, should endorse his name as counsel on the paper containing the proof of notice. This should always be done at the time.

A motion which interferes with the power of the court in controlling its own calendar, will not necessarily be granted by default. *Crain* vs. *Rowley*, 4 How., 79. This case was in the Court of Appeals, but there can be no question that the other courts possess a similar discretion under rule 39.

Nor can an order, void in itself, as exceeding the powers of the court or judge, be sustained, even though so taken. *Wilkinson* vs. *Tiffany*, 4 Abb., 98.

But, where the order is otherwise regular, it will be sustained, even

though a substantial excuse for postponement be subsequently offered. It was the duty of the adverse party to appear and submit that excuse at the time. *Van Alstrand* vs. *House*, 3 Abb., 226.

In the Superior Court, where several judges sit at the same time, the party wishing to default his adversary must have him called in vacation, before the justice who sits at chambers on the day of return. In term time, defaults can only be granted by the justice holding the special term, in the room which he occupies for such business. *Cobb* vs. *Lackey*, 4 Duer, 673; 12 How., 200; 2 Abb., 158.

(*b.*) COURSE OF HEARING, WHERE BOTH PARTIES APPEAR.

A motion, when brought on in regular course, is heard and argued in the usual manner; the affidavits on both sides, or any other papers or documents on which the motion is grounded, are first read; after which counsel are heard on both sides, in support, opposition, and reply, as in other cases, the right to commence and close the argument resting, of course, with the moving party.

The moving party, on opening his motion, can only read the affidavits and papers served with his notice or order to show cause, or those previously served, and therein referred to. He cannot introduce evidence, of his intention to rely on which he has not given due notice to his adversary.

The party opposing the motion is entitled to use the papers served by his adversary, or referred to in the notice, together with the pleadings and any previous proceedings in the action, and any papers previously served by him upon his adversary, which bear directly upon the question at issue. He is also entitled to bring in, and to read on the hearing, any affidavits which he may consider necessary, and may have obtained, in order to rebut the case made by his adversary, or to strengthen that made out by him in opposition, and likewise any exhibits there referred to.

It has been held that it is competent for the judge who hears a motion to order a *vivâ voce* examination. *Barber* vs. *Case*, 12 How., 351; *Meyer* vs. *Lent*, 16 Barb., 538. The latter case is, however, reversed, and the former necessarily overruled by the Court of Appeals. *Meyer* vs. *Lent*, 7 Abb., 225.

When the opposer's case is closed, it is open to the moving party to introduce counter-evidence, if he have any; and his latitude in this last respect is clearly the same as that of his adversary. If the matter in the affidavits in opposition show a state of things of which he was not previously aware, it is competent for him to ask that the motion may stand over, for some limited period, to enable him to bring evidence in reply, and likewise that he be furnished with copies of the

opposing testimony; and, if the case be of sufficient importance, and the matter requiring to be rebutted is clearly new matter, the application will, in all probability, be granted, and the above condition imposed. In general, however, the original statement and counter-statement of the parties, suffices for the purposes of an ordinary motion, and an adjournment for the above purpose is a matter of comparatively rare occurrence.

The different cases in which motions of particular classes are entitled to precedence have been before adverted to, and the provisions for that purpose cited under section 72.

In the first district, a motion, not reached on the day for which it was noticed, stands over, as of course, till the next, and so on till it is disposed of. *Mathis* vs. *Vail*, 10 How., 458.

It is, of course, competent for the parties, by stipulation, or for the judge, by order, to adjourn the hearing of a motion to any other day than that for which it is noticed, and so on, from time to time, either before or when it is reached or brought on in its order.

In motions placed on the motion-calendar, in the first district, express provision has been made for such adjournment by consent filed with the clerk, by the rule of the 29th of March, 1860, as above referred to.

On the argument of a contested motion, it is not unusual, where the case is of sufficient importance, for the counsel on both sides to prepare and submit written points and citations of authorities, as on any other argument. The judge, if he so think fit, may, of course, take the papers and reserve his decision, and usually does so in such cases.

A motion on the ground of irregularity, on which the practice of the moving party is open to the same objection, is *felo de se*. *Newcomb* vs. *Reed*, 14 How., 100. See also *Sawyer* vs. *Schoomaker*, 8 How., 198.

Whether affidavits, as to the mere credibility of a witness, should ever be received on motion, has been held questionable. If ever received, it should be with an opportunity to the adverse party to produce counter-affidavits. *Merritt* vs. *Baker*, 11 How., 456. See generally, as to the privilege to a moving party to ask that the motion stand over, for the purpose of obtaining affidavits, in rebuttal of new matter alleged by his adversary, *Schermerhorn* vs. *Van Voast*, 5 How., 458; 1 C. R. (N. S.), 400.

In a case where the affidavits on a motion are not sufficiently definite and certain, it is competent, and may be proper for the court to order a reference to try the question raised. *Meyer* vs. *Lent*, 7 Abb., 225. Although reversed on another point, the case below, as reported 16 Barb., 538, lays down the same doctrine. See also *Barron* vs. *Sandford*, 14 How., 443; 6 Abb., 320 (note); *Demilt* vs. *Leonard*, 19

How., 140; 11 Abb., 252; *Pendleton* vs. *Weed*, 17 N. Y., 72; *Kirby* vs. *Fitzpatrick*, 18 N. Y., 484. See likewise, as to old equity suits, *Flagg* vs. *Munger*, 3 Barb., 9; 2 C. R., 17. *Steele* vs. *Palmer*, 7 Abb., 181, recognizes the principle, but holds that the power should be cautiously exercised by the court, and only in special cases, when the judge himself cannot come to a satisfactory conclusion, upon the facts as made out.

It is positively laid down in *Meyer* vs. *Lent* and *Barron* vs. *Sandford*, above cited, that on a reference of the above description, either party is entitled to examine his opponent, as to the facts stated in the affidavits, and to produce other evidence. The decisions that such testimony cannot be compelled for the purposes of a motion which have been before cited, would seem to refer only to an examination antecedent to, and for the purposes of the motion, before it is made.

The moving party must fully make out and prove his case on the hearing, or the application will be denied. *Accessory Transit Company* vs. *Garrisen*, 18 How., 1; 9 Abb., 141.

To be cognizable on the hearing, the ground of any objection taken must distinctly appear on the moving papers, *Harder* vs. *Harder*, 26 Barb., 409; and it will be irregular to grant relief to an opposing party, on matters appearing on his papers, which the moving party has had no opportunity to answer. Nor will the court allow such opposing party to amend a defect in his proceedings, unless it can see that no valid objection could be made to such amendment, on a motion specifically directed to that end. *Garcie* vs. *Sheldon*, 3 Barb., 232.

Defects in the moving papers will, however, be waived by an appearance and omission to object. *Main* vs. *Pope*, 16 How., 271; and continued laches in making a motion may be held to bar the applicant's right altogether. *Bogardus* vs. *Livingston*, 7 Abb., 428.

A question, already decided by one justice of a district, sitting at special term, should not be passed upon adversely by another, on a renewal of the same motion under leave given. The proper course is to deny the renewed motion, to the end that the judgment of the general term may be obtained. *Peel* vs. *Elliott*, 16 How., 484.

Costs cannot be awarded to the moving party, if omitted to be asked for in the notice of motion. *Northrup* vs. *Van Dusen*, 5 How., 134; 1 C. R., 140. Nor should they be so, when the applicant fails in part of his application. *Allen* vs. *Allen*, 14 How., 248; *Mackenzie* vs. *Hackstaff*, 2 E. D. Smith, 75.

Under a recent amendment of section 315, costs can now be granted to abide the event, according to the old practice. Before that amendment this power, though frequently exercised, had been doubted. *Vide Johnston* vs. *Jillitt*, 7 How., 485.

And, where necessary, costs on an interlocutory proceeding may now be adjusted by the clerk—section 311, amendment of 1862.

In the event of delay on the part of the court, in deciding on a motion, when argued, the moving party will not be allowed to suffer, but effect will be given to the decision, as of the time when the motion was made. So held, and a judgment intermediately taken set aside, in *Willson* vs. *Henderson*, 15 How., 90. See generally, *Crawford* vs. *Wilson*, 4 Barb., 504 (524), and cases cited.

An amendment of his pleading by the adverse party, subsequent to notice served, will not deprive the mover of his right to bring on the motion, on the merits, where any portion of the grounds of it are equally applicable to the amended as to the original pleading. *Toll* vs. *Cromwell*, 12 How., 79.

(*d.*) Incidental Points.

The following are some of many decisions, which bear upon the subject of motions, generally considered, and for the consideration of which the present juncture appears upon the whole the most appropriate.

Where a creditor's action had been brought, and the plaintiff moved in that suit to set aside certain sales under execution as irregular, and also for an order directing the sheriff to retain unsold property, it was held that the latter portion of the relief might be granted, but that the former should be denied, in the motion so made. The application for that purpose should have been in the action in which the executions issued. *Jackson* vs. *Sheldon*, 9 Abb., 127.

After issue has been joined, motion is not the proper form for raising objections which go to defeat the whole case of the adverse party. The cause should be regularly tried in its proper order, and the party's title to relief should not be otherwise passed upon. *Banks* vs. *Maher*, 2 Bosw., 690. In applications which do not go to the whole issue, motion is, on the contrary, the proper course. See below, under various heads.

In *Burnham* vs. *De Bevoise*, 8 How., 159, it was held, however, that an incurable defect in a complaint is not waived by pleading, but can be taken advantage of by motion, at any time, in any stage of the action.

A motion must not be made prematurely. Thus, in divorce, a motion for alimony, *pendente lite*, noticed before service of a copy of the complaint, after demand, was adjourned, to give the defendant time to put in his answer. *Reese* vs. *Reese*, 2 C. R., 81.

So likewise with reference to an application to appoint a committee of a lunatic, before a commission of lunacy has been issued and returned. The court possess no jurisdiction to make such an order, however pressing may be the circumstances. *In re Payn*, 8 How., 220.

So further with reference to a motion to strike a cause from the general term calendar, noticed before the appellant's time to file his case after settlement had expired. *Donohue* vs. *Hicks*, 21 How., 438.

And, under certain circumstances, delay in making a motion will be fatal. See above, as to motions to correct a pleading, the time for making which is prescribed by rule 50. A motion to relieve a party from a judgment taken against him, through mistake, surprise, or neglect, must be made within one year, Code, section 174; and, generally, laches, if gross, will be fatal, or detrimental to the success of an application in this form. *Bogardus* vs. *Livingston*, 7 Abb., 428. See also, *St. John* vs. *Hart*, 16 How., 192, as to a denial of a motion to discontinue, without payment of additional costs, incurred by the party's delay to make it. See likewise, as to the denial of a motion to set aside an irregular proceeding, on the ground of delay in the application. *Persse and Brooks Paper Works* vs. *Willett*, 14 Abb., 119; *Fearn* vs. *Gelpcke*, 13 Abb., 473, there referred to.

The court will not interfere on motion, in a matter within the discretion of a referee, pending the reference, and before his report; even though the referee himself be desirous of obtaining the decision of the court, on a point raised in the course of the proceedings. The parties must wait for the report, and then review it in the usual mode. *Schermerhorn* vs. *Develin*, 1 C. R., 13. See, also, *Ayrault* vs. *Sackett*, 17 How., 461; 9 Abb., 154, note.

When, however, the report has been made, and appears defective, the court will then interfere on motion. *Doke* vs. *Peek*, 1 C. R., 54; *Deming* vs. *Post*, 1. C. R., 121. This proceeding is, however, only applicable to the curing of formal defects, and not to the review of the conclusions come to, however erroneous they may be. See hereafter, under the heads of *Trial by Referees*, and *Appeals*.

The mere fact that, pending a motion to set aside a judgment on the ground of irregularity, the defendant, in order to save his rights, served a notice of appeal to the general term, was held not to be a waiver of the motion, in *Clumpha* vs. *Whiting*, 10 Abb., 448.

The powers of the court do not extend so far as to enable it to correct a final decree, regularly entered, though not enrolled, upon motion, except on consent, or as to matters quite of course. It can only be done by means of a rehearing, or, if the decree have been enrolled, by bill of review. *Picabia* vs. *Everard*, 4 How., 113. Corrections may, however, be made, as to provisions merely consequent on directions already given, such as, for instance, the correction of an insufficient notice of sale in partition. *Romaine* vs. *McMillen*, 5 How., 318.

After an appeal has been taken, a motion cannot be made in the court below, on matters directly pertaining to, and affecting the appeal

itself. *Valten* vs. *National Loan Fund Life Assurance Society*, 19 How., 515. But this restriction does not extend to matters in mere correction of the record. See below, under the head of *Appeals* and *New Trial*.

In special statutory proceedings, where the mode of obtaining relief, or the review of a decision, is made the subject of special provision, the course pointed out must be prescribed, and the ordinary provisions of the Code will not be applicable. *Vide In re Albany Northern Railroad Co.* vs. *Cramer*, 7 How., 164; *Vischer* vs. *The Hudson River Railroad Company*, 15 Barb., 37; *Welch* vs. *Cook*, 7 How., 282.

A doubtful question in *mandamus* will not be entertained on motion to quash, but the *mandamus* will be allowed to go, that the matter may come up in due form on the return. *People* vs. *College of Physicians*, 7 How., 290.

A motion clearly unnecessary, and irregular as such, should, it has been held, be dismissed, instead of being denied. *Bull* vs. *Melliss*, 13 Abb., 241.

(*e.*) Renewal of Motion.

An application, once made and refused, or granted conditionally, cannot be subsequently made, on the same state of facts, to another justice; and, if made, the order should be revoked. See rule 23, above cited.

The principle of this rule is fully carried out in *Bellinger* vs. *Martindale*, 8 How., 113; *Mills* vs. *Thursby* (No. 2), 11 How., 114; and *How* vs. *Frear*, 13 Abb., 241, note; 21 How., 343.

It may be renewed, however, by leave of the court, whenever granted.

To obtain that leave, all necessary facts should appear. *Bellinger* vs. *Martindale*, *supra*. The existence of new matter, which has occurred or come to the knowledge of the moving party since the decision of the former motion, should be shown. *Willet* vs. *Fayerweather*, 1 Barb., 72. Matter known to him at the time of the first, but not stated, cannot be made the ground of a second application. The applicant must disprove laches. *Vide Cazneau* vs. *Bryant*, 6 Duer, 668; 4 Abb., 402; *Pattison* vs. *Bacon*, 21 How., 478; 12 Abb., 142.

In the event of such an application, the applicant must state in his affidavit, the fact of the previous application. See rule 23.

The denial of a motion, on the default of the moving party, is no bar to its renewal, if that default be sufficiently excused. *Bowman* vs. *Sheldon*, 5 Sandf., 657; 10 L. O., 338.

The decision of a motion is never regarded in the light of "*res adjudicata*," although, as a matter of orderly practice, the court will not usually allow a motion, once made and decided, to be renewed on the

same facts, nor upon additional facts, without leave first obtained. *Snyder* vs. *White*, 6 How., 321.

See, however, as to the decision of the judge on a previous motion being conclusive, so far as controverted questions of fact are concerned, *Skinner* vs. *Oettinger*, 14 Abb., 109.

A rehearing of a motion may sometimes be granted on the same papers, but only on special occasions, and to prevent a failure of justice, as with reference to an unappealable order. *White* vs. *Monroe*, 33 Barb., 650; 12 Abb., 357.

See, as to the impropriety of one justice of a district passing, at special term, on a renewed motion, on a point previously decided on the original hearing, *Peel* vs. *Elliott*, 16 How., 484.

The subject of the costs of a motion, and when they should or should not be awarded, will be found discussed in book XIV., section 338, under the head of *Costs of Motion.*

§ 79. *Orders.*

(*a.*) General Remarks.

The decision of the court or judge on a motion, whether *ex parte* or opposed, is, when pronounced, carried into effect by means of an order.

An order is thus defined, by section 400, above cited:

> Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

The above definition is so wide as to be clearly applicable to every proceeding, in which interlocutory action is taken by the court or judge, on application of the party. A warrant of attachment has accordingly been held to be clearly within it, in *Conklin* vs. *Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49; and *Bank of Lansingburgh* vs. *McKie*, 7 How., 360.

The distinction between an order and a judgment is so broad, that, in ordinary cases, there is little risk of the one being confounded with the other. This distinction is laid down in *Bentley* vs. *Jones*, 4 How., 335; 3 C. R., 37, in the following terms: "An order is the decision of a motion. A judgment is the decision of a trial."

In a certain class of cases, however, in relation to decisions upon demurrers, or in respect of a frivolous pleading, the limits approach more closely, and have given rise to some discussion, which will be hereafter considered, under the heads of the proceedings in question.

An order made by an officer having jurisdiction in the premises, however irregular it may appear to be, cannot be disregarded or treated as a nullity; the only course will be to move to vacate or set it aside.

See *Blackmar* vs. *Van Inwager*, 5 How., 367; 1 C. R. (N. S.), 80; *Hempstead* vs. *Hempstead*, 7 How., 8; *Geller* vs. *Hoyt*, 7 How., 265. See also *The Arctic Fire Insurance Company* vs. *Hicks*, 7 Abb., 204. An order returnable on a Sunday is, however, there held to be a nullity.

An order, duly made, binds all parties to the suit who have been properly served. It is not, however, it would seem, conclusive upon a person not a party, even though he appear by counsel to oppose. See *Acker* vs. *Ledyard*, 8 Barb., 514.

(*b.*) Form of Order.

In drawing up an order upon an opposed motion, the following rules must be observed:

1. When made at a special or general term, an express reference to such term, the time and place at which it is held, and the name or names of the judge or judges holding it, must be prefixed, prior to, or in connection with, the title of the cause. On a mere chamber order this is not necessary. See, however, *In re The Knickerbocker Bank*, 19 Barb., 602; *Dresser* vs. *Van Pelt*, 6 Duer, 687; 15 How., 19; and *Caldwell's case*, 35 Barb., 444; 13 Abb., 405, as to a mistake in this respect not being a fatal error.

2. The title of the cause should be correctly given.

3. A reference must be made to the papers read, identifying them. See especially rule 56, as to the mode of such reference to a petition, when the order is so granted.

4. The fact that counsel have been heard should be stated, where such is the case. Where the order is taken by default, the fact that the adverse party was called and did not appear, should be similarly alleged. The proof of service must also be indorsed with the name of the moving counsel—rule 55.

5. Then follows the actual order. When taken by default, it should be couched in the precise terms of the notice, or petition, "*mutatis mutandis.*" If the motion is granted as made, the same rule should be observed. If the court vary its terms or make any other directions, that variance and those directions must be strictly followed.

On *ex parte* applications, the order will of course be prepared beforehand. On contested motions, where it is likely to be granted as moved for, this will often be a convenient practice, as it can then be handed in at once to the judge, either for his signature at the time, or afterwards, if he defer his decision.

If the decision varies from the notice, the order will have to be settled, after the decision is pronounced. Where the counsel on both sides are in court, this is usually done at once, and the terms of the order, when settled between them, are submitted to the judge forthwith, while

the subject is fresh in his memory. Where, on the contrary, that decision is deferred, and subsequently delivered, in the absence of the counsel or either of them, the prevailing party then draws up the form of order, and usually submits it to the opposite counsel, before applying to the judge for his signature. In the first district of the Supreme Court, it is expressly prescribed that an order on a litigated motion shall not be entered, except on consent, or at least one day's notice to the opposite party. See rule of the 27th of May, 1857, before cited.

If, when an order is so submitted, the opposite counsel approves of it, either as drawn, or with alterations, it is usual for him to subjoin a consent to its entry, or to add his approval in the margin. The order, as so approved, can then be handed in to the judge for signature, and entered.

Should there be any question on the terms of the document drawn up, or should the moving party merely serve notice of settlement, without submitting any form, the parties then attend before the judge who heard the application, in order that he may finally decide on the exact form of entry. In such cases, it is a frequent practice for the counsel on each side to prepare the forms for which they contend, and after, or in connection with their argument, to present them to the judge for settlement, or for election between them. The latter, at the time, or subsequently, if he takes the papers under advisement, adopts one of the forms, either as it stands, or as altered by him, or draws up and signs his own order, and then either forwards the papers to the moving party, or lodges them with the clerk, who communicates the decision generally by posting up a notice of it at his office, or the chambers of the court. When so signed, that order may, of course, be entered by the prevailing party without further preliminary.

The above is the course usually pursued in the first district, and, wherever feasible, will be found the most convenient. It is not, however, imperative. In the others it is a frequent, and, indeed, the usual practice for the judge, on returning the papers to the clerk, to indorse upon or subjoin to them a mere note of his decision, without settling or signing the form of the order.

It is also not unusual for the judge, sitting at special term, merely to announce his decision to the clerk, when he gives it at the time of the hearing, and for the latter to record it, as delivered, upon his minutes.

In either of the foregoing cases, the clerk himself subsequently enters the proper order, on application of the prevailing party, without settlement or signature by the judge. Should any difficulty arise as to its exact terms, communication must be again had with the judge, and it will then be a convenient practice to transmit to him, with such communication, a form for his settlement and signature.

When the order is made at chambers, the usual course is for the judge to sign his name at the foot of it. Where, however, it is made at special term, or is otherwise of such a nature as to require entry with the clerk, the practice, when a form is submitted, is for him to indorse upon, or subjoin to the document a direction for the clerk to enter it, and which constitutes the latter's authority for that purpose.

On *ex parte* applications, the order may be either drawn up in the above manner, or appended at the close of the moving papers. It must then be submitted to the judge for his signature. The same is the case as regards the preparation of an order by consent.

(*c.*) Entry of Order.

When made at special term, the order must in all cases be entered with the clerk. The same course should be pursued with chamber orders also, whenever they are made upon notice, or are opposable in their nature, as granting relief against an adverse party. Mere extensions of time or *ex parte* orders, not of the above description, need not be entered at all, as before noticed.

Section 466 defines clearly the clerk with whom such entry is to be made. He is "the clerk of the court where the action is pending, and, in the Supreme Court, the clerk of the county mentioned in the title of the complaint, or of another county to which the court may have changed the place of trial;" the clerk, in short, of the county of venue for the time being, in whose office all papers should be filed. See this subject fully treated, and the decisions in point cited, under the head of *Filing Papers*, in the present book, section 67.

An order extraneous to the regular course of the suit, as, for instance, in supplementary proceedings, though made in another district, should be entered in that in which the venue is laid. *Gould* vs. *Torrance*, 19 How., 560.

The entry of an order, when requisite, is now made imperative, by rule 3, as amended upon the last revision, and the course to be pursued when the order is to be entered in a different county from that in which the motion is made, is clearly prescribed. See that rule as cited *in extenso* in section 67, as above. See also, as to the previous practice in this respect, *Savage* vs. *Relyea*, 3 How., 276; 1 C. R., 42, there cited.

Where an order affects a stay of proceedings, it has been held that the entry of it under this rule is imperative, and will be strictly enforced. *Sage* vs. *Mosher*, 17 How., 367. The filing, which is in fact equivalent to the entry of orders for service by publication, or substituted service, is likewise positively enjoined by rule 4, cited above in the same section. Orders by consent must also be entered, or they will not be binding. (Rule 13.)

In those cases in which, as above noticed, the judge merely communicates his decision, and does not himself sign the form of order, the usual course is for the prevailing party to prepare and submit to the clerk the form he proposes to enter. That form must, of course, be in exact conformity with, and must, where practicable, follow the exact wording of the decision as communicated. The authority of the clerk is of necessity restricted, and it is of course wholly incompetent for him to make any variation whatever from that decision, in matter of substance.

It is also not unfrequent for a judge, on deciding a motion, to return the papers, with a note of his decision, to the prevailing party, instead of to the clerk. In this case the same practice may be pursued, the note of decision, when filed, being equally efficient as an authority to the clerk to make the necessary entry, whether he receive it direct from the judge, or through the medium of the party. The party, in such case, prepares the form of order, and either submits or transmits it to the clerk, accompanied by the decision and papers, according to circumstances.

The practice is similar, in relation to orders entered by consent. The form of order is prepared, and either subjoined or annexed to the consent, and filed with it. In the first district, the consent and order must, with the exceptions below noticed, be submitted to a judge, and his signature obtained, before entry. In the others, the clerk may enter the order at once, without the judge's signature, on the consent being produced and filed. The same practice is now also pursued in the first district, as regards orders for discontinuance, or substitution of an attorney. See rule of the 29th of September, 1859, above cited. In other cases, the practice remains as heretofore.

A consent signed by the attorneys or counsel in the cause requires no proof, the judge or clerk taking judicial notice of their signatures. If signed by a party, as such, an affidavit identifying his signature must be annexed. The consent must, of course, be signed by all parties to the suit, or all affected by the order, or it cannot be entered.

The entry of an order, of course, declaring a case and exceptions abandoned, on filing affidavit, showing a default in filing the same for ten days after settlement, pursuant to the provisions of rule 37, would seem also to be within the powers of the clerk. Where practicable, the signature of the judge had, however, better be obtained.

The filing of the papers upon which an order is based, or has been granted, or opposed, in connection with its entry, is also substantially imperative in its nature. It is clearly implied by the terms of rule 3, and made obligatory in various cases by rule 4. In the Superior Court, the clerk is expressly directed not to enter any order, unless this prac-

tice is strictly complied with. See rule of the 11th of April, 1857, above cited.

The same rule also expressly directs that the order, when entered, shall specify such papers, and the same practice should be pursued in the other tribunals. See also rule 56, as to the mode of specification of the effect of a petition, in an order grounded upon that form of proceeding.

In the event of any neglect or dereliction of the moving party, either in the entry of his order, when obtained, or the filing of the papers in connection with it as above, his adversary may compel him to do so by application to the court. An order made at special term is, in fact, of no validity, until its entry. As regards chamber orders, express power is given by section 350, to compel that entry for the purposes of an appeal. The course to be pursued in this case, is to serve a requisition to that effect on the adverse party, and, if he neglect to do so, to apply to the court, on proof of service of such requisition, and that it has not been complied with. The section being imperative, the order to compel such entry will be an order of course, and may, therefore, be obtained *ex parte*. In the event of continued non-compliance, a motion to vacate would probably be the proper course. As to the necessity of the entry of an order, of whatever nature, before an appeal can be taken therefrom, *vide Nicholson* vs. *Dunham*, 1 C. R., 119; *Smith* vs. *Dodd*, 2 E. D. Smith, 215; *Marshall* vs. *Francisco*, 10 How., 147; *Peet* vs. *Cowenhoven*, 14 Abb., 56.

If, after an order has been settled, a resettlement be directed, and the order is then modified, it must be re-entered, and a second copy served. *Bowman* vs. *Earle*, 3 Duer, 691.

As to the power of the court to order the entry of an order *nunc pro tunc*, in a case calling for that form of relief, *vide Willson* vs. *Henderson*, 15 How., 90.

And, in a proper case, an amendment of an order may be prescribed, as a condition upon the granting of ulterior relief. *Mallory* vs. *Clark*, 9 Abb., 358; 20 How., 418.

If, on the contrary, an order be improperly entered, it may be stricken out and vacated on motion. See *Bedell* vs. *Powell*, 3 C. R., 61.

An order or judgment directing the payment of money, or affecting the title to property, may, if granted on petition only, and not in a regular suit, be enrolled and docketed as other judgments, under the special authority conferred by rule 56.

Where an order is granted on terms for the benefit of the adverse party, that party must either accept or abandon the order *in toto*. If he avails himself of the terms, his right to maintain an appeal from it will be lost. *Peel* vs. *Elliott*, 16 How., 483; *Noble* vs. *Prescott*, 4 E. D. Smith, 139.

Where a stay of proceedings, originally granted until the decision of the motion, is continued by the order made upon it, any proceedings taken after the decision, and before the entry of the order, will be irregular. *Warren* vs. *Wendell*, 13 Abb., 187.

Where, after the decision of a motion, but before the entry of the order, the suit becomes abated, the entry cannot be perfected until after it has been duly revived. *Reed* vs. *Butler*, 11 Abb., 128.

Where an order, made at chambers, is erroneously entitled at special term, that mere fact will not necessitate its entry, if not otherwise requisite. *Caldwell's case*, 35 Barb., 444; 13 Abb., 405.

Appeals from orders and their incidents, will be considered hereafter under the appropriate head.

(*d.*) Certified Copy.

The order having been duly entered, and the papers on which it was granted duly filed, a certified copy should be obtained from the clerk of the court. His fee on such copy is the usual payment of five cents per folio, and may be charged as a disbursement. It is an usual practice to prepare the copy and examine it with the clerk, paying him the fee. This will be found a convenient method, where dispatch is an object, though, of course, it is not incumbent on the party to do so, but the clerk is, on the contrary, bound to furnish the copy, on payment of the fees.

(*e.*) Service of.

The order being thus entered, and a certified copy obtained, a copy of the latter should be served on the opposite party, with a formal notice indorsed, to the effect that it is a copy of the order so made. The same is the case, with reference to orders made out of court and not entered with the clerk, copies of which should be served in like manner, accompanied, where necessary, with copies of the affidavits or papers on which they were granted, as before noticed. This service should, in all cases, be made at once, and should never be neglected or deferred, for the obvious reason, that the time within which an appeal may be taken by the adverse party, runs (under section 332) from the date of written notice only, without reference to that of the making or entry of the order itself; and, if that precaution be neglected, the time for taking such an appeal will be indefinitely postponed. See as to the necessity, for this purpose, of making a renewed service of an order, which has been resettled after entry, *Bowman* vs. *Earle*, 3 Duer, 691, *supra*.

By section 348, as amended in 1862, service of notice of the order or judgment affirming a judgment appealed from, is made a condition

precedent to the commencement of an action upon the undertaking given on the part of the appellant.

It would seem from the case of *Hempstead* vs. *Hempstead*, 7 How., 8, that an omission to serve the whole of the papers necessary to be served with an order, though an irregularity, does not render the proceeding absolutely void and inoperative, until set aside on a proper application.

As to the mode of service, when made, see heretofore under section 66. The provisions of section 418, to the effect that service of a paper tending to bring a party into contempt, must be personal, must, of course, be borne in mind, as regards orders having that tendency.

(*f.*) Performance of Conditions.

Under rule 57 as above cited, a party is allowed twenty days for payment of costs or performance of any condition, if imposed, unless otherwise directed. Where costs to be adjusted are to be paid, fifteen days are allowed for payment after the adjustment.

In *Sturtevant* vs. *Fairman*, 4 Sandf., 674, it was held that, where an order requires a party to amend, or the like, and directs him to pay costs; the payment of those costs is not a condition precedent to the act required, unless a special provision to that effect be made, or necessarily implied in the order.

Where an order opening a default, imposed terms that a stipulation should be made, which, it appeared, could not be performed, it was held that the party could not appeal from the order on that ground; that his proper course would have been to give the stipulation; and that if, by reason of facts beyond his control, he could not afterwards comply with it, he should then set up such facts, in answer to the motion founded on his omission to comply. *Gale* vs. *Vernon*, 4 Sandf., 709. The appeal in that case was accordingly dismissed, and a judgment for non-suit, granted in consequence of the omission to stipulate under these circumstances, sustained.

(*g.*) Enforcement of Orders.

This subject, both as regards the recovery of costs, and also the mode of compelling the performance of an act directed to be done, by process of contempt, will be hereafter considered under the head of *Execution*.

As to the power of giving to an order, made on petition, the effect of a judgment, in certain cases, see rule 56, as above cited and referred to.

(*h.*) Review or Vacating of Orders.

The questions as to the review of orders, will be likewise fully considered under the head of *Appeals*. *Ex parte* orders may be vacated or modified, without notice, by the judge who made them; or by the

same, or any other judge, on notice, in the usual manner. (See Code, § 324.) Orders of any nature may be set aside for irregularity, on a regular application. An order may be revoked, under rule 23, if unduly obtained, by means of a second application, on the same state of facts on which a previous motion has been refused. A revocation of a stay of proceedings, on a motion to change the venue, may also be obtainable as of right, on taking the measures for that purpose, prescribed by rule 58.

The following decisions relate to the power given by section 324:

The application, to vacate or modify, when made to the judge who granted the order, may be *ex parte*, nor is there any thing in the section which restricts it to the moving party. In a proper case, calling for immediate interference, his adversary may apply. As a general rule, however, the latter will be left to his motion in the usual course. See, as to the general scope of the section, *Cayuga County Bank* vs. *Warfield*, 13 How., 439.

The power of the judge to vacate an injunction order, even when granted by himself, is denied in *Mills* vs. *Thursby*, 1 C. R., 121, on the ground that the case is governed by section 225. In *Bruce* vs. *Delaware and Hudson Canal Company*, 8 How., 440, the existence of that power is maintained, though it is held not to be the better practice, and that it should never be done, except in a case of urgency, for the prevention of immediate injury.

A motion to vacate, on notice, may be made at once, without any necessity of a previous application to the judge who granted the order. *Lindsay* vs. *Sherman*, 5 How., 308; 1 C. R. (N. S.), 25; *Blake* vs. *Locey*, 6 How., 108; 1 C. R. (N. S.), 406.

The section does not apply to an order obtained upon notice to the adverse party, though made out of court; the course in such a case is to procure its entry, if necessary, under section 350, and to appeal. *Follett* vs. *Weed*, 3 How., 360; 1 C. R., 65.

It has been held that, where an allowance has been irregularly granted, the party aggrieved may either appeal, or move to vacate under this section. *Wilkinson* vs. *Tiffany*, 4 Abb., 98.

But so far as such allowance rests in discretion, it will not be reviewed on such a motion, nor, as a general rule, will any question, as to the exercise of discretion by a judge, be so entertained. See *Dresser* vs. *Jennings*, 3 Abb., 240; *Lapeous* vs. *Hart*, 9 How., 541; or any objection on a mere point of form, not involving the merits. *Vide Main* vs. *Pope*, 16 How., 271.

An application to one judge to modify the order of another, as to the imposition of terms, was held not to be improper, in *Selden* vs. *Christopher*, 1 Abb., 272.

But, as a general rule, it will not be proper to apply to one judge, on motion, to review the order of another. See *Ryle* vs. *Harrington*, 14 How., 59; 4 Abb., 421; *Bangs* vs. *Selden*, 13 How., 163. See, however, that course taken, where an order, made in the first district, in an action triable elsewhere, was claimed to be void. *Harris* vs. *Clark*, 10 How., 415.

BOOK V.

OF PROVISIONAL REMEDIES.

This class of proceedings forms the subject of a separate division of the Code, title VII., part II., and, for obvious reasons, will be most conveniently treated, in connection with the subject of interlocutory applications. Four out of the five principal remedies so provided are usually, though not necessarily applied for, at the outset of the suit, when commenced, and all are extrinsic to the regular determination of the controversy between the parties, and adoptable or not at the discretion of the mover.

The subjects of the present and of the preceding book are, therefore, to a certain degree, parenthetical. After much consideration, the author has adhered to the arrangement adopted by him in his second edition, of introducing them, as such, at a stage immediately consequent upon the inception of a regular suit, before passing on to the consideration of the pleadings and proceedings in such suit, when commenced.

CHAPTER I.

ARREST AND BAIL.

§ 80. *Statutory and other Provisions.*

This remedy forms the subject of chapter I., title VII., part II. of the Code, running as follows:

CHAPTER I.

Arrest and Bail.

§ 178. (153.) No person shall be arrested in a civil action, except as prescribed by this act; but this provision shall not affect the act to abolish im-

prisonment for debt, and to punish fraudulent debtors, passed April 26th, 1831, or any act amending the same, nor shall it apply to proceedings for contempts.

§ 179. (154.) The defendant may be arrested, as hereinafter prescribed, in the following cases :

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the State, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation, or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found, or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud, in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested, in any action, except for a wilful injury to person, character, or property.

The form of this section, as it stands, was fixed on the amendment of 1851.
In 1848 it was less comprehensive, sections 4 and 5 being wholly omitted.
In 1849 they were added, and the scope generally extended by amendment.

§ 180. (155.) An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 181. (156.) The order may be made, when it shall appear to the judge by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

The provisions of this chapter shall apply to all actions included within the provisions of section 179, which shall have been commenced since the 30th day of June, 1848, and in which judgment shall not have been obtained.

Dates, as it stands, from 1849. In 1848 it consisted of the first sentence only, with some verbal differences, restricting the power as now conferred.

§ 182. (157.) Before making the order, the judge shall require a written

undertaking on the part of the plaintiff, with or without sureties, to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the State, and worth double the sum specified in the undertaking, over all his debts and liabilities.

Dates from 1849. In 1848 the undertaking was to be for $250.

§ 183. (158.) The order may be made to accompany the summons, or at any time afterward, before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at the time and place therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or indorsed.

But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days after the service of the order of arrest, in which to answer the complaint in the action, and to move to vacate the order of arrest or to reduce the amount of bail.

The final clause was added on the amendment of 1862. The rest of the section dates from 1849, and was substantially the same in 1848.

§ 184. (159.) The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him a copy thereof.

§ 185. (160.) The sheriff shall execute the order by arresting the defendant, and keeping him in custody until discharged by law; and may call the power of the county to his aid, in the execution of the arrest, as in case of process.

§ 186. (161.) The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

§ 187. (162.) The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section 179, and undertaking to the same effect as that provided by section 211.

In 1848, this section stopped at the words, "enforce the judgment therein;" the conclusion was added in 1849.

§ 188. (163.) At any time before a failure to comply with the undertaking,

the bail may surrender the defendant, in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court, or county judge, may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated; and, on filing the order, and the papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for the cause mentioned in subdivision 3 of section 179, so as to discharge the bail from an undertaking, given to the effect provided by section 211.

In 1848, the concluding exception was omitted. In 1849, a portion of it was added. In 1851, the section was settled as it now stands.

§ 189. (164.) For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him; or, by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

§ 190. (165.) In case of failure to comply with the undertaking, the bail may be proceeded against by action only.

§ 191. (166.) The bail may be exonerated, either by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

The words, "or his imprisonment in a state-prison," were added on the amendment of 1849.

§ 192. (167.) Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff or attorney by whom it is subscribed, with his return indorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.

Dates from 1849. In 1848, the original undertaking was to be delivered by the sheriff to the plaintiff, and returned by the latter, within ten days, if the bail were not accepted.

§ 193. (168.) On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff, or attorney by whom the order of arrest is subscribed, notice of the justification of the same, or other bail (specifying the places of residence and occupation of the latter), before a judge of the court, or county judge, at a specified time and place, the time

to be not less than five, nor more than ten days, thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section 187.

Dates as it stands from 1851. In 1848 the justification was to be before a judge. In 1849, as at present, or before "a justice of the peace." These last words were stricken out in 1851, but, strangely enough, the corresponding change was not made in sections 194, 195, and 196.

§ 194. (169.) The qualifications of bail must be as follows:

1. Each of them must be a resident, and householder or freeholder, within the State.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, or a justice of the peace, on justification, may allow more than two bail to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

In 1848, the words, "or a justice of the peace," were not in the section. They were added in 1849, and, as above noticed, have never since been stricken out.

§ 195. (170.) For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manuer as the judge or justice of the peace, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Same remarks as to last section. Dates as it stands from 1849.

§ 196. (171.) If the judge or justice of the peace find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exouerated from liability.

Same remarks as on last.

§ 197. (172.) The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

§ 198. (173.) The sheriff shall, within four days after the deposit, pay the same into court; and shall take from the officer receiving the same, two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had ou the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

Dates from 1849. Substantially the same in 1848.

§ 199. (174.) If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 193, any time before judgment; and, thereupon, the judge before whom the justifica-

tion is had, shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.

Has come down substantially unchanged, the amendment necessary to make it conform to sections 194 to 196, having been omitted in 1849.

§ 200. (175.) Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and, after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited, and remaining unapplied.

§ 201. (176.) If, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability, by the giving and justification of bail, as provided in sections 193, 194, 195, and 196, at any time before process against the person of the defendant, to enforce an order or judgment in the action.

A merely verbal change was made in 1849.

§ 202. (177.) If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

§ 203. (178.) The bail taken upon the arrest, shall, unless they justify, or other bail be given or justified, be liable to the sheriff, by action, for damages which he may sustain by reason of such omission.

A merely verbal change in 1849.

§ 204. (179.) A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

This power was originally confined to any time before the justification of bail. In 1858 it was extended to any time before judgment, as it now stands.

§ 205. (180.) If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made.

The provisions of this portion of the Code are, by special statute, extended to all actions for penalties incurred, or moneys payable, under the acts in relation to insurances within this state by foreign corporations; and the defendants in such actions are, accordingly, arrestable, in the manner, and with all the incidents above prescribed. Laws of 1857, ch. 548, §§ 9, 10; vol. 2 of 1857, p. 171.

Under subdivision 5 of section 401, motions to vacate or modify an

arrest are entitled to precedence over all others in all the districts. See heretofore, section 72, under the head of *Motions*.

Under section 423, and rule 4, already cited *in extenso* in section 67, under the head of *Filing of Papers*, the undertakings required to be given under this chapter must be filed with the clerk of the court.

Rule 5 (83) makes this express provision as to the justification of bail:

> Whenever bail are required to justify, they shall justify within the county where the defendant shall have been arrested, or where the bail reside.

Rule 6 (71), providing that, in all cases where a justice or other officer approves of the security to be given, he shall require the sureties to justify; and also, that all undertakings shall be acknowledged in like manner as deeds of real estate, has been already cited *in extenso* in section 69, under the head of *Undertakings*.

Rule 7, already cited in section 67, prescribes that the sheriff shall file with the clerk the affidavits on which an arrest is made, within ten days after the arrest.

§ 81. *General Remarks.*

Though subjected to a complete refusion, and modified in some respects by the Code, the law on this subject remains substantially the same as under the previously existing statutes. The intentions of the framers of the former measure in this respect, are expressed by themselves, as follows, in page 160 of their report: "The enactments of the Code," say they "are intended as a substitute for all the present statutes, providing for the arrest of persons upon civil process, before execution. We have," they proceed, "adhered generally to the principle of the existing laws; although, in some respects, we have restricted the right of arrest, and particularly by requiring, in all cases, an order of a judge. We have also provided, that, before an arrest, the plaintiff must give security to pay the defendant's costs, and whatever damages he may sustain by the arrest. We have also proposed that the defendant may make a deposit of money, in all cases, instead of giving bail."

(*a.*) Privileged Persons.

Before entering on the subject of arrest in general, it may be convenient to consider the persons who are privileged therefrom, by statute or otherwise, and who, accordingly, do not fall within the purview of the present chapter.

They may be shortly stated as follows:

Senators and representatives of Congress, during their attendance at the sessions of their respective houses, and in going to or returning from the same. Constitution of United States, art. I., § 6, sub. 1.

Members of the state legislature, during their attendance at the session, or while absent, with leave of the house to which they belong; likewise for fourteen days previous to any session, and while going to and returning therefrom, if the time do not exceed fourteen days. The same privilege is given during any adjournment not exceeding fourteen days. Officers of either house, while in actual attendance, are also similarly exempt. *Vide* 1 R. S., 154, §§ 6 to 10, inclusive.

Electors, on election-day. Law of April 5th, 1842, tit. I., § 4. *Vide* 1 R. S. (3d edition), p. 130. Also electors at town meetings, during such meetings. 1 R. S., 342, § 10.

Militiamen, on the day of parade. 1 R. S., 303, § 27.

Officers of a court of record, during its actual sitting; when sued alone, but not when sued with any other person; but this privilege does not extend to an attorney or counsellor, unless employed in some cause, pending, and then to be heard in such court. 2 R. S., 290, § 86.

Witnesses, whose attendance is enforceable in any proceeding, during such attendance, and while going to and returning from the place at which they are required to attend. 2 R. S., 462, § 51. See *Stewart* vs. *Howard*, 15 Barb., 26, as to the waiver of this privilege by a general appearance.

Revolutionary soldiers. 2 R. S., 428, ch. 238 of 1830, §§ 1, 2, 3. *Vide* 2 R. S., 523 (3d edition).

Persons holding office under the metropolitan police act, while actually on duty. Laws of 1857, ch. 569, § 18, vol. 2, of 1857, p. 211. Not so, however, when off duty. See *Squires's Case*, 12 Abb., 38.

And, lastly, persons exempt by law from suit in the state courts—as ambassadors, consuls, &c. (see heretofore, under the head of *Parties*), are, of necessity, exempt from arrest under the process of such courts.

A sheriff is liable to arrest for the wrongful taking of property, the same as any other person. *Hill* vs. *Lott*, 10 How., 46.

(*b.*) Non-imprisonment Act of 1831.

It will have been seen that, by section 178, the operation of this statute is expressly saved.

It may be convenient, therefore, to take a glance at its provisions, and to show how far they may be considered as still existent, or as substantially abrogated.

By section 1 of that statute, imprisonment was abolished in all actions or suits founded on contract, or for the recovery of damages for breach of contract; but, by section 2, proceedings for contempts,

actions for fines or penalties, or on promises to marry, or for moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment, were exempted from that abolition.

Under section 3, a plaintiff in any of the actions falling within the purview of section 1, was, nevertheless, enabled, either before or after judgment, to apply to a judge of the court in which his suit was brought, or to any officer authorized to perform the duties of such judge, for a warrant to arrest the defendant.

The circumstances under which such warrant was obtainable, were thus defined by section 4:

§ 4. No such warrant shall issue, unless satisfactory evidence be adduced to such officer by the affidavit of the plaintiff, or of some other person or persons, that there is a debt or demand due to the plaintiff from the defendant, amounting to more than fifty dollars, and specifying the nature and amount thereof, as near as may be, for which the defendant, according to the provisions of this act, cannot be arrested or imprisoned; and establishing one or more of the following particulars:

1. That the defendant is about to remove any of his property out of the jurisdiction of the court in which such suit is brought, with intent to defraud his creditors; or,

2. That the defendant has property or rights in action which he fraudulently conceals, or that he has rights in action, or some interest in any public or corporate stock, money, or evidences of debt, which he unjustly refuses to apply to the payment of any judgment or decree which shall have been rendered against him, belonging to the complainant; or,

3. That he has assigned, removed, or disposed of, or is about to assign, remove, or dispose of any of his property, with intent to defraud his creditors; or,

4. That the defendant fraudulently contracted the debt, or incurred the obligation, respecting which such suit is brought.

The statute then goes on to provide for the arrest of the defendant; for a substantial trial before the officer issuing the warrant, if such defendant, when arrested, shall controvert the plaintiff's allegations, and for his continued imprisonment, in case those allegations shall be substantiated, unless he shall pay or secure the debt, or make, or give security that he will make, an assignment of all his property in the manner there prescribed.

On comparison of the section of the statute in question, above cited, with the provisions of the Code, it will be seen that, on most points, those provisions are nearly coincident, and the latter measure is in effect a substitute for the former. Section 178, and subdivisions 1 and 2 of

section 179 of the Code, fully cover the ground taken in sections 1 and 2 of the statute of 1831.

Subdivision 5 of section 179 of the Code seems also fully to comprise the remedies given by subdivisions 1 and 3 of section 4, of the previous statute. The only difference is that, in subdivision 1 of the latter, the case of a removal out of the jurisdiction of the court is specially put; and that subdivision 3 embraces, in terms, the case of an assignment, as well as a removal or disposition of property. But both seem fairly comprised in the more general wording of the Code.

Subdivision 4 of section 179 seems again fully to coincide with, and to be in fact of wider operation than subdivision 4 of section 4 of the other statute.

Subdivision 2 of the latter is, however, wholly diverse from the portion of the Code now under consideration. It is applicable only to proceedings after judgment to reach property endeavored to be unjustly retained by the debtor, and, as such, will be hereafter considered in that connection. See as to proceedings of this nature, *King* vs. *Kirby*, 28 Barb., 49. It may be remarked, however, in passing, that a similar remedy is provided by section 292 of the Code, in the course of supplementary proceedings.

Proceedings under the act of 1831, have, therefore, for the most part, fallen into disuse, and the author has accordingly deemed it unnecessary to treat that branch of the subject in detail. There can be no doubt, however, that a plaintiff is entitled to his election to proceed under either statute. *Gregory* vs. *Weiner*, 1 C. R. (N. S.), 210; *Corwin* vs. *Freeland*, 6 How., 241; *Latham* vs. *Westervelt*, 26 Barb., 256; *Hall* vs. *Kellogg*, 2 Kern., 325. But, in proceeding under the earlier statute, he will be held to stricter practice. Being a special proceeding, strict legal proof must be given; a failure in sufficiency of statement, will involve a failure of jurisdiction, and a warrant so issued, will be no protection to those acting under it. *Vredenburgh* vs. *Hendricks*, 17 Barb., 179; *Broadhead* vs. *McConnell*, 3 Barb., 175 (189).

(*c.*) Proceedings for Contempts.

This branch of the present subject will be treated of hereafter, under the head of *Enforcement of Orders*, in the chapter treating of execution. It may be remarked, however, at this point, that, by chapter 390, of the laws of 1847, imprisonment for contempt in non-payment of interlocutory costs is abolished, except as regards attorneys, solicitors, counsellors, or officers of the court, when ordered to pay costs for misconduct as such; and witnesses, when ordered to pay them, on attachment for non-attendance. See *Buzard* vs. *Gross*, 4 How., 23; *Vreeland* vs. *Hughes*, 2 C. R., 42.

And it has been held that the statute of 1847 does not reach the case of a judgment-debtor, committed for a general contempt in supplementary proceedings. *People* vs. *Kelly*, 22 How., 309; 13 Abb., 450.

(*d.*) Writ of Ne Exeat.

Considerable discussion has taken place upon the subject of this proceeding, and as to whether it is or is not included in the general abolition of arrest in civil actions, effected by section 178, according to the declared intention of the commissioners of the Code, in their report.

In its aspect of equitable bail, merely as the means of enforcing payment of an equitable debt, there seems no doubt but that such is the case. *Vide Fuller* vs. *Emeric*, 2 Sandf., 626; 2 C. R., 58; 7 L. O., 300; *Forrest* vs. *Forrest*, 3 C. R., 121.

In another aspect, however, the remedy in question appears to be maintainable, *i. e.*, in those cases in which its office is that of a prerogative writ, and its object merely to insure the performance of some act, to compel which the ordinary process of execution will be insufficient; or the giving of adequate security by a defendant for that performance, before he will be allowed to quit the state. *Forrest* vs. *Forrest*, 10 Barb., 46; 3 C. R., 141; 5 How., 125; 9 L. O., 89; *Bushnell* vs. *Bushnell*, 7 How., 389; affirmed, 15 Barb., 399; *Glenton* vs. *Clover*, 10 Abb., 422; and it has been held that it is even issuable against a *feme covert*, when a proper foundation is laid for an equitable action against her. *Neville* vs. *Neville*, 22 How., 500.

The issuing of this writ is, however, an exercise of jurisdiction which the courts will assume with great caution, and only in cases where the plaintiff has no other remedy, and a necessity for such interposition is clearly shown. *Vide Forrest* vs. *Forrest*, *supra*; *Pratt* vs. *Wells*, 1 Barb., 425.

§ 82. *When Defendant is Arrestable.*

The circumstances under which a plaintiff is entitled to arrest a defendant, are defined under five different classes, by section 179 of the Code, as above cited.

It is proposed in the present section to consider these different classes, *seriatim*, in their order.

A few decisions, however, bearing upon all in common will be cited in the first instance:

(*a.*) Preliminary Remarks.

The following cases bear generally on the subject of arrestability, without reference to any peculiar class, under which such arrest may be sought to be made.

Liability to arrest, to be enforceable, must be personal. Thus, a husband, though responsible for the act of his wife, cannot be arrested for it. *Anon.*, 1 Duer, 613; 8 How., 134.

And, though a wrong may have been committed, still the plaintiff cannot maintain an arrest of the defendant, unless he shows himself entitled to maintain an action for its redress. See *Neville* vs. *Neville*, 22 How., 500.

A person cannot be arrested for the same cause, on proceedings in two different courts. The prior arrest is a bar to its repetition in another suit. *Hernandez* vs. *Carnobeli*, 4 Duer, 642; 10 How., 433. But the prior process, to have this effect, must be valid; if void, the second arrest will stand. *Schadle* vs. *Chase*, 16 How., 413.

And when a party has once been arrested and held to bail, but afterwards discharged for insufficiency in the affidavits, he should not be arrested again in the same action. *Enoch* vs. *Ernst*, 21 How., 96.

Considerable discussion has arisen upon the point as to whether a defendant is or is not arrestable, in an action brought upon a judgment.

In *Goodrich* vs. *Dunbar*, 17 Barb., 644, it was held that, in such a case, the original cause of action, and the remedy of arrest, as incidental to it, is merged in the previous judgment, and the defendant cannot be arrested in an action upon the latter. The judgment in this case was recovered in another state, and the doctrine above cited is, to a certain extent, *obiter*, the actual decision being mainly based on the fact that the defendant was not arrestable under any circumstances. The same rule has been laid down as to a judgment in this state, though recovered in a court which has not the power to grant an arrest under the Code. *McButt* vs. *Hirsch*, 4 Abb., 441. See, likewise, *Harris* vs. *Cone*, 10 How., 259.

In other cases, however, an arrest of this nature has been sustained. In *McButt* vs. *Hirsch*, the arrest, though held generally unsustainable, was, nevertheless, supported, on the ground that the examination of the debtor, in supplementary proceedings, disclosed a disposal of property with intent to defraud creditors. Similar proceedings, under the non-imprisonment act, were also sustained after judgment, even though taken by an assignee, in *King* vs. *Kirby*, 28 Barb., 49.

The recovery of judgment upon a note, indorsed by the defendant, was held to be no bar to a separate action against him for fraud, inducing the sale of the goods for which such note was given, especially in a case where such fraud had been subsequently discovered. *Wanzer* vs. *De Baum*, 1 E. D. Smith, 261; 1 C. R. (N. S.), 280.

And, where the existence of fraud was patent upon the face of a foreign judgment record, it was held no bar to the arrest of the defend-

ant in respect of the fraud thus apparent. *Arthurton* vs. *Dalley*, 20 How., 311.

See generally, as to the power of looking behind a judgment, to the original equities or incidents of the transaction, *Clark* vs. *Rowling*, 3 Comst., 216; *Oakley* vs. *Aspinwall*, 4 Comst., 513.

A proceeding which falls short of a valid and complete judgment, though in itself a matter of record, is also no bar to an arrest. So held, as to the preliminary inquisition on an English extent. *Peel* vs. *Elliott*, 16 How., 485; 7 Abb., 433; 28 Barb., 200. So also, as to a judgment obtained by default, and opened on terms, but allowed to stand as security. *Union Bank* vs. *Mott*, 16 How., 525; 8 Abb., 150; affirmed, 17 How., 353. An arrest is also obtainable after verdict, notwithstanding a stay of proceedings granted to the defendant for the purpose of making a case. *Lapeous* vs. *Hart*, 9 How., 541.

Although a non-resident has the same right as a resident to this provisional remedy, yet, if he attempt to exercise it, under circumstances of seeming oppression, the court will scrutinize his proceedings the more closely. *Hyer* vs. *Ayres*, 2 E. D. Smith, 211.

As to the expediency of resorting to this remedy, in all practicable cases, with a view to the ultimate issue of execution against the person of the defendant, see *Kredenburgh* vs. *Morgan*, 4 Bosw., 646; 18 How., 469; *Molenaor* vs. *Kerner*, 22 How., 190. See likewise Code, section 288, amendment of 1862.

(*b.*) Subdivision 1.—Where the Action sounds in Tort.

On reference to subdivision 1 of section 179, as above cited, it will be seen that, in this class of actions, a defendant is arrestable, as under the old practice.

There is, however, this distinction to be drawn:

In actions for injuries to person, character, or property, or in the old action for damages in respect of trover and conversion of the latter, the defendant is arrestable, by reason of the nature of the action itself, without regard to his residence.

In other actions for damages not arising out of contract, he is only arrestable when he is a non-resident, or is about to remove from the state.

The following have been decided to come within the class of injuries to the person. An action for *crim. con.* *Delamater* vs. *Russel*, 4 How., 234; 2 C. R., 147; *Strauss* vs. *Schwarzwaelden*, 4 Bosw., 627. An action for seduction. *Taylor* vs. *North*, 3 C. R., 9.

On the collateral question of joinder, an action for a limited divorce on the ground of cruelty, has been held to fall within the class of actions

for injury to the person. *McIntosh* vs. *McIntosh*, 12 How., 289; but not so as to a suit for total divorce on the ground of adultery.

The total conversion of property is an injury to it, for which a defendant is arrestable. *Northern Railway of France* vs. *Carpentier*, 13 How., 222; 3 Abb., 259.

An action against a common carrier, for loss of goods, sounds *in tort*, and he will be arrestable. *Burkle* vs. *Ells*, 4 How., 288; 2 C. R., 148. So also does an action against an innkeeper for loss of baggage. *The People* vs. *Willett*, 26 Barb., 78; 15 How., 210; 6 Abb., 37.

In this class of actions, however, the defendant can only be arrested under this section, when he is a non-resident or about to remove from the state. The gist of the action is for negligence, not for a conversion. *People* vs. *Willett*, *supra*.

The proof that a defendant is about to remove from the state must be positive, and show an intended change of residence, or he may be discharged. *Brophy* vs. *Rodgers*, 7 L. O., 152.

The questions as to residence and domicile, on which the remedy as against a non-resident may depend, will be fully considered hereafter under the head of *Attachment*, on which remedy the decided cases upon the subject have the more immediate bearing.

An action for damages in consequence of fraudulent representations, inducing the sale of goods to another person, falls within the present subdivision and not under subdivision 4. Non-residence or an intended departure, must therefore be shown, before an arrest can be maintainable. *Smith* vs. *Corbiere*, 3 Bosw., 634.

A defendant in ejectment was held not to be arrestable, for damages awarded against him, in respect of mesne profits. The claim against him, in that respect, sounds in contract. *Fullerton* vs. *Fitzgerald*, 10 How., 37; 18 Barb., 441.

But, where the complaint demanded damages for the unlawful holding of the property, it was held, collaterally, that the defendant was arrestable. *Merritt* vs. *Carpenter*, 30 Barb., 61. Not so, however, where no such claim is made by the pleadings. In such a case the order for arrest was vacated. *Brush* vs. *Mullen*, 12 Abb., 242.

An agent of the father, acting within the scope of his instructions, and using no undue force, was held not to be liable to arrest, in an action for taking possession of the person of an infant. *Hernandez* vs. *Carnobeli*, 4 Duer, 642; 10 How., 433.

(*c.*) Subdivision 2.—Actions ex contractu, Agents, &c.

This subdivision is of wider scope than the last.

The defendant, under it, may be arrested—

In an action on a fine or penalty.

In an action for breach of promise to marry.

For money received, or property embezzled by a defendant, in an official or fiduciary capacity.

For misconduct or neglect in an office or professional employment.

The two first heads are clear in themselves, and have not given rise to any specific controversy.

The two latter have been the subject of more discussion. Under the Code of 1848, it was doubted whether the words, "fiduciary capacity," embraced the case of a defaulting agent. See *Dunaher* vs. *Meyer*, 1 C. R., 87, *pro*, and *Smith* vs. *Edmonds*, 1 C. R., 86, and *White* vs. *McAllister*, 1 C. R., 106, *contra*. The subsequent amendments have, however, placed the matter beyond a doubt.

The following have been held to come within the purview of the subdivision:

An auctioneer, selling goods, but failing to pay over the purchase-money to his employer. *Holbrook* vs. *Homer*, 6 How., 86; 1 C. R. (N. S.), 406. A broker, employed to sell exchange on a foreign country, at certain limited rates, over and above his commissions, and failing to account for the proceeds. *Barret* vs. *Gracie*, 34 Barb., 20. An agent, employed to sell goods, and account weekly, and failing so to account. *Turner* vs. *Thompson*, 2 Abb., 444. The surety on a lease, intrusted with money by his principal to pay rent due, and failing to do so. *Burhaus* vs. *Casey*, 4 Sandf., 706. An agent, employed to collect moneys, and appropriating them. *Stoll* vs. *King*, 8 How., 298. One who collects his own claim, in conjunction with that of another, under an agreement to account for the latter's due proportion, and who fails so to account and pay it over. *Hull* vs. *McMahon*, 10 Abb., 319. See also, as to the responsibility of a *feme covert*, and of her husband, under similar circumstances, *Solomon* vs. *Waas*, 2 Hilt., 179. An attorney, resident in another state, similarly employed to collect moneys there. *Yates* vs. *Blodgett*, 8 How., 278. A factor, receiving money for a specific purpose, and misappropriating it. *Noble* vs. *Prescott*, 4 E. D. Smith, 139. A commission merchant, failing to account for sale-moneys, under a specific consignment. *Schudder* vs. *Shiells*, 17 How., 420. See, as to trover, in respect of moneys specifically received, *Donahue* vs. *Henry*, 4 E. D. Smith, 162. An agent, failing so to account, although alleging the accidental loss of the amount received by him. *Frost* vs. *McCarger*, 14 How., 131. Directors of a public company, guilty of a fraudulent and illegal sale of its property. *Crook* vs. *Jewett*, 12 How., 19. The clerk of such a company, abstracting and converting its shares, whether belonging to, or deposited with them. *The Northern Railway Company of France* vs. *Carpentier*, 4 Abb., 47,

See also *same case*, 13 How., 222; 3 Abb., 259. A party with whom stock is pledged, as collateral security for an usurious loan, and refusing to return it, on demand. *Cousland* vs. *Davis*, 4 Bosw., 619.

An agent, having received money, is arrestable, on a failure to pay it over, even although a case of embezzlement, or fraudulent misapplication, be not stated. *The Republic of Mexico* vs. *Arrangois*, 5 Duer, 634; 11 How., 576; *Same case*, 11 How., 1. But where, by the terms of the contract between him and his principal, he was entitled to retain a certain sum out of his receipts, and had retained no more, his arrest was vacated. *Chapin* vs. *Seeley*, 13 How., 490.

A principal may revoke his instructions to the agent, as to the disposal of money entrusted to him, and the latter is bound to obey his subsequent directions. If he refuse, he will be arrestable, though acting in good faith. *Schadle* vs. *Chase*, 16 How., 413.

The arrest, in this country, of the officer of a foreign government, charged with misapplication of funds of that government, was maintained in *Peel* vs. *Elliott*, 16 How., 481, 484, 485; 7 Abb., 433; 28 Barb., 200. An arrest was also sustained, in respect of a fraud committed in a foreign country, in *Arthurton* vs. *Dalley*, 20 How., 311.

The New York partner of a house, doing business also in England, was held arrestable for money received on sale of exchange on the English house, and which they failed to pay. *Bull* vs. *Melliss*, 9 Abb., 58.

See also generally as to the liability of all the partners to arrest, for a fraud committed by one of them in the course of the partnership business, *Townsend* vs. *Bogart*, 11 Abb., 355; *Coman* vs. *Reese*, 21 How., 114; *Anonymous*, 6 Abb., 319, note.

In other cases, however, an arrest has been vacated, so far as related to one of the partners, shown to be innocent of any participation in his co-partner's fraud. *Wetmore* vs. *Earle*, 9 Abb., 58, note; *The Hanover Company* vs. *Sheldon*, 9 Abb., 240. See also dissenting opinions in *Bull* vs. *Melliss*, and *Townsend* vs. *Bogart*, *supra*.

Where one of the defendants, a note-broker, received the notes of the plaintiffs to sell for cash, delivered them to another defendant, without requiring payment, and the latter, after selling them, only handed over part of the money, both were held arrestable for the conversion. *Robbins* vs. *Seithel*, 20 How., 366.

A principal is not liable for the fraud of his agent, provided he does not participate in or ratify it. Either will make him arrestable. *Claflin* vs. *Frank*, 8 Abb., 412.

Where a bill had been deposited with a banker, whilst solvent, for collection in the ordinary course of business, the receipt of the amount, after his subsequent insolvency, was held not to constitute him a fidu-

ciary, and an order for his arrest was vacated. *Bussing* vs. *Thompson*, 6 Duer, 696; 15 How., 97.

A general consignee and agent for disposal of the cargo of a ship, is not arrestable for a failure to account and pay over his balance. He is not a mere fiduciary. *Goodrich* vs. *Dunbar*, 17 How., 644.

A consignee, responsible for any deficiency on the sale of goods reconsigned by him to third parties, and who had received that deficiency from the original consignor, under a similar responsibility, but had neglected to perform his own agreement with his sub-consignees, was held not to stand in a fiduciary capacity, as regards the latter, and not to be arrestable in a suit commenced by them. *Angus* vs. *Dunscomb*, 8 How., 14.

Any compromise with, or taking of fresh security from a party originally arrestable, will change the original claim for the wrong into a debt, and destroy the plaintiff's right to an arrest; even although the intention of the parties may have been otherwise. *Alliance Insurance Company of Philadelphia* vs. *Cleveland*, 14 How., 408; *The Merchants' Bank of New Haven* vs. *Dwight*, 6 Duer, 659; 13 How., 366. The mere granting of an extension of time upon a non-negotiable promise, not founded upon a new consideration, was, however, held not to have this operation, in *Geller* vs. *Seixas*, 4 Abb., 103.

As to when the original cause of action, so far as this remedy is concerned, will or will not be considered as merged in a subsequent judgment, see heretofore, at the commencement of this section. See also *Hyer* vs. *Ayres*, there cited, as to the greater strictness of examination into a case, where this remedy is sought by a non-resident plaintiff.

(*d.*) Subdivision 3.—Replevin, &c.

Under the Code as it now stands, the concealment of property sought to be recovered must be fraudulent, in order to give the remedy of arrest under this subdivision. Under the Code of 1849, the bare removal, so that it could not be found by the sheriff, was held sufficient. *Van Neste* vs. *Conover*, 8 Barb., 509; 5 How., 148.

In *Roberts* vs. *Randel*, however, 3 Sandf., 707; 5 How., 327; 3 C. R., 190; 9 L. O., 144; it was held, even under that measure, that an arrest could not be granted when the defendant had not, in fact or in law, the possession of the property claimed. See also *Reimar* vs. *Nagel*, 1 E. D. Smith, 256; 1 C. R. (N. S.), 219.

The same doctrine is maintained in *Merrick* vs. *Suydam*, 1 C. R. (N. S.), 212, as regards property parted with in good faith before suit brought; but this exception is stated to the principle, *i. e.*, when the defendant has parted with it, with the intent to deprive the plaintiff of

the benefit of it, or to prevent its being retaken. In such a case the defendant can be held to bail.

There can be no doubt that a case of the latter description is one to which the section will apply. That replevin is maintainable under such circumstances, is laid down in *Brockway* vs. *Burnap*, 16 Barb., 309; overruling *same case*, 12 Barb., 147; 8 How., 188; and questioning the authority of *Roberts* vs. *Randel*, in this respect. See also *Van Neste* vs. *Conover*, 20 Barb., 547; *Savage* vs. *Perkins*, 11 How., 17; *Drake* vs. *Wakefield*, 11 How., 106. See *Brockway* vs. *Burnap* approved, *Nichols* vs. *Michael*, 23 N. Y., 264 (269).

An arrest cannot be maintained under this subdivision, in respect of property, originally fraudulently obtained, but subsequently sold out in the regular course of trade, before the commencement of the action. Such a cause of action comes under subdivision 1, and a defendant, under such circumstances, was discharged on giving ordinary bail, instead of the special undertaking provided for by sections 187 and 211. *Pike* vs. *Lent*, 4 Sandf., 650.

Where the property claimed was shown to be in the lawful custody of a third party, an order of arrest was vacated with costs. *Mulvey* vs. *Davison*, 8 How., 111.

An arrest under this subdivision is not maintainable where the action itself is not for the possession of the property, but for damages for its conversion. *Seymour* vs. *Van Curen*, 18 How., 94.

In *Chappel* vs. *Skinner*, 6 How., 338, it was held that, after having arrested the defendant under this subdivision, the plaintiff cannot subsequently take the goods under the ordinary process of replevin. He was entitled to either remedy, at his election, but, having made that election, was bound to abide by it.

(*e.*) SUBDIVISION 4.—FRAUD IN CONTRACTING DEBT, &C.

Under this subdivision, the defendant is arrestable, when he has been guilty of a fraud in contracting the debt, or incurring the obligation sued upon;

Or, in concealing or disposing of property, for the taking, detention, or conversion of which the action is brought.

This last head seems to be already provided for, in substance, under subdivisions 1 and 4, as above considered. No case is reported, bearing directly on the applicability of this particular subdivision to that class of cases.

Those bearing on the question of the fraudulent contracting of a debt are, however, more numerous.

The import of the words, "incurring the obligation," is fully considered in *Crandall* vs. *Bryan*, 15 How., 48; 5 Abb., 162. They are there

held to be equivalent to the expressions, "legal liability" or "legal duty." The arrest of a defendant for fraudulent representations, inducing the sale of land, was accordingly maintained.

The cases are numerous in which a defendant has been held arrestable for false representations, inducing the giving of credit or the making of a sale of goods to him, when actually insolvent. See *Freeman* vs. *Leland*, 2 Abb., 479: *Wanzer* vs. *De Baum*, 1 E. D. Smith, 261; 1 C. R. (N. S.), 280; *Mucklan* vs. *Doty*, 20 How., 236; *Wilmerding* vs. *Mooney*, 11 Abb., 283; *Ballard* vs. *Fuller*, 32 Barb., 68; *Wallace* vs. *Murphy*, 22 How., 414. See also, generally, as to fraudulent misrepresentations, *Bennett* vs. *Judson*, 21 N. Y., 238.

And a party, obtaining credit by a false representation, must be held to intend the legitimate consequences of his act. A mere denial of the intention to defraud will not avail him. *Whitcomb* vs. *Salsman*, 16 How., 533.

A party who had represented himself to be solvent, at a time when he must have known of his insolvency, was refused to be discharged in *Scudder* vs. *Barnes*, 16 How., 534.

Where, however, a party believed the representations made by him to be true, at the time when he made them, he was held not to be arrestable, though they were in fact false. *Birchell* vs. *Strauss*, 28 Barb., 293; 8 Abb., 53; *Gaffney* vs. *Burton*, 12 How., 516.

A party who borrowed money expressly for one use, but converted it to another, was held arrestable under this subdivision in *Lovell* vs. *Martin*, 11 Abb., 126.

The mere concealment of insolvency, or probable insolvency, unaccompanied by any positive representation, tending to induce a credit, has been held not to be a fraud, entitling the vendor to avoid the sale. But otherwise, if, at such time, the purchaser has already performed an open and notorious act of insolvency, and omits to disclose it. *Mitchell* vs. *Worden*, 20 Barb., 253. See also as to a mere concealment, accompanied by an honest, though abortive, purpose, to continue business and pay for the goods, not amounting to a fraud, *Nichols* vs. *Pinner*, 18 N. Y., 295. See also *Hall* vs. *Naylor*, *ibid.*, 588.

To avoid a sale, the fraudulent representations must be direct, and made to the vendor himself. Evidence of mere representations to others, whom he did not in fact defraud, will be inadmissible. *Murfey* vs. *Brace*, 23 Barb., 561; *Hall* vs. *Naylor*, *infra*. But evidence of contemporaneous transactions of the same nature may be admissible, as showing the "*quo animo*." *Hall* vs. *Naylor*, 18 N. Y., 588. See *same case* below, 6 Duer, 71; but reversed on another point.

The decisions cited in the two last sentences, do not bear directly upon the subject of arrestability. They seem, however, on the whole,

to be adverse to the conclusion come to in *Morrison* vs. *Garner*, 7 Abb., 425, that a mere concealment of insolvency, unaccompanied by any direct representation, was sufficient to authorize the arrest of a party, purchasing exchange upon credit, with the intention to make use of the bills so purchased, without paying for them.

A false representation, inducing the giving of credit to a third person, is not within this subdivision. *Smith* vs. *Corbiere*, 3 Bosw., 634.

In relation to the responsibility of partners for false representations, inducing a sale to the partnership, see above, subdivision 2, and cases there cited, especially *Townsend* vs. *Bogart*, 11 Abb., 355; *Anon.*, 6 Abb., 319, note; and *Coman* vs. *Reese*, 21 How., 114.

As to fraud in the contracting a debt, being merged in a subsequent settlement, or taking of additional security, or in the obtaining of a judgment on such debt, in an action *ex contractu*, see previous portions of this section, and cases there cited. See, however, *Wanzer* vs. *De Baum*, 1 E. D. Smith, 261; 1 C. R. (N. S.), 280, as to an action for deceit being still maintainable for fraud in the sale of goods, notwithstanding a previous judgment, on the defendant's indorsement on a note given on their sale.

To authorize an arrest of this nature, the fraud must be personal, and committed at the time. A husband was, accordingly, held not arrestable on a debt contracted by him on the faith of a specific appropriation of moneys, part of his wife's separate estate, to their payment, but which she subsequently countermanded, he himself receiving the payment. *Isaacs* vs. *Gorham*, 1 Hilt., 479.

An action to recover damages incurred by reason of acts of the plaintiff, induced by fraudulent misrepresentations of the defendant, was held to sound in tort, and not in contract, and not to fall within this subdivision, and an order for arrest of the defendant was accordingly vacated in *McGovern* vs. *Payn*, 32 Barb., 83.

(*f.*) Subdivision 5.—Fraudulent Disposition of Property.

It has been held that, to bring a defendant within the purview of this subdivision, the removal of property must be secret. The fact that the defendant "is about to depart out of the country, taking his property with him, although he owes debts to a large amount, will not subject him to the operation of this section. It is the secrecy which evinces the fraudulent intent, and not the disposal or removal of the property." *Anon.*, 2 C. R., 51.

The points bearing upon a fraudulent disposition of property will be more fully considered hereafter, under the head of *Attachment*, to which remedy most of the reported decisions refer.

A debtor is not arrestable for a mere constructive fraud, arising out

of the informality of an assignment made by him, unless a fraudulent intent is shown. *Birchell* vs. *Strauss*, 28 Barb., 293; 8 Abb., 53; *Spies* vs. *Joel*, 1 Duer, 669. See generally *Platt* vs. *Lott*, 17 N. Y., 478.

But, after assignment made, a disposal by the assignee of the property comprised in it, may be an arrestable fraud. *McButt* vs. *Hirsch*, 4 Abb., 441.

One partner cannot arrest another, on an allegation of this description. He has no remedy under these circumstances, but in a suit for an injunction and receiver. *Cary* vs. *Williams*, 1 Duer, 667.

A mere refusal to pay or provide for a debt, however gross in its nature, is not *per se* sufficient evidence of an intended fraudulent disposition. *Hathorn* vs. *Hall*, 4 Abb., 227.

An open removal of property, under an honest misconception as to its being exempt from execution, was held not to be a fraudulent removal, within the scope of the non-imprisonment act, in *Krauth* vs. *Vial*, 10 Abb., 139. See an arrest under this subdivision sustained in *Phillips* vs. *Benedict*, 33 Barb., 655; 12 Abb., 355.

The case of a fraudulent disposition of property in a foreign country, as between foreigners, was held not to fall under this subdivision. *Blason* vs. *Bruno*, 33 Barb., 520; 21 How., 112; 12 Abb., 265.

In *The People* vs. *Kelly*, 35 Barb., 444; 13 Abb., 405, it was considered that the provisions of this subdivision do not comprise the case of a creditor's bill, for the purpose of setting aside a fraudulent assignment, but that they only extend to actions for the recovery of money; and that, to warrant the arrest of a party, the fraud charged against him must be actual, and not constructive.

(*g.*) Arrest of Female.

The provision to this effect governs the previous subdivisions of the section. A female is therefore not arrestable in an action for breach of promise of marriage. *Siefke* vs. *Tappey*, 3 C. R., 23.

An illegal detention or concealment has been held to be an injury to property, for which a female is arrestable. *Starr* vs. *Kent*, 2 C. R., 30. This case is, however, overruled in express terms, and the principle laid down that the exception only refers to wilful injuries. *Tracy* vs. *Leland*, 2 Sandf., 729; 3 C. R., 47; 8 L. O., 234. In *Solomon* vs. *Waas*, however, 2 Hilt., 179, this latter conclusion is disapproved.

The participation of a female in a fraudulent conversion of railway shares, was held to be a wilful injury to property, for which she was arrestable. *The Northern Railway of France* vs. *Carpentier*, 13 How., 222; 3 Abb., 259. The subsequent discharge of the same party (*vide* 4 Abb., 47), does not affect this decision, having been granted on the ground of insufficiency of evidence.

A female cannot be arrested for fraud in contracting a debt. She is exempted by this subdivision. *Wheeler* vs. *Hartwell*, 4 Bosw., 684.

Where a proper foundation is laid for an equitable action against her, a female may, it is said, be arrestable upon a *ne exeat*. Not so, however, in a suit upon contract, not in fact binding upon her. See *Neville* vs. *Neville*, 22 How., 500.

In *Anonymous*, 1 Duer, 613; 8 How., 134, it was held by the Superior Court, that, notwithstanding the provision above cited, rendering a female arrestable for her wilful torts, the rule of common law is not altered, which exempts a married woman from arrest in all cases whatever; and likewise that the Code does not authorize the arrest of the husband, in any action founded solely either upon the contract or tort of the wife, in which he is not a participant.

In *Solomon* vs. *Waas*, however, 2 Hilt., 179, this conclusion is dissented from by the New York Common Pleas, and it is held that the old rules of law are not changed, but that a husband is still arrestable for the tort of his wife, and bound to put in bail for both; and that, though she is entitled to be discharged in the first instance, on proof of her coverture, she may be charged in execution with him after judgment.

(*h.*) Arrest for Usurpation of Office.

The provisions of section 435, under which, in actions by the attorney-general in respect of usurpation of office, the defendant is arrestable, must not be overlooked, though the proceeding is one of comparatively unfrequent occurrence.

§ 83. *Application for Arrest.*

The order may, under section 183, be made to accompany the summons, or at any time afterwards, before judgment.

Under section 180, it is obtainable from a judge of the court in which the action is brought, or from a county judge. See *Seymour* vs. *Mercer*, 13 How., 564, as to the powers of a special surrogate in this respect.

(*a.*) Affidavit.

It is so obtainable upon affidavit, the requisites of which are prescribed by section 181.

This affidavit may be made by the plaintiff, or by any other person.

It must show—

1. That a sufficient cause of action exists.
2. That the defendant is arrestable under section 179.

These two cardinal requisites must be made to appear by the statement of facts and not by bare allegation to that effect. See *Pindar*

vs. *Black*, 4 How., 95; 2 C. R., 53; *Adams* vs. *Mills*, 3 How., 219; *Crandall* vs. *Bryan*, 15 How., 48; 5 Abb., 162. A bare averment in the words of the statute, will be wholly insufficient. See this subject more fully considered hereafter under the heads of *Injunction* and *Attachment*, the conditions on obtaining which, the latter especially, are substantially the same, and the affidavits must, to sustain the remedy, possess similar requisites.

A cause of action must be shown by the affidavit, with sufficient averments to sustain it, or the order will not stand. *Adams* vs. *Mills*, 3 How., 219.

The affidavit must be positive, not argumentative, and must make out a *primâ facie* case against the defendant. *Martin* vs. *Vanderlip*, 3 How., 265; 1 C. R., 41.

An affidavit, to warrant an arrest, must contain evidence which, in the judgment of the officer, amounts to proof of the charge. So held under the non-imprisonment act. *Vredenburgh* vs. *Hendricks*, 17 Barb., 179. Such officer must have, before granting the order, legal evidence, tending to convict the defendant of the charge made. The decision on the weight and conclusiveness of such evidence rests, then, in his discretion. *Courter* vs. *McNamara*, 9 How., 255.

Such evidence must be the best evidence that can reasonably be procured, and, wherever the statement can be made positively, it should be so. This does not, however, absolutely preclude the use of statements on information and belief.

In such a case, however, the nature, quality, and sources of the information must be disclosed, so that the judge's mind may have something to work upon, and he may be able to determine whether the belief is well founded or not. Good reasons, too, must be given why a positive statement cannot be procured. *Whitlock* vs. *Roth*, 10 Barb., 78; 5 How., 143; 9 L. O., 95; 3 C. R., 142; *Bell* vs. *Mali*, 11 How., 254; *Crandall* vs. *Bryan*, 15 How., 48; 5 Abb., 162. See also, *Peel* vs. *Elliott*, 16 How., 481; 7 Abb., 433, in which an arrest was maintained on an affidavit wholly so grounded, as to facts occurring in a foreign country, the sources of the information being given, and the impossibility of procuring a more direct statement at the time, made apparent.

An affidavit on mere unsupported hearsay will, however, be wholly insufficient. *Cook* vs. *Roach*, 21 How., 152; *Blason* vs. *Bruno*, 33 Barb., 520; 21 How., 112; 12 Abb., 265.

On the other hand, where the plaintiff had, in his affidavit, stated facts of his own knowledge, which it appeared that he only knew from information, the arrest so obtained was vacated. *Moore* vs. *Calvert*, 9 How., 474.

The examination of a judgment-debtor may, it seems, be used against

him as an affidavit, on an application of this description. *McButt* vs. *Hirsch*, 4 Abb., 441.

A verified complaint, when before the judge at the time of application, may be used, for the purpose of sustaining the order. *Brady* vs. *Bissell*, 1 Abb., 76; *Turner* vs. *Thompson*, 2 Abb., 444.

It has been held also, that a fatal defect in the complaint will render the arrest unsustainable. *Bell* vs. *Mali*, 11 How., 254. A mere error of definition or superfluity of statement will not, however, have this effect. *Peel* vs. *Elliott*, 16 How., 485; 28 Barb., 200; 7 Abb., 433.

Where a sufficient cause of action has been set forth, bringing the case clearly within the purview of section 179, special cause for requiring bail need not be alleged, as under the former practice. *Baker* vs. *Swackhamer*, 5 How., 251; 3 C. R., 248.

Although an arrest may be granted, on matters independent of the cause of action, yet, where the statements in the affidavit were wholly inconsistent with the case as made by the complaint, the order was vacated. *Wicker* vs. *Harmon*, 21 How., 462; 12 Abb., 476. But the absence of averment of fraud in the complaint, will not affect the validity of the order of arrest. *Muklan* vs. *Doty*, 20 How., 236.

A defendant, by giving bail, admits the sufficiency of the affidavit, and waives his right to object to any formal defects in it, if existent. *Stewart* vs. *Howard*, 15 Barb., 26.

To give any precise form for the statements of fact in an affidavit of this nature, would be impossible, inasmuch as such affidavit must, of necessity, vary according to the circumstances of each particular application. One only caution appears necessary with reference to this, as to other similar cases; and this is, that, on all occasions, the *gravamen* of the charge against the defendant had better be summed up in the exact words of the statute itself, and be stated throughout in accordance with that wording, so as to bring the case, in precise and definite terms, within one or more of the subdivisions of section 179. It is impossible to insist too strongly upon the expediency of strict attention being paid to this rule, in all questions, of whatever nature; and, likewise, to the principles laid down in the foregoing decisions, particularly with reference to the clear and correct statement of the cause of action, or ground or grounds of arrest, being kept in mind on all occasions.

As to the requisites of the affidavit, necessary to sustain an arrest in an action for *crim. con.*, see *Sachs* vs. *Bertrand*, 22 How., 95; 12 Abb., 433; *Strauss* vs. *Schwarzwaelder*, 4 Bosw., 627

It is of course competent for the plaintiff so to frame the affidavit, as to bring his case within the operation of any number of the separate subdivisions or grounds laid down in section 179, either conjointly or

disjunctively. As to the validity of an affidavit of this nature, when framed in the alternative, see, on the analogous subject of attachment, *Van Alstyne* vs. *Erwin*, 1 Kern., 331.

Where a fact is alleged in its legal import, the details need not be set out. Thus, in an affidavit by a married woman, seeking an arrest for misapplication, it was held sufficient to allege the fact that the fund misapplied was her separate property, without showing how it became so. *Lippman* vs. *Petersburgh*, 10 Abb., 254.

(*b.*) Security.

The plaintiff, on applying for the order, must also be prepared with the security required by section 182. It may be with or without sureties. If without, the plaintiff himself must annex an affidavit of justification.

The section requires such undertaking to be "on the part of the plaintiff," on which expression some discussion has arisen.

In the Superior Court, it has been held that the plaintiff himself must execute this undertaking, in all cases, even though non-resident. *Richardson* vs. *Craig*, 1 Duer, 666. The possibility of the execution of the next friend or guardian of a married woman, or infant, being, for this purpose, reasonably considered as that of a plaintiff, is, however, admitted. The rule so laid down has been further relaxed by the same tribunal, in admitting an undertaking, executed by the admitted agent of a foreign government, as sufficient on the part of that government as plaintiff. *Republic of Mexico* vs. *Arrangois*, 11 How., 1; affirmed, 5 Duer, 634; 11 How., 576. See, as to the strict rule being applicable to partition by petition, *Jennings* vs. *Jennings*, 2 Abb., 6.

In the Supreme Court, however, this strictness of construction has not obtained, and an undertaking, in an ordinary suit, not executed by the plaintiff himself, but only by his surety or sureties, has been held sufficient. *Bellinger* vs. *Gardner*, 12 How., 381; 2 Abb., 441; *Courter* vs. *McNamara*, 9 How., 255; *Askins* vs. *Hearns*, 3 Abb., 184.

In *Peel* vs. *Elliott*, above cited, the undertaking was of the same description, and passed without question. In the recent case of *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472, the doctrine of *Richardson* vs. *Craig* has been formally abandoned by the Superior Court itself, and an undertaking executed, "on the part of the plaintiff," by sureties alone, held to be sufficient. The point may now, therefore, be considered as settled. See also *Lief* vs. *Shausenburg*, referred to in *same case*, and reported, 10 Abb., 477, note.

Although the section says, "with or without sureties," the concurrence of one is sufficient. The real purport of the expression is with or

without security. *Courter* vs. *McNamara*, 9 How., 255. See also, as to a bond on maritime attachment, *Ward* vs. *Whitney*, 4 Seld., 442.

An undertaking of this description is amendable, *nunc pro tunc*, as of the original execution, at the discretion of the court. *Bellinger* vs. *Graham*, *supra*; see 2 R. S., 566, sections 33, 34; *Beach* vs. *Southworth*, 6 Barb., 173. See also Code, sections 173, 174. See, however, as to a special statutory proceeding, *Jennings* vs. *Jennings*, 2 Abb., 6, above noticed.

A copy of the undertaking need not be served upon the defendant, at the time of the arrest. *Leopold* vs. *Poppenheimer*, 1 C. R., 39.

It seems, by the case of *Manley* vs. *Patterson*, 3 C. R., 89, that the defendant is entirely without remedy, if the plaintiff's sureties omit to justify, or even on showing them to be insufficient or insolvent. The court even doubted whether "the judge had any right to refuse an order for arrest," under subdivision 3, where the sheriff has returned that the property in question has been eloigned, "even if he was fully aware that the plaintiff had put in sham security." The arrest in that case was, however, vacated on another ground, hereafter noticed.

It would appear, however, by analogy with the principles laid down in *Davis* vs. *Marshall*, 14 Barb., 96, with reference to the issuing of an attachment by a justice, that the giving of the undertaking by the defendant, in the form above mentioned, is a condition precedent to the making the order; and that, if omitted, the proceeding will be voidable, if not void. See *Bennett* vs. *Brown*, 4 Comst., 254, there cited.

The undertaking, when executed, must be acknowledged by the sureties, and the usual affidavit of justification subjoined. It is the duty of the officer applied to to require this (rule 6); but the defect, it seems, is amendable. *Conklin* vs. *Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49.

When presented to the judge, his approval should be indorsed upon it. It must then be filed with the clerk of the court. See Code, section 423. And this must be done forthwith, with the clerk of the proper county, and within five days at the furthest, under penalty of the proceeding being vacated on motion—rule 4. The approval of the judge has been held essential, and its omission a fatal defect. See *Newell* vs. *Doran*, 21 How., 427.

(*c.*) Order.

The requisites and form of the order to be applied for are distinctly prescribed by section 183.

The time of its return not being fixed by special provision, should be inserted at some reasonable date. The first day of the succeeding term may, in the majority of instances, be a proper period to insert, but each case will be governed by its peculiar circumstances. The amount of bail required, must also be fixed. In ordinary cases, the proper sum

will be double the amount of the claim. The matter rests, however, in the discretion of the judge, and may be modified by him accordingly. See *Baker* vs. *Swackhamer*, 5 How., 251; 3 C. R., 248.

The affidavit, undertaking, and order, having been thus prepared, and submitted to the judge to whom application is made, his signature must be obtained to the latter, if his decision be to grant it. The undertaking having been filed as above directed, the affidavit and order of arrest must thereupon be delivered to the sheriff, as provided by section 184, with all necessary instructions, to enable him to discover and arrest the defendant.

Service of the order upon the defendant is now rendered essential by section 183, as amended in 1862; and it has the effect of extending his time to answer, or to move to vacate, or to reduce the amount of bail.

By the express terms of the section the order can only be made before judgment. This applies, however, only to a judgment actually enforceable. Where, therefore, a judgment taken had been opened, and the defendant allowed to come in and defend, a subsequent arrest was sustained, even though the judgment itself was ordered to stand as security. *Union Bank* vs. *Mott*, 17 How., 353; 9 Abb., 106; affirming *same case*, 16 How., 525; 8 Abb., 150.

§ 84. *Mode and Incidents of Arrest.*

With this delivery, the duty of the plaintiff's attorney is completed, and that of the sheriff commences. In cases where immediate dispatch is necessary, it may be convenient to prepare and hand to the sheriff, with the originals, copies of the affidavit and order, which, under the same section, it is his duty to deliver to the defendant at the time of the arrest. In strictness, it is the sheriff's duty to make them, but the necessary delay for that purpose, however short, might possibly, in some cases, involve inconvenience.

The provision, requiring the delivery of such copies, has, however, been held to be merely directory, and the defect one which may be cured by amendment, in the discretion of the court. *Keeler* vs. *Betts*, 3 C. R., 183; *Courter* vs. *McNamara*, 9 How., 255.

The sheriff, under rule 7, is bound to file the affidavits with the clerk, within ten days after an arrest, when made.

If he does not succeed in effecting an arrest, within the time prescribed by the order, an amendment, extending that time, should be applied for, under section 174.

If he fail to make a due return, within the time so prescribed or extended, the performance of that duty may be enforced by attachment, and a notice should be served upon him, as provided by rule 8.

The mode of arrest, when made, is prescribed by section 185. The sheriff must keep the defendant in custody until discharged by law. It must be made fairly, and not induced by false representations; if so, the defendant may be discharged. *Goupil* vs. *Simonson*, 3 Abb., 474.

On making his return, the sheriff must deliver the order of arrest to the plaintiff, or his attorney, with that return indorsed. Where bail has been given, it must be accompanied by a certified copy of the undertaking. This return, when made, is conclusive. *Columbus Insurance Company* vs. *Force*, 8 How., 353.

The liability of the sheriff, in respect of an escape, or otherwise, is expressly provided for by sections 201 and 202. If a deposit be made, or bail be given, and justified, as hereafter noticed, the sheriff's liability is at an end; but, if not, he is, himself, liable as bail. He may, however, discharge himself from that liability, by the giving and justification of bail, in the same manner as provided with respect to the defendant himself, at any time before the latter is charged in execution; but, after he has been so charged, his powers in that respect are gone, and his liability is the same as that of other bail. *Buckman* vs. *Carnley*, 9 How., 180; *Sartos* vs. *Merceques*, 9 How., 188. His liability, as above, may be enforced, by proceeding against him or his sureties, in the usual manner. If, on the other hand, bail be put in on the part of the defendant, and such bail, or others, fail to justify, they will, under section 203, be liable to the sheriff, by action, for any damages which he may sustain by that omission.

§ 85. *Defendant's Course when Arrested.*

(*a.*) Motion to Vacate.

On the arrest taking place, the first point to be looked into by the defendant is, in relation to the validity of the order of arrest, and also as to the amount of the bail thereby required to be given; as, if the order be informal, or if the bail demanded be excessive, relief may be obtained by him, by means of a special application to the court. His powers in this respect are conferred by section 204, as above cited. It will have been observed in connection with this section, that prior to the amendment of 1858, a motion for this purpose could only be made before "the justification of bail." Since that amendment, such relief is obtainable at any time before judgment, without regard to the fact as to whether bail has or has not been given or justified. A motion for the reduction of bail could hardly be entertained, however, after the latter proceeding has taken place. And a motion to vacate, if made after justification of bail, would certainly be strictly scrutinized, and,

probably, denied, unless a very strong case were shown. It is also probable that the doctrine laid down in *Stewart* vs. *Howard*, 15 Barb., 26, *i. e.*, that the putting in of bail waives all objections to the form of the plaintiff's affidavit, or on the ground of the defendant's privilege from arrest, may still be maintained.

The recent amendment in section 183 (1862) extends the time to make a motion, of the above nature, to twenty days after service of the order of arrest. No change having been made in section 204, it seems clear that this amendment cannot operate to shorten the period there allowed for that purpose. It would, however, clearly extend the time, in a case where service is made within twenty days before judgment, and such will, probably, be held to be its operation.

The following may be referred to as decisions under section 204, before the amendment, and whilst the justification of bail remained the statutory criterion: *Barber* vs. *Hubbard*, 3 C. R., 169; *Wilmerding* vs. *Moon*, 1 Duer, 643; 8 How., 213 (in which it was held that where bail had never been given, such an application could be made, even after judgment); *Lewis* vs. *Truesdell*, 3 Sandf., 706; and *Barker* vs. *Dillon*, 1 C. R. (N. S.), 206; 9 L. O., 310. In the last two cases it was considered that a delay by the defendant in making this motion, until after his bail had become perfect, by expiration of the plaintiff's time to except, was equivalent to justification, and was a bar to the application, overruling the contrary view as held in *Barber* vs. *Hubbard*. See, however, *per contra*, *Cady* vs. *Edmonds*, 12 How., 197; and *Gaffney* vs. *Burton*, 12 How., 516. In *Dale* vs. *Radcliff*, 15 How., 71; 25 Barb., 333, a consent to accept bail, as tendered, was, in like manner, held equivalent to justification. See likewise, generally, *Overill* vs. *Durkee*, 2 Abb., 383, reported as *O'Niel* vs. *Durke*, 12 How., 94; *McKenzie* vs. *Hackstaff*, 2 E. D. Smith, 75.

The following decisions carry out the amendment in section 204, to the effect that a motion of this nature may now be made in all cases, at any time prior to the entry of judgment, and after bail has been perfected: *Warren* vs. *Wendell*, 13 Abb., 187; *Wicker* vs. *Harmon*, 21 How., 462; 12 Abb., 476.

The motion for this purpose must be made upon notice in the usual manner, or upon an order to show cause. If grounded on a positive defect in the papers on which the arrest was granted, no affidavits will, of course, be necessary. If, on the other hand, the application be grounded on facts extrinsic to the case as made by the plaintiff, the facts so adduced must, of course, be proved on affidavit in the usual manner, and copies of such affidavits must be served with the notice or order to show cause, in due course.

Since the amendment of 1858, motions for this purpose are entitled

to a preference, in all the districts, under section 401, subdivision 5. See heretofore, under the head of *Motions*.

Since the same amendment, it is clear that a motion of this nature is inadmissible after the entry of judgment. See the following cases: *Barker* vs. *Wheeler*, 23 How., 193; 14 Abb., 170; *Roberts* vs. *Carter*, 17 How., 479; 9 Abb., 106, note; *Crowell* vs. *Brown*, 17 How., 68; 9 Abb., 107, note; overruling *The Bridgewater Paint Manufacturing Company* vs. *Messmore*, 15 How., 12. See, however, recent amendment of section 183 (1862), as regards a motion of this nature, made within twenty days after service of the order upon the defendant.

A motion of this nature may, it seems, be made *ex parte*, to the judge who granted the order, but to no other. *Cayuga County Bank* vs. *Warfield*, 13 How., 439. Of course this mode of procedure can only be applicable to cases where the plaintiff's proceedings are manifestly defective. Where the matter admits of a contest, or where the application is made to another judge, it must, of course, be made upon notice or order to show cause, the usual period of notice being given. It must, in all the districts (except the first), be made at special term, and not at chambers. *Same case; Dunaher* vs. *Meyer*, 1 C. R., 87; and a county judge has no power to hear such a motion, even though it be to vacate his own order. *Rogers* vs. *McElhone*, 20 How., 441; 12 Abb., 292; *Lancaster* vs. *Boorman*, 20 How., 421.

Since the revision of 1858, a motion of this description lies for irregularity, in the event of the plaintiff's neglect to file the undertaking duly approved. See rule 6, above referred to. See also *Newell* vs. *Doran*, 21 How., 427.

Motions of this description fall under two general heads:

1. Motions by the defendant, on the ground of defect in the plaintiff's proceedings, grounded on those proceedings alone;

2. Motions on affidavits, denying the facts alleged by the plaintiff, or setting up new matter in defence, or by way of avoidance;

Which classes it is proposed to consider *seriatim*.

(*b.*) Motions on Plaintiff's Papers.

On an application of this description, the plaintiff cannot introduce additional evidence in support of the arrest—the remedy must stand or fall on the original papers. See *Peel* vs. *Elliott*, 16 How., 481 (482); *Adams* vs. *Mills*, 3 How., 219; *Martin* vs. *Vanderlip*, 3 How., 265; 1 C. R., 41.

Where the defendant moves in this form, the plaintiff's affidavit, being uncontradicted, is to be taken as true; it is, however, to be strictly construed against him. *Hathorn* vs. *Hall*, 4 Abb., 227. But if his statements establish a *primâ facie* case, such case, being uncontradicted, is ufficient, and the order should stand. *Moers* vs. *Morro*,

29 Barb., 361; 17 How., 280; 8 Abb., 257. See likewise *The Union Bank* vs. *Mott*, 17 How., 353; 9 Abb., 106, as to the effect of such an omission to contradict, even when the statements are based upon information and belief only.

A motion of this description should be made at once; and it has been held that it cannot properly be so after answer. *Vide Bedell* vs. *Sturta*, 1 Bosw., 634; 6 Abb., 319, note. See however *The Columbus Insurance Company* vs. *Force*, 8 How., 353. The obtaining of judgment will be a positive bar to it. *Wilmerding* vs. *Moon*, 1 Duer, 645; 8 How., 213.

A variance between the mode of statement in the plaintiff's complaint, and in his affidavits, would seem not to be a ground for vacating the order. *Steele* vs. *Palmer*, 7 Abb., 181. See also *Peel* vs. *Elliott*, 16 How., 485; 7 Abb., 433; 28 Barb., 200. Nor will an amendment of the summons have that effect. *Union Bank* vs. *Mott*, 6 Abb., 315.

Where, however, the plaintiff had, after arrest, served his complaint, including several causes of action, to some of which that remedy did not extend, it was held that the order should have been vacated. *Lambert* vs. *Snow*, 2 Hilt., 501; 17 How., 517; 9 Abb., 91; *McGovern* vs. *Payn*, 32 Barb., 83. A fatal defect in the complaint may also have the same effect. *Bell* vs. *Mali*, 11 How., 254; *Neville* vs. *Neville*, 22 How., 500. Or a variance, showing clearly that the ground of action is inconsistent with the ground of arrest. *Seymour* vs. *Van Curen*, 18 How., 94; *Wicker* vs. *Harmon*, 21 How., 462; 12 Abb., 476. *Harris* vs. *Cone*, 10 How., 259, tends to the same effect, but seems unsustainable, in view of the decision in *Corwin* vs. *Freeland*, and other analogous cases, hereafter referred to.

In *Sachs* vs. *Bertrand*, 22 How., 95; 12 Abb., 433, the order was vacated, on a deficiency of allegation in the plaintiff's affidavit, to make out the offence charged. See also as to an affidavit on mere hearsay, *Cook* vs. *Roach*, 21 How., 152.

An order of this nature will not be vacated on a merely technical objection, independent of the cause of arrest, and which may be remedied by amendment, such as that of a misjoinder of parties. *Webber* vs. *Moritz*, 11 Abb., 113.

A motion for the reduction of bail may be made on the plaintiff's own showing, where it is clearly excessive. *Baker* vs. *Swackhamer*, 5 How., 251; 3 C. R., 248. It was there considered that, where the defendant was a permanent resident, a less amount of bail would be required for his appearance, than in the case of a transient person.

(*c.*) Motion on Affidavits.

Motions of this nature may be again subdivided under two general heads.

1. Motions to vacate, when the ground of arrest constitutes, or tends to constitute, the plaintiff's cause of action.

2. Motions where the right of arrest arises out of collateral circumstances, not bearing directly upon the plaintiff's right to recover.

The distinction now established has given rise, in the course of that establishment, to considerable discussion.

It may be considered as settled that, in that class of actions which sound in tort, or where the fraud, or the circumstances by which the defendant becomes arrestable, form an integral part of the plaintiff's cause of action, and one of the issues to be tried in the cause, a bare denial of the plaintiff's allegations in this respect, will not, *per se*, form ground for the defendant's discharge. According to the old familiar rule, the court will not try the cause upon motion. See *Martin* vs. *Vanderlip*, 3 How., 265; 1 C. R., 41; *Adams* vs. *Mills*, 3 How., 219; *Geller* vs. *Seixas*, 4 Abb., 103; *Soloman* vs. *Waas*, 2 Hilt., 179; *Crittenden* vs. *Hubbell*, 6 Abb., 319, note; *Cousland* vs. *Davis*, 4 Bosw., 619; *Bedell* vs. *Sturta*, 1 Bosw., 634; 6 Abb., 319, note; *Barrett* vs. *Gracie*, 34 Barb., 20; *Anonymous*, 6 Abb., 319, note; *Noble* vs. *Prescott*, 4 E. D. Smith, 139. See also *The Republic of Mexico* vs. *Arrangois*, 5 Duer, 634; *Frost* vs. *McCarger*, 14 How., 131. The obtaining of judgment was, even before the amendment, a positive bar to a motion of this class. *Wilmerding* vs. *Moon*, 1 Duer, 645; 8 How., 213. The defendant is not, however, absolutely precluded from establishing, if he can do so, the existence of a complete defence; and, if he succeeds, the order may be vacated. See *Manley* vs. *Patterson*, 3 C. R., 89; *Barber* vs. *Hubbard*, 3 C. R., 156; affirmed, 3 C. R., 169. The burden of proof rests, however, in such case, upon the applicant. The court may assume to itself the power of weighing the evidence on both sides, to determine whether the order shall stand, even where the defendant's case rests upon a general denial. *Falconer* vs. *Elias*, 3 Sandf., 731; 1 C. R. (N. S.), 155. But, as a general rule, it will not do so, and if the applicant falls short of satisfying the court that such a defence exists, and will be certainly established on the trial, the application should not be granted. See *The Republic of Mexico* vs. *Arrangois*, *supra*, qualifying the doctrine laid down in *same case*, 11 How., 1; and so far overruling *Hernandez* vs. *Carnobeli*, 4 Duer, 642; 10 How., 433. See also *Frost* vs. *McCarger*, 14 How., 131; *Anonymous*, 6 Abb., 319, note; and a *primâ facie* case shown by the plaintiff, will be sufficient to sustain the order. *Gould* vs. *Sherman*, 10 Abb., 411.

On the other hand, in cases where the action sounds in contract, or where the arrestability of the defendant arises out of extrinsic facts, immaterial to the decision of the main issues of the case, the whole question is open on a motion of this description. In the event of a contest

of fact, the burden of sustaining the arrest will be upon the plaintiff, and, if he does not make out his case, the defendant is entitled to be discharged. The test will be, whether, upon the whole case, as made out on both sides, the court, if called upon to act on the application as *res nova*, would grant the order. *Republic of Mexico* vs. *Arrangois*, 5 Duer, 634; *Same case*, 11 How., 1; *Hernandez* vs. *Carnobeli*, 4 Duer, 642; 10 How., 433; *Chapin* vs. *Seeley*, 13 How., 490; *The Union Bank* vs. *Mott*, 6 Abb., 315; *Barron* vs. *Sanford*, 14 How., 443; 6 Abb., 320, note; *Claflin* vs. *Frank*, 8 Abb., 412; *Mecklin* vs. *Berry*, 23 How., 380; *Allen* vs. *McCrasson*, 32 Barb., 662. See likewise, *Corwin* vs. *Freeland*, 2 Seld., 560, and *Cheney* vs. *Garbutt*, 5 How., 467; 1 C. R. (N. S.), 166; *Falconer* vs. *Elias*, 3 Sandf., 731; 1 C. R. (N. S.), 155; and, even the obtaining of judgment was not, before the recent amendment, a bar to a motion of this description. *Wilmerding* vs. *Moon*, 1 Duer, 645; 8 How., 213. See also *Camp* vs. *Tibbets*, 2 E. D. Smith, 20; 3 C. R., 45.

A mere denial of the plaintiff's case will not, however, form ground for the defendant's discharge, even in cases of this description. There must be a preponderance of evidence, either by other witnesses, or by the statement of other matters to confirm that denial. *Phillips* vs. *Benedict*, 20 How., 265. And, in a doubtful state of circumstances, the defendant will not be discharged, where full explanations, rebutting the inferences to be drawn from the plaintiff's statements, are not given by him. *Wilmerding* vs. *Mooney*, 11 Abb., 283.

If an unfounded statement has been made by the plaintiff in his affidavit, the arrest will not stand. *Moore* vs. *Calvert*, 9 How., 474. See also as to his perjury, *Strong* vs. *Grannis*, 26 Barb., 122.

An arrest induced by fraudulent representations, will likewise be vacated. *Goupil* vs. *Simonson*, 3 Abb., 474.

A motion of this nature is the only proper remedy, where the action is one in which the defendant cannot be arrested. *Holbrook* vs. *Homer*, 1 C. R. (N. S.), 406; 6 How., 86.

The fact that the plaintiff has levied under an attachment in another state, is no ground for vacating an arrest in this. *Vide Lithaner* vs. *Turner*, 1 C. R. (N. S.), 210, and *Fowler* vs. *Brock*, there referred to.

The defendant cannot move to vacate, on the ground that special cause for requiring bail has not been shown, as under the former practice. The setting forth a sufficient cause of action is now enough. *Baker* vs. *Swackhamer*, 5 How., 251; 3 C. R., 248.

On a motion of this description the defendant cannot set up the defence of the statute of limitations, where he has omitted to raise it by his answer. *Arthurton* vs. *Dulley*, 20 How., 311.

A mere overstatement of the plaintiff's claim is not, *per se*, a ground

for the discharge or modification of the order. *Noble* vs. *Prescott*, 4 E. D. Smith, 139.

And the amount of bail fixed by one judge, should not be reduced by another, unless new facts are presented, bearing upon the question. *Union Bank* vs. *Mott*, 6 Abb., 315.

The fact that the defendant has already been arrested for the same cause, under the process of another court, is sufficient to entitle him to his discharge, or to have the plaintiff put to his election. *Hernandez* vs. *Carnobeli*, 4 Duer, 642; 10 How., 433. But, to have that effect, such prior process must be valid. *Schadle* vs. *Chase*, 16 How., 413. Nor is it sufficient that the defendant was arrestable, on proceedings instituted in a foreign country; it must be shown that he was actually arrested. *Arthurton* vs. *Dalley*. 20 How., 311.

As to the effect of a settlement between the parties, altering the nature of the plaintiff's claim, or the merger of that claim in a judgment obtained on contract, upon the plaintiff's right to an arrest, see heretofore, under section 82, and cases there cited. Where that right is destroyed or impaired, the defendant is, of course, entitled to his discharge.

In one case, an application in the nature of a motion to vacate the original arrest, may be made after judgment, and that is in the event of the plaintiff's neglecting to charge the defendant in execution. This remedy is specially provided by the Revised Statutes (2 R. S., 556, §§ 36, 37), and has not been abolished by the Code. *Wells* vs. *Jones*, 2 Abb., 20.

In an application by one non-resident against another, it seems the courts will hold the plaintiff to stricter practice, where the case presents any features calling for that course. *Hyer* vs. *Ayres*, 2 E. D. Smith, 211.

It has been held that an appeal from an order denying a motion of this description is to be discouraged, and that it should be affirmed, unless the appellant shows clearly that the necessary facts were not established. *Moers* vs. *Morro*, 29 Barb., 361; 17 How., 280; 8 Abb., 257.

And, where leave has been given to the applicant to renew his motion, and he avails himself of that leave, the appeal cannot be sustained. *Peel* vs. *Elliott*, 16 How., 483; *Noble* vs. *Prescott*, 4 E. D. Smith, 139.

(*d.*) Course on Hearing.

Under section 205, the plaintiff, where the defendant moves to vacate upon affidavits, is entitled to introduce supplementary proof in support of the order. Otherwise he cannot do so.

It has been held, on the analogous question of replevin, that, on a motion to set aside, the plaintiff may be allowed to amend his original

papers. See *Depew* vs. *Leal*, 2 Abb., 131; *Spalding* vs. *Spalding*, 3 How., 297. See also, as regards arrest, *Bell* vs. *Mali*, below cited.

A verified complaint may be used by the plaintiff to sustain the original order. *Brady* vs. *Bissell*, 1 Abb., 76; *Turner* vs. *Thompson*, 2 Abb., 444.

The counter affidavits, which the plaintiff is entitled to use on such a motion, must be such as meet or repel the case made in the defendant's proofs. The principles on this subject are the same as those under the former practice. *Martin* vs. *Vanderlip*, 3 How., 265; 1 C. R., 41.

It has been held that he cannot, on such affidavits, set up a ground for retaining the arrest, not put forth as an original ground of the order. *Cady* vs. *Edmonds*, 12 How., 197. In *Bell* vs. *Mali*, 11 How., 254, leave was, however, given to the plaintiffs to amend their complaints, which, as framed, were unsustainable, and to supply defects in their affidavits; the defendants to have the right to answer such new affidavits, and renew the motion for their discharge.

In *Ballard* vs. *Fuller*, 32 Barb., 68, and *Scott* vs. *Williams*, 14 Abb., 70, evidence of other concurrent frauds committed by the defendant, was allowed to be introduced as proof of his intent in committing the particular fraud charged. See generally *Hall* vs. *Naylor*, 18 N. Y., 588, there referred to.

On the hearing of a motion of this description, it is competent for the court, if it so think fit, to order a reference, and adjourn the decision of the motion till the coming in of the report. *Barron* vs. *Sanford*, 14 How., 443; 6 Abb., 320, note. But, to warrant such a proceeding, it has been held that the case should be very special, so as not to enable the judge himself to come to a satisfactory conclusion upon the facts as made out, without further investigation. *Steele* vs. *Palmer*, 7 Abb., 181.

On the granting of a motion of this description, it is competent and usual for the court to impose the condition, that no action shall be brought for false imprisonment, when it appears that the arrest was without malice and upon probable cause. *The Northern Railway Company of France* vs. *Carpentier*, 4 Abb., 47; *Alden* vs. *Sarson*, 4 Abb., 102; *Sachs* vs. *Bertrand*, 22 How., 95; 12 Abb., 433; *Edgerton* vs. *Ford*, 11 Abb., 415; *McGovern* vs. *Payn*, 32 Barb., 83 (92.)

A motion of this nature, if denied, cannot be renewed, on any state of facts, without leave of the court. *Lovell* vs. *Martin*, 21 How., 238. *Same case*, 12 Abb., 178.

The discharge of the defendant, if granted, is *res judicata*, and he cannot be rearrested, even although adjudged guilty of fraud at a trial, had upon his default to appear upon the call of the cause. *Steele* vs.

Palmer, 11 Abb., 62. See also, generally, *Enoch* vs. *Ernst*, 21 How., 96.

§ 86. *Bail by Defendant.*

Assuming that the defendant is satisfied that no grounds exist, by means of which the order of arrest can be vacated, or the amount of bail reduced, by means of a special application as above; or if his application has been made, and his discharge denied, two modes are open to him, by which his immediate release may be obtained.

1. By giving bail in the original or reduced amount fixed by the order.

2. By a deposit of the same amount in the hands of the sheriff.

These proceedings may be taken by him, under section 186, "at any time before execution." After judgment, the plaintiff's remedy ceases of course to be provisional, and becomes absolute, under the execution, if duly issued. See subsequent chapter on that subject.

(*a.*) Deposit.

This mode of procedure is of comparatively rare occurrence. It is regulated by sections 197 to 200 inclusive, as above cited.

The sum to be deposited, is the amount mentioned in the order. Of course, where the bail has been reduced, the reduced amount only need be paid to the sheriff. On payment, that officer gives the defendant a certificate, whereon he is entitled to his discharge.

Within four days, the amount must be paid by the sheriff into court, two certificates being taken by him, one of which he delivers to each party.

The defendant may obtain a return of the amount, on giving and justifying bail, at any time before judgment.

But, on judgment being given, the money is to be applied under the direction of the court. If in favor of the plaintiff, he is entitled to satisfaction out of the fund. The defendant then receives the surplus; or, if judgment be in his favor, the whole fund is returned to him.

Money so deposited becomes, after the giving of bail, the property of the defendant, and is, as such, liable to attachment in the hands of the sheriff, before actual return. *Salter* vs. *Weiner*, 6 Abb., 191.

(*b.*) Bail, Nature of.

The nature of the bail to be given, is prescribed by section 187.

The undertaking must be written.

It must be executed by two or more sufficient sureties.

It must state their places of residence and occupations.

Unless the arrest is made under the third subdivision of section 179, it must be to the effect that "the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein."

If the arrest is made under the third subdivision, the undertaking must then be similar to that prescribed by section 211, to be given on the return of the property in replevin. It must be to the effect that the sureties "are bound, in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant."

The wording of this part of section 187 is obscure, and leaves it somewhat uncertain whether it was the meaning of the legislature that the undertaking in this case should contain the requisites of section 211, in addition to, or in substitution for those of section 187. Until the section be corrected, or its exact construction be settled, it may possibly be the safest course to combine both in the form adopted.

As to the stringency and effect of this peculiar form of security, see *Van Neste* vs. *Conover*, 8 Barb., 509; 5 How, 148. Unless the case is clearly brought within the terms of the subdivision, the court will not enforce it, but will only require the more ordinary security. *Pike* vs. *Lent*, 4 Sandf., 650; *Mulvey* vs. *Davison*, 8 How, 111.

(*c.*) Bail, Qualifications of.

The qualifications of parties proposed as bail are declared by section 194, as follows:

Each must be a resident, and householder or freeholder within the state.

Each must be worth the amount specified in the order of arrest, exclusive of property exempt from execution; or more than two may be allowed to justify severally, in lesser amounts, if the whole justification be equivalent to two sufficient bail.

The above specific qualifications, now rendered imperative, do not, however, affect the question of disqualification on other grounds, when applicable. The old common law doctrines in this respect are unaffected by the Code. An attorney, therefore, or his clerk, remains disqualified, although he may otherwise satisfy all the conditions imposed by section 194. *Miles* vs. *Clark*, 2 Bosw., 709; affirmed, 4 Bosw., 632; *Wheeler* vs. *Wilcox*, 7 Abb., 73; see also *Ryckman* vs. *Coleman*, 13 Abb., 398. So also as to officers of the court—persons temporarily or permanently privileged—persons indemnified by the defendant's attorney—persons manifestly unworthy of trust, &c., &c.

(*d.*) UNDERTAKING, ITS INCIDENTS AND FORM.

The sheriff, on taking bail, is confined to and must strictly pursue the authority conferred by the statute. It seems, however, that if the plaintiff personally discharge the debtor from arrest, he may take any security he pleases. *Vide Decker* vs. *Judson*, 16 N. Y., 439 (442). It has been held that, where proceedings are taken in a court of limited jurisdiction, the sureties ought to be resident within the district embraced in its powers. See *Herrick* vs. *Taylor*, 1 C. R. (N. S.), 382, note. This conclusion seems, however, doubtful.

The undertaking, and the affidavits of justification by the sureties, must be in strict conformity with the wording of the statute. See sections 187, 194. The place of residence and occupation of the sureties must be stated—section 187. The undertaking itself must, under rule 6, be proved or acknowledged by the latter as a deed of real estate, before it can be received or filed. It must, of course, be signed, and the affidavits sworn to by all of them; when perfected, it must be delivered to the sheriff, who is bound to receive the bail, if sufficient, and to release the defendant thereupon; though of course it is competent for him to refuse an undertaking, deficient in any respect, either as regards the sureties, or the form of the document itself. The sheriff must then, "within the time limited by the order, deliver the order of arrest to the plaintiff or attorney by whom it is subscribed, with his return indorsed, and a certified copy of the undertaking of the bail." See section 192. The original remains with him for the present—subject of course to the direction of the court. On justification, however, in the event of the sureties being excepted to, it passes out of his possession into that of the clerk, as below shown.

§ 87. *Exception and Justification.*

(*a.*) EXCEPTION.

If the plaintiff is not satisfied with the bail taken by the sheriff, his course is to serve upon the latter a notice that he does not accept it. This must be done within ten days after the receipt by him of the sheriff's return, and of a certified copy undertaking, as prescribed by section 192.

The omission so to except, is an acceptance of the bail, and exonerates the sheriff from liability. It is, also, a waiver of all technical objections to the capacity of the sureties. See *Miles* vs. *Clarke*, 4 Bosw., 632; affirming *same case*, 2 Bosw., 709.

(*b.*) Notice of Justification.

On receipt of notice of exception, the sheriff or the defendant may, within ten days thereafter, give to the plaintiff or his attorney, notice of justification of the same or of substituted bail (specifying, in that case, the places of residence and occupations of the latter), before a judge of the court or a county judge, at a specified time and place, the time to be not less than five, nor more than ten days thereafter. In case other bail be given, there must be a new undertaking executed—section 194.

Rule 5 (83) prescribes that, in such case, the bail shall justify in the county where the defendant shall have been arrested, or where such bail reside. This must, of course, be attended to in the specification of place.

The period for justification by the sureties, may be extended beyond the limit prescribed in the notice, on good cause shown; an order must, however, be duly obtained, and a fresh notice given. *Burns* vs. *Robbins*, 1 C. R., 62.

A stipulation between the attorneys, if entered into in due form, will, of course, have the same effect.

(*c.*) Justification.

Whenever due notice of justification has been given, the plaintiff is bound to attend, at the time and place specified, or, as of course, the bail will stand perfected, and the sheriff discharged. By not attending, he wholly waives the benefit of his exception, and this will equally be the case though the sureties themselves may fail to attend. *Vide Ballard* vs. *Ballard*, 18 N. Y., 491.

If, on the contrary, the notice be given for a wrong county, it will be a nullity, and the sheriff will not be discharged, unless the plaintiff waive the objection, by appearing on the examination, or otherwise by direct acquiescence in the proceeding.

On a technical failure of the sureties to attend, at the time and place appointed, a re-justification was ordered, on an undertaking on appeal, in *Hees* vs. *Snell*, 8 How., 185.

The mode of procedure, on justification, is prescribed by section 195. Each of the bail must attend before the judge or justice, at the time and place specified. Each may be examined on oath by the plaintiff touching his sufficiency, in such manner as the judge or justice may prescribe. As to the evident mistake in this and the analogous sections, on the amendment of 1851, and the evident power of the county judge, in lieu of a justice of the peace, in this matter, see note to the above section, as cited in section 80, *supra*.

On a failure on the part of the sureties to attend, the plaintiff should

obtain from the judge or officer a certificate of that fact, in order to the establishment of the sheriff's liability, if necessary. When he has regularly attended, and the adverse party has failed to be present, it seems that the latter result must necessarily follow. In *Hees* vs. *Snell*, *supra*, the sureties, on appeal, attended and justified at a later hour; and this proceeding was treated as irregular, and a re-justification ordered. On arrest, a stricter rule would probably be enforced, and the proceeding held void, though possibly the time to justify might be extended, on sufficient cause shown.

When, on the contrary, the sureties attend, the examination regularly proceeds. It must be reduced to writing, and must also be subscribed by the bail, if required by the plaintiff.

Both of the sureties must be examined, and must answer all reasonable questions as to their sufficiency, within the discretion of the presiding officer. A failure to answer, when required, will of course involve a failure of the justification. If either surety fail to justify, the proceedings will be incomplete, and the sheriff will not be discharged.

It is competent, however, for the judge or justice to allow others to be substituted for the defaulting surety or sureties, and leave should be applied for at the time, to do so, and to give fresh notice.

In this case, such substituted sureties must attend and submit to a similar examination. A new undertaking must be executed. Section 193.

On the substituted justification, it is also competent for the judge to allow more than two bail in the whole to justify, in amounts less than that expressed in the order. Section 194.

But, in any case where more than two justify, whether on the original or on a substituted justification, the whole justification must be equal to that of two sufficient bail. If not, the proceeding will be irregular. *Vide Graham* vs. *Wells*, 18 How., 376.

In the event of the bail failing to justify, they are liable to the sheriff, for all damages which he may sustain by reason of such omission. The giving or justification of substituted bail, will, however, discharge the original sureties. See section 203.

When the examination has been had, and the justification proves insufficient, a certificate of the fact should be obtained by the defendant from the presiding officer, as suggested before, in the case of a default to attend.

Where, on the contrary, the bail on justification is found sufficient, the duty of the presiding officer is prescribed by section 194. He is to annex the examination to the undertaking, and cause both to be filed with the clerk. The attorney for the defendant will, as a general rule, be the proper party to see that this is done. It more imme-

diately however concerns the sheriff, as, until the proceeding is complete, he will not be exonerated from liability. Its completion discharges him. See same section.

The undertaking then passes out of the possession of the sheriff into that of the clerk, in whose custody it thenceforth remains, subject to the directions of the court. The proper clerk is the clerk of the county in which the action is triable, either originally or by change of venue. Code, § 466. In a court of special jurisdiction, the clerk of that court is, of course, the proper depositary.

In the event of a failure on the part of the plaintiff to except, and the consequent acceptance by him of the bail, involving a similar exoneration of the sheriff from liability, the undertaking still remains in the custody of that officer. No provision is made, enabling him to file it, in such case, with the clerk. It seems, however, to be rather contemplated by section 188.

The justification or acceptance of bail, when complete, cannot be reopened, on the ground of the subsequent insolvency of the sureties. The discharge of the sheriff is absolute. See analogous decisions, in *Willett* vs. *Stringer*, 6 Duer, 686; 15 How., 310; *Dudley* vs. *Goodrich*, 16 How., 189.

§ 88. *Surrender by Bail.*

At any time before a failure to comply with their undertaking, it is competent for the bail to surrender the defendant, or for him to surrender himself in their exoneration.

The practice, in this respect, is analogous to that prior to the Code, under 2 R. S., part III., chap. VI., article III., §§ 380 to 383, inclusive.

The present mode of procedure is prescribed by sections 188 and 189.

Under subdivision 1 of the former section, a certified copy of the undertaking shall be delivered to the sheriff. That officer is then to detain the defendant thereon, as upon an order of arrest. He is, thereupon, by a certificate in writing, to acknowledge the surrender.

Under section 189, the bail, at any time or place, before they are finally charged, may themselves arrest the defendant; or, by a written authority, indorsed on a certified copy of the undertaking, they may empower any person of suitable age and discretion to do so.

On such arrest by any person other than the sheriff, the defendant must, of course, be delivered over into the custody of that officer, and his certificate of surrender obtained with all practicable dispatch.

When the defendant is within the county, the more usual mode will, of course, be to deputize the sheriff himself, or one of his officers. When the party to be arrested is out of its limits, the bail must act themselves, or appoint a special agent.

In re Taylor, 7 How., 212, it was considered by Humphrey, county judge, that it was competent for any one or more of several bail, to give the authority above provided for, without the concurrence of all concerned; and also, that though they had failed to justify, the bail in that case were competent to surrender their principal, and authorized to take all necessary steps for that purpose.

The period within which this authority may be exercised by the bail, is fixed by section 191. They are allowed twenty days for that purpose, from the commencement of an action against them, or within such further time as may be allowed by the court. The right of action does not, of course, accrue, until a judgment has been obtained against their principal, and an execution against his property issued and returned unsatisfied.

When, however, the twenty days have once expired, and the time for surrender has not within that period been extended, it is no longer legally competent for the bail to surrender their principal, or for the sheriff to hold him. *Baker* vs. *Curtis*, 10 Abb., 279.

It is, however, competent for the court to relieve the sureties in such a case, and to allow of a subsequent surrender, on payment of the costs of the action, under the general authority conferred by section 172. *Gilbert* vs. *Bulkley*, 1 Duer, 668. But such relief is discretionary, and will not be granted, where connivance or *laches* exist on the part of the sureties, *vide Baker* vs. *Curtis*, *supra*. In *Bank of Geneva* vs. *Reynolds*, 20 How., 18; 12 Abb., 81, it was considered that, where bail apply for leave to make a surrender after the expiration of the legal period, they should be required to disprove the fact of being indemnified by their principal, and that, if such be the case, their application should be denied. The discretion of the court in this respect was accordingly held to have been improvidently exercised, but, as it could not be reviewed upon appeal, a rehearing at special term was directed. See long note upon the subject of the discharge or exoneration of bail, at 12 Abb., 81.

§ 89. *Exoneration of Bail.*

The cases in which the bail may be exonerated are prescribed by section 191. They are as follows:

1. By the death of the defendant.
2. By his imprisonment in a state prison.
3. By his legal discharge from the obligation to render himself amenable to the process.
4. By his surrender to the sheriff of the county where he was arrested, in execution of such process, within the time limited, as stated in the

last section. See generally, as to the exoneration of bail, *Bank of Geneva* vs. *Reynolds*, 20 How., 18; 12 Abb., 81, and note, at latter reference.

As to the right of the bail to move for a discharge, on the ground of the death of their principal, and as to their power to obtain such relief, on facts from which the presumption of that death may legally be drawn, see *Merritt* vs. *Thompson*, 1 Hilt., 550; as to the period at which they can claim exoneration in such case, even after action brought against them, see *Hayes* vs. *Carrington*, 21 How., 142; 12 Abb., 179.

The expression, "imprisonment in a state prison," will, probably, not be confined to a prison in this state, but receive construction, with reference to section 4 of chapter 231, of 1845, which prescribes that, whenever a bail-bond shall have been taken, on the arrest of a party in a suit at law, or in equity, and such "party shall be subsequently imprisoned, either in this state, or in any other state or territory of the United States, or in Canada, or elsewhere, on a criminal charge," the court in which the suit is pending, shall have power, upon due notice to the opposite party, "to make such reasonable order for the relief of such bail, as they may see fit to grant."

In the *Union Bank* vs. *Mott*, 19 How., 114; 10 Abb., 372, on a motion by the plaintiff for leave to amend during the trial, the original bail were discharged, the amount required having been excessive, and the propriety of the original arrest doubtful, on the facts as then shown; but without prejudice to a new application for arrest, under the amended complaint.

(*a.*) Exoneretur.

In the event of surrender, the course to be pursued by the bail to obtain an exoneration, is substantially the same as under the former practice, and is specially prescribed by subdivision two of section 188.

Notice of eight days must be given to the plaintiff.

A certified copy of the undertaking, and of the sheriff's certificate of surrender, under subdivision one of the same section, must be produced.

A copy of that certificate must be served upon the plaintiff, with the notice.

Application must then, on the expiration of the notice, be made to a judge of the court, or county judge.

It is of course competent for the plaintiff, if he can show cause, to oppose the motion; as for instance, where the application is not made in due time, within the limitation imposed by section 191.

Where, however, the applicant has been regular in his practice, and the defendant duly surrendered, the order will be nearly as of course. On a motion of this description, it is not competent for the bail to ques-

tion the legality of the original arrest; their undertaking estops them. *Vide Barker* vs. *Russell*, 11 Barb., 303; 1 C. R. (N. S.), 57, reversing *same case*, 1 C. R. (N. S.), 5; *Gregory* vs. *Levy*, 12 Barb., 610; 7 How., 37; *Holbrook* vs. *Homer*, 6 How., 86; 1 C. R. (N. S.), 406.

The arrest of the defendant under execution against his person, on final judgment in the same action, is, of course, *per se*, an exoneration of the bail, without the necessity of any special order for that purpose, and their undertaking is then performed.

But this observation is not applicable to, nor does the subdivision now in question, comprise an undertaking on arrest, under subdivision three of section 179. In that case, the sureties still remain responsible for the value of the property in respect of which the arrest is made, and generally, for the payment of any judgment recovered by the plaintiff against the defendant. Nothing but full satisfaction and payment of that judgment, will, in this case, avail to discharge their liability. See section 179, subdivision three, sections 187 and 188, subdivision two.

The award of judgment in favor of their principal, is of course a discharge of the liability of bail, whilst that judgment subsists; but if, upon appeal, it be reversed, or if it be set aside, with liberty to the plaintiff to proceed in the action, their liability revives. *Van Gerard* vs. *Lighte*, 13 Abb., 101. As to the necessity of an application for an *exoneretur* being made, in order to set in motion the time, within which the plaintiff is bound to charge the defendant in execution, see *Hills* vs. *Lewis*, 13 Abb., 101, note.

§ 90. *Sheriff's Liability.*

This liability is provided for by section 201.

The sheriff himself is liable as bail in the following cases:

1. If, after being arrested, the defendant escape or be rescued.
2. If bail be not given; or, if given, it be not justified.
3. Or, if a deposit be not made in lieu thereof.

He may, however, at any time, before process issued against the person of the defendant to enforce an order or judgment in the action, discharge himself from such liability, by the giving and justification of bail, in the ordinary manner, as provided in sections 193 to 196 inclusive.

In the event of any judgment being recovered against him on this liability, and remaining unsatisfied on execution, recourse may be had for any deficiency, against his sureties on his official bond, as in other cases of delinquency.

In assuming these liabilities he is, however, entitled to the same privileges as ordinary bail. He may arrest and surrender the defend-

ant in the same manner and within the same period. No special process is necessary to enable him to make that arrest, and if, at any time, within the prescribed limit, he can, by any lawful means, obtain the custody of the defendant's person, so that he can be held in execution, his liability will be discharged. *Buckman* vs. *Carnley*, 9 How., 180; *Sartos* vs. *Merceques*, 9 How., 188; *Daguerre* vs. *Orser*, 3 Abb., 86; *McGregory* vs. *Willett*, 17 How., 439; *Seaver* vs. *Genner*, 10 Abb., 256; *Daguerre* vs. *Orser*, 10 Abb., 12, note.

In relation to the liability of the sheriff in such cases, being identical with that of bail, who have failed to surrender their principal, see *Gallarati* vs. *Orser*, 4 Bosw., 94; *Metcalf* vs. *Stryker*, 31 Barb., 62; 10 Abb., 12; *McCreery* vs. *Willett*, 22 How., 91.

Of course these provisions and decisions in no wise effect the subsequent liability of the sheriff for an escape or rescue of the defendant, after he has been charged in execution against his person, which arises under different conditions, and is governed by different rules. As to the nature of his liability, on an escape after execution, *vide Metcalf* vs. *Stryker*, *supra*.

§ 91. *Remedies against Bail.*

This remedy is now by action only. Section 180.

In order to commence this action it does not appear to be necessary that the undertaking should be previously delivered out of Court to the plaintiff. There seems, on the contrary, a manifest impropriety in doing so. It should remain in the original custody, in order that, on application of the bail, a certified copy may be obtainable, to enable them to procure the surrender of the defendant, under sections 188 and 189. A copy, or even an examination of the document, is all that is necessary to enable the plaintiff to commence and proceed with his action, and its production upon the trial may be obtained in the usual manner.

The proceedings in such an action, when brought, are the same as in other cases, and therefore fall under their appropriate heads, in the other portions of this work.

§ 92. *Discharge from Arrest.*

The provisional arrest, under the powers of this chapter, will become merged in a subsequent imprisonment of the defendant, when finally charged on execution against the person. The entry of judgment in his favor, of course, entitles him to his immediate release, if actually imprisoned at the time, unless provision to the contrary be made by the court, before such entry.

In the mean time, between the entry of judgment in favor of the plaintiff, and the return of an execution against the defendant's property unsatisfied, which, under section 288, must necessarily precede the issuing of one against his person, the vitality of the original arrest continues unimpaired, and the defendant, if then in custody, will remain charged under it, with deprivation, from the entry of that judgment, of the power he previously possessed of moving to vacate the order or to reduce the amount of bail—section 204. In the event of any vexatious delay on the part of the plaintiff, to charge the defendant in execution, after the time for doing so has arrived, the latter has his remedy by motion for a *supersedeas*. See this subject hereafter considered, under the head of *Execution against the Person*. *Vide Wells* vs. *Jones*, 2 Abb., 20; *Hill* vs. *Lewis*, 13 Abb., 101, note, *supra*.

(*a*.) Discharge by Operation of Law, or otherwise.

It remains to consider the cases in which a defendant may be discharged from arrest, under special circumstances, or by operation of law.

Insanity, either at or subsequent to the arrest, forms no ground for an unconditional discharge. The only manner in which a defendant can be removed from the legal custody, is under the act in relation to lunatic asylums, passed on the 7th of April, 1842, and that, during his insanity only. *Bush* vs. *Pettibone*, 4 Comst., 300; 1 C. R. (N. S.), 264.

A defendant will be released from imprisonment, by operation of law, on his discharge as an insolvent, under the provisions of title I., chapter V., part II., of the Revised Statutes, particularly of articles 3, 4, 5, 6, and 7 of that title. See 2 R. S., pp. 1 to 52. The proceedings in relation to a discharge of this nature are in no wise affected by the Code.

CHAPTER II.

REPLEVIN.

§ 93. *Statutory and other Provisions.*

This remedy, closely analogous to the former practice in like cases, forms the subject of chapter II., title VII., part II. of the Code.

That chapter runs as follows:

Chapter II.

Claim and Delivery of Personal Property.

§ 206. (181.) The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as provided in this chapter.

Dates from 1849. In the original Code the remedy was only obtainable "at the time of commencing the action."

§ 207. (182.) Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing,

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief.

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property.

§ 208. (183.) The plaintiff may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff.

§ 209. (184.) Upon the receipt of the affidavit and notice, with a written undertaking, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound, in double the value of the property as stated in the affidavit, for the prosecution of the action; for the return of the property to the defendant, if return thereof be adjudged; and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff; the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken, or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Dates, as it stands, from 1849. In 1848 notice of justification of the sureties was also to be served.

§ 210. (185.) The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to

the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify, on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

Dates from 1849. Substituted for section 185 of 1848, which was shorter and less specific.

§ 211. (186.) At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound, in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged; and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required, within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216.

Dates, as it stands, from 1849. In 1848 the defendant's right to a return, on giving the security, was absolute, without any provision for a right of exception on the part of the plaintiff.

§ 212. (187.) The defendant's sureties, upon a notice to the plaintiff of not less than two, nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived; and may retain the property until that time; but, if they, or others in their place, fail to justify, at the time and place appointed, he shall deliver the property to the plaintiff.

Dates, as it stands, from 1849. Less comprehensive in 1848.

§ 213. (188.) The qualifications of sureties, and their justification, shall be as are prescribed by sections 194 and 195, in respect to bail upon an order of arrest.

§ 214. (189.) If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

§ 215. (190.) When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

§ 216. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title

thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and, notwithstanding such claim, when so made, he may retain the property a reasonable time, to demand such indemnity.

This and the next section were not in the original Code, but were first inserted, as they now stand, on the amendment of 1849.

§ 217. The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

By section 423, special provision is made as to the undertakings provided for by this chapter. Instead of being filed with the clerk, as in all other cases, it is expressly directed that all such undertakings "shall, after the justification of the sureties, be delivered by the sheriff to the parties, respectively, for whose benefit they are taken."

§ 94. *General Remarks.—Right to Remedy.*

The provisions of the Code, in this respect, are in substitution for the provisional relief obtainable in an action of replevin, under the old practice. *Vide* 2 R. S., part III., chapter VIII., title XII.; 2 R. S., 522 to 534, inclusive.

The subject now immediately under consideration, being simply the provisional remedy obtainable in an action of this description, and not the proceedings in the action itself, it is not proposed to enter, for the present, on any lengthened consideration of the rights of parties in this respect, or the mode in which those rights are ultimately enforced. These will be considered hereafter, under their proper heads.

The citation of a few decisions bearing upon such rights in general, and the cases in which it is or is not obtainable by a party seeking it, may not, however, be inappropriate on the present occasion.

To obtain the remedy in question, the party seeking it must show an absolute title to goods, of which he seeks to obtain the possession, or an absolute special property in them, and also an immediate and undivided right to that possession. A lessor of chattels cannot, therefore, maintain replevin for them, during the existence of his lessee's term. The remedy is in the latter. *Bruce* vs. *Westervelt*, 2 E. D. Smith, 440.

Nor can one partner maintain it against another. *Azel* vs. *Betz*, 2 E. D. Smith, 188; *Koningsburg* vs. *Launitz*, 1 E. D. Smith, 215. Nor will such an action lie, at the suit of one tenant in common of chattels, against another, or the bailee of that other. *Russell* vs. *Allen*, 3 Kern., 173.

The plaintiff's right must be clear, and void of impeachment. A gambling apparatus, seized by and in custody of the police, was accordingly held not to be repleviable. *Willis* vs. *Warren*, 1 Hilt., 590; 17 How., 100.

A mere equitable lien cannot be so enforced, the action being strictly a possessory action. *Otis* vs. *Sill*, 8 Barb., 102. To maintain replevin for property, in respect of which a lien is claimed, the plaintiff must be entitled, not merely to a charge upon, but to the possession of, that property. *McCurdy* vs. *Brown*, 1 Duer, 101.

The plaintiff in such cases has, as a general rule, an election, whether he will sue in replevin or trover. To entitle him to the remedy considered in the present chapter, he must adopt the former mode of procedure. The action must be strictly possessory. If he sues for a conversion, and asks judgment for the value, and not for the return of the goods, proceedings under the present chapter will be void. *Spalding* vs. *Spalding*, 3 How., 297; 1 C. R., 64; *Dows* vs. *Green*, 3 How., 377; *Seymour* vs. *Van Curen*, 18 How., 94. See also *Maxwell* vs. *Farnam*, 7 How., 236.

The plaintiff must, in like manner, elect between the present remedy, and that of arrest, for the wrongful taking of property. If he avail himself of the latter, he cannot subsequently maintain the former. See last chapter, section 82, subdivision 3, and case of *Chappel* vs. *Skinner*, 6 How., 338, there cited.

Where the defendant has *bonâ fide* parted with the possession of the property claimed, before suit brought, replevin is not maintainable; but where, on the contrary, he has so parted with it, with a fraudulent intent, this form of procedure may be adopted. See last chapter, section 82, subdivision 3, and cases of *Brockway* vs. *Burnap*; *Van Neste* vs. *Conover*; *Savage* vs. *Perkins*, and *Drake* vs. *Wakefield*, there cited. See also *Nichols* vs. *Michael*, 23 N. Y., 264.

Replevin will lie against goods in the hands of an actual purchaser, after delivery, where he has obtained that delivery by means of fraudulent representations. *Hunter* vs. *The Hudson River Iron and Machine Company*, 20 Barb., 493; *Van Neste* vs. *Conover*, 20 Barb., 547; or, where such purchaser has not fully complied with the conditions under which the delivery was made. *Kidd* vs. *Belden*, 19 Barb., 266.

And a fraudulent vendee of goods, and his assignee for creditors, are

liable to be jointly sued for their possession. *Nichols* vs. *Michael*, 23 N. Y., 264.

Where the defendant's possession is fraudulent, no previous demand will be necessary, before commencing the action. *Hunter* vs. *The Hudson River Iron and Machine Company*, *supra*; *Pringle* vs. *Phillips*, 5 Sandf., 157. But, where the defendant is an innocent holder, or has come into possession of the property as assignee, or bailee of the original wrongdoer, demand must be made, unless he can be charged with fraud or complicity in the transaction. *Fuller* vs. *Lewis*, 13 How., 219; 3 Abb., 383.

The obtaining, or not obtaining, of the provisional remedy, has no bearing upon the plaintiff's right to maintain the action. He may, if he chooses, dispense with his privilege in this respect. *Vogel* vs. *Badcock*, 1 Abb., 176.

§ 95. *Provisional Remedy, how obtained.*

(*a.*) Time of Obtaining.

This, under section 206, is at the time of issuing the summons, or at any time before answer. The remedy is therefore only obtainable at the outset of the action, and, if delayed until after the service of the complaint, may be frustrated by an answer being put in.

The usual and obvious course is, therefore, to draw the papers and obtain the remedy, at the very outset of the action, concurrently with the issuing of the summons.

In justices' courts, it will be seen above that the right is still further restricted, and is only exercisable at the time of issuing the summons, and not afterwards.

(*b.*) Affidavit.

The first step to be taken is the affidavit required by section 207.

The preparation of this document must be carefully attended to, as, the proceeding being statutory in its nature, every requisite prescribed must be strictly complied with.

It may be made either by the plaintiff himself, or by some one on his behalf.

It must show as follows:

1. That the plaintiff is owner of the property claimed, or that he is lawfully entitled to the possession of it, by virtue of a special property therein.

If he is entitled by virtue of such a special property, the facts in respect to that special property must be set forth.

A particular description of the property must be given.

Where the plaintiff claims the property as owner, a bare allegation to that effect, in the words of the statute, is sufficient. The facts as to his right need only be set forth, when he claims, in the words of the section, "a special property therein." *Burns* vs. *Robbins*, 1 C. R., 62; *Vandenburgh* vs. *Van Valkenburgh*, 8 Barb., 217.

Where, on the contrary, such a special property is claimed, the facts out of which it arises must be set out. This must be done concisely, but with sufficient fullness to make the fact clearly appear; and, where the evidence of the facts relied on rests in a writing, that writing should be set out, as the basis of the conclusion that such special property exists. *Depew* vs. *Leal*, 2 Abb., 131.

The affidavit must further show—

2. That the property is wrongfully detained by the defendant; and,

3. The alleged cause of detention thereof, according to the deponent's best knowledge, information, and belief.

The allegation of detention may be made in the words of the statute; the cause of detention should, of course, be set forth with sufficient fullness to make it clearly appear.

The affidavit must further show, in the next place,

4. That the property in question has not been taken for a tax, assessment, or fine, pursuant to a statute; or been seized under an execution or attachment against the property of the plaintiff; or, if so seized, then that it is, by statute, exempt from such seizure.

As to the first two branches of this sentence, a negation in the wording of the statute will, of course, be sufficient. But, if the property be claimed as exempt from seizure, the facts showing that exemption must clearly appear. In *Spalding* vs. *Spalding*, 3 How., 297; 1 C. R., 64, it was considered necessary that a detailed statement of facts should be given for that purpose. In *Roberts* vs. *Willard*, 1 C. R., 100, this view is overruled, and it was held that a positive statement of the fact on the advice of counsel, or even a positive allegation, if made unqualifiedly, might be sufficient. It is clear that the better course will be to state the facts in all cases, with sufficient detail to show that the conclusion of law as to exemption is based upon adequate grounds, and not upon the mere *ipse dixit* of the party.

In a case of this nature, where a portion only of property of the same description falls within the right of exemption, the debtor must make his election, and claim the specific portion, so as to give the officer an opportunity to return it, or he cannot maintain replevin. *Seaman* vs. *Luce*, 23 Barb., 240.

If property be wrongly taken under an execution or attachment, it will be no justification, and replevin will still be maintainable in respect of it, by the real owner. *Marsh* vs. *Backus*, 16 Barb., 483; *Cross* vs.

Phelps, 16 Barb., 502; *Kuhlmann* vs. *Orser*, 5 Duer, 242. The sheriff, in taking the goods of a wrong person, takes them at his peril, and replevin may often be the proper form to raise a question as to a disputed execution, or an illegal, though actual levy. For property rightly taken under an attachment, or otherwise duly in the custody of the law, replevin, of course, will not lie. *Keyser* vs. *Waterbury*, 3 C. R., 233.

The affidavit must lastly show,

5. The actual value of the property. This should, of course, be given correctly, according to the best estimate that can be made.

Some value must in all cases be stated. It may, however, be arbitrary, and have reference to extrinsic circumstances. Thus, replevin has been held maintainable for a warehouse entry, though bearing no actual value on its face. *Knehue* vs. *Williams*, 1 Duer, 597; 11 L. O., 187.

It seems that an affidavit of this description will be irregular, if sworn to before the plaintiff's attorney. *Anonymous*, 4 How., 290.

(*b.*) 1. REQUISITION TO SHERIFF.

The affidavit being prepared and sworn to, a requisition to the sheriff is then indorsed upon it, as prescribed by section 208.

Although not expressly stated, there can be no doubt that the signature of the plaintiff's attorney will be sufficient, where that of the plaintiff himself cannot be obtained.

(*c.*) UNDERTAKING.

But, before the sheriff can be called upon to act, an undertaking must be tendered to him, as prescribed by section 209.

That undertaking must be executed by one or more sufficient sureties.

Those sureties must be approved by the sheriff.

They must, by the undertaking, be bound in double the value of the property, as stated in the plaintiff's affidavit, for the prosecution of the action; for the return of the property to the defendant, if that return be adjudged; and for the payment to the latter of such sum as may, for any cause, be recovered by him against the plaintiff.

This undertaking is subject to the same general conditions as those in other cases. The sureties must subjoin the usual affidavit of justification, and it must be duly proved and acknowledged, as required by rule 6. See also *Anon.*, 4 How., 290.

The sheriff must indorse his approval in writing, on the undertaking. *Burns* vs. *Robbins*, 1 C. R., 62.

By the same case, the following points are also decided: 1. That a party to a suit cannot be properly taken by the sheriff as a surety; 2. That, if the name of a party has been inserted jointly with that of

another, the sheriff may erase the former, provided he approves of the undertaking with one surety only; 3. That if he originally intended to require two, then he may require another name to be inserted in the place of that of the party, before he approves; but, 4. That no change can be so made in the undertaking, unless the original surety assents to it.

Once given, the undertaking cannot be afterward altered by the substitution of another surety, on the failure of one of those originally named to justify, without the consent of all parties, and of the other surety. A new undertaking should be executed under such circumstances. *Cobb* vs. *Lackey*, 6 Duer, 649. See, however, as to the liability of a substituted surety, executing a bond so altered, *Decker* vs. *Judson*, 16 N. Y., 439.

The sureties on such an undertaking are liable for all costs awarded to the defendant, including the costs of an appeal. *Tibbles* vs. *O'Connor*, 28 Barb., 538.

It has been held, accordingly, that after giving an undertaking of this nature, the plaintiff cannot afterward be called upon to give the ordinary security for costs, in a case where it might otherwise be required. *Wisconsin Marine and Fire Insurance Company Bank* vs. *Hobbs*, 22 How., 494. The contrary conclusion is, however, maintained, and the defendant held to be entitled to the usual security for costs, though an undertaking in replevin had been given, in *Boucher* vs. *Pia*, 14 Abb., 1.

An undertaking, duly given, stands in the place of, and effects a change in, the title to the property. *Austin* vs. *Chapman*, 11 L. O., 103.

(*d.*) Sheriff's Course of Proceeding.

On lodgment with the sheriff of the affidavit, notice, and undertaking, as above, and, on approval by him of the latter, the proceeding is complete, no application to the court being necessary. The sheriff then seizes the property, giving notice to the defendant, as prescribed by section 209. That notice is given, by serving upon such defendant a copy of the affidavit, notice, and undertaking. These must be delivered to him personally, if he can be found, or to his agent, from whose possession the property is taken. If neither can be found, they may be left at the usual place of abode of either, with some person of suitable age and discretion.

His powers under the Code are more limited than they were under the former practice. Under the Revised Statutes he might take the goods in question from any person in whose hands they might be found. Now, he can only take them from the possession of the defendant or his agent, and to justify him in taking them out of the hands of

a third party, he must establish the fact that such an agency subsists, or the taking will be wrongful. *King* vs. *Orser*, 4 Duer, 431.

If he takes the goods of a wrong party, he takes them at his peril, and he is answerable for the acts of his deputies, and liable under his official bond. *People* vs. *Schuyler*, 4 Comst., 173; *King* vs. *Orser*, and *Kuhlman* vs. *Orser*, *supra*. Nor will the fact that he was directed to take the specific goods in question protect him, under these circumstances. *Stimpson* vs. *Reynolds*, 14 Barb., 506. This last conclusion is, however, controverted in *Foster* vs. *Pettibone*, 20 Barb., 350. It is there held that he is protected by the process issued to him, and that resort must be had to the issuers or instigators of that process.

Whilst the goods are in his possession, the sheriff is responsible for more than ordinary diligence; but his liability is not that of an insurer, so as to withdraw the issue of negligence from a jury. *Moore* vs. *Westervelt*, 21 N. Y., 103; reversing *same case*, 1 Bosw., 357.

The mode in which the property may be taken, and the powers of the sheriff in this respect, and his duties as to its custody and ultimate delivery, are prescribed, as above, by sections 214 and 215.

Where property levied upon by the sheriff, on execution, was taken out of his possession by replevin, and he subsequently recovered judgment in the action, it was held to be his duty to prosecute the bond given on the taking, for the benefit of the execution plaintiff, and that he could not demand an indemnity from the latter. *Swezey* vs. *Lott*, 21 N. Y., 481.

§ 96. *Defendant's Course of Action, and Ulterior Proceedings.*

On seizure of the property, three courses are open to the defendant:

1. He may move to set aside the plaintiff's proceedings, on the ground of irregularity;

2. He may require the plaintiff's sureties to justify; or,

3. He may give counter security, for the purpose of retaining the property.

(*a.*) Motion to set aside.

If he move to set aside, the motion must be noticed at once, and before excepting to the sureties, or taking any other proceeding; and an *interim* stay of proceedings, and extension of the time to except, or give counter security, must be at once applied for. By requiring the sureties to justify, his right to make a motion on the ground of irregularity will be gone. See cases cited in last chapter on the analogous question of *Arrest*. Three days only are allowed him for the former purpose.

As in other similar cases, a defendant, seeking to vacate a proceed-

ing on the ground of original defect, must appear specially. A general appearance will be a waiver of any irregularities. *Hyde* vs. *Patterson*; 1 Abb., 248.

Defendants, who have given counter security, and obtained a redelivery, cannot afterwards maintain a motion of this description. *Nicoll* vs. *Pinner*, 10 How., 376; *Wisconsin Marine and Fire Insurance Company Bank* vs. *Hobbs*, 22 How., 494.

On a motion of this description, the original affidavits and papers, if defective, may be amended, or supported by supplemental proofs. *Spalding* vs. *Spalding*, *supra*; *Depew* vs. *Leal*, 2 Abb., 131. See also, as to amendment of pleadings to support proceeding, *Dows* vs. *Green*, 3 How., 377.

(*b.*) Justification by Plaintiff's Sureties.

The defendant, at any time within three days after service of the affidavit and undertaking, may give notice to the sheriff that he excepts to the sufficiency of the plaintiff's sureties—section 210.

It must be borne in mind that, by taking this course, he loses his right to claim a redelivery of the property. The undertaking, when so perfected, stands in its place. *Vide Austin* vs. *Chapman*, 11 L. O., 103.

If he decline or omit to give such notice, he will be deemed to have waived all objection to the sureties.

If he except to them, justification takes place, in precisely the same manner as that of bail on arrest, and the qualifications of the sureties are the same—section 213. See last chapter.

Until waiver of the objection, or completion of the justification of the original or of substituted sureties, the sheriff remains responsible for their sufficiency.

If the plaintiff's sureties omit to justify, it seems the defendant will be without remedy, except as against the sheriff. See *Manley* vs. *Patterson*, 3 C. R., 89.

The case of *Burns* vs. *Robbins*, 1 C. R., 62, above referred to, is authority, as to the power of the court to allow further time for sureties to justify, upon good cause shown; but, it seems, a new notice must be given by them, under these circumstances.

If, on exception taken, the actual justification of the sureties be sufficient, a technical deficiency in the original affidavit annexed to the undertaking, will not render it void. The affidavit is not required by any provision of law, but is only a precautionary measure for the benefit of the sheriff. *Grant* vs. *Booth*, 21 How., 354. But all the sureties named must justify, or the undertaking will be irregular. See *Graham* vs. *Wells*, 18 How., 376.

(*c.*) Counter Security by Defendant.

If the defendant, instead of moving to vacate, or testing the qualifications of the plaintiff's sureties, prefer to retain the property in his own possession, it is competent for him to do so, upon giving counter security.

This security must be given by him within three days after the taking and after service of notice on him, or his right to give it will be lost.

The undertaking must be executed by two or more sufficient sureties, bound in double the value of the property, as stated in the plaintiff's affidavit, for the delivery of that property to the plaintiff, if a return be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. The liability of the sureties on such an undertaking is immediate and absolute, on the recovery of judgment by the plaintiff. *Slack* vs. *Heath*, 4 E. D. Smith, 95; 1 Abb., 331. The very giving of it seems to be *primâ facie* evidence, on the trial, that the defendants actually detain the property. *Black* vs. *Foster*, 28 Barb., 387; 7 Abb., 406.

The sureties of the defendant are bound to justify, in any case, upon a notice to the plaintiff, of not less than two, nor more than six days. Section 212. No notice of exception is necessary on the part of the latter, nor is any specific period limited, within which the justification must take place. In the mean time, however, and until such justification is either completed or expressly waived, the sheriff is responsible, and may retain the property. Section 212. See *Graham* vs. *Wells*, 18 How., 376.

(*d.*) Delivery to Plaintiff.

If within the three days limited as above, the defendant does not give counter security, the plaintiff becomes entitled to the delivery of the property, unless it be claimed by a third party, under section 216. His right to that delivery is absolute, on the expiration of the period in question. *McCann* vs. *Thompson*, 13 How., 380.

In the same manner, if the defendant's sureties for retaining possession, or others in their place, fail to justify at the time and place appointed, the plaintiff then becomes absolutely entitled to possession.

(*e.*) Delivery to Defendant.

If, on the contrary, the justification of the defendant's sureties be completed or expressly waived, the defendant then becomes absolutely entitled to a delivery to him. Section 212.

After such redelivery, the plaintiff cannot, by any means, obtain a restitution before judgment. The court will, however, interfere in a proper case for the protection and preservation of the property while it

so remains in the hands of the defendant. *Hunt* vs. *Mootry*, 10 How., 478. See also, as to such an injunction, *Erpstein* vs. *Berg*, 13 How., 91; *Furniss* vs. *Brown*, 8 How., 59.

(*f.*) Sheriff's Fees.

On delivery of the property to either party, the sheriff is entitled to receive from that party his lawful fees for taking, and necessary expenses for keeping it. Section 215. For the fees in question, see 2 R. S., 644 to 647. The expenses must, of course, be reasonable; and, if any question arise, a taxation of his account may be applied for in the usual manner.

(*g.*) Claim by Third Party.

In the event of a claim to the property being made by any person other than the defendant or his agent, the party making it must serve upon the sheriff, an affidavit of his title and right to the possession of the property, stating the grounds of such right and title. Of course, the statement in such an affidavit must be full and specific, and must show distinctly the existence, and paramount nature, as against the plaintiff, of the adverse title so claimed.

In such a case the sheriff is not bound to keep the property, or to deliver it to the plaintiff, unless the latter, on demand, shall indemnify him, by an undertaking executed by two sufficient sureties, freeholders and householders of the county, accompanied by their affidavits that they are each worth double the value, as stated by the plaintiff. The sheriff may, however, retain the property a reasonable time, to demand such indemnity. Section 216.

This is the only manner in which a third party, claiming goods actually replevied, can assert his claim. He cannot himself replevy the property, as against that officer or against the plaintiff. *Edgerton* vs. *Ross*, 6 Abb., 189.

The section in question does not in terms prescribe to whom the property should be delivered in such a case, and it seems it should be restored to the original defendant, against whom the claimant may then assert his rights. *Vide Edgerton* vs. *Ross*, *supra*.

(*h.*) Disposal of Papers.

Under section 423, the different undertakings prescribed by this chapter are, after the justification of the sureties, to be delivered by the sheriff, to the parties for whose benefit they are respectively taken.

The affidavit and notice must be filed by that officer with the clerk of the court, within twenty days after the taking of the property. Section 217.

(*i.*) On Discontinuance, Property to be Restored.

The plaintiff cannot discontinue his action, without providing for the return of the property to the defendant, as well as for the payment of costs. If the defendant be in a situation to ask for a dismissal of the complaint, he should set the cause down, and take judgment by default, in the ordinary course. He cannot obtain a judgment for a return, on the usual motion for dismissal. *Wilson* vs. *Wheeler*, 6 How., 49; 1 C. R. (N. S.), 402.

CHAPTER III.

INJUNCTION.

§ 97. *Statutory Provisions.*

This remedy, being the same as that previously obtainable in equity, forms the subject of chapter III., of title VII., part II., of the Code.

That chapter runs as follows:

Chapter III.

Injunction.

§ 218. (191.) The writ of injunction as a provisional remedy is abolished; and an injunction, by order, is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof, or by a county judge, in the cases provided in the next section; and, when made by a judge, may be enforced as the order of the court.

§ 219. (192.) Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded; and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual; a temporary injunction may be granted, to restrain such act. And where, during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

Dates, as it stands, from 1849. Less full in 1848.

§ 220. (193.) The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

§ 221. (194.) An injunction shall not be allowed, after the defendant shall have answered, unless upon notice, or upon an order to show cause; but, in such case, the defendant may be restrained, until the decision of the court or judge, granting or refusing the injunction.

This and the two next sections date substantially from 1848, but were slightly altered in 1849.

§ 222. (195.) Where no provision is made by statute, as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

§ 223. (196.) If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made, requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained.

§ 224. (197.) An injunction to suspend the general and ordinary business of a corporation shall not be granted, except by the court, or a judge thereof. Nor shall it be granted, without due notice of the application therefor, to the proper officers of the corporation, except where the people of this State are a party to the proceeding, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes, after the first day of January, one thousand eight hundred and fifty, as such proceedings are or shall be provided by law, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain, by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

In 1849, the two exceptions in the second sentence were first inserted, by way of amendment. Otherwise, the section dates from 1848.

§ 225. (198.) If the injunction be granted by a judge of the court, or by a county judge, without notice, the defendant, at any time before the trial, may apply, upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the

complaint, and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

A mere verbal change in 1849.

§ 226. (199.) If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

The attention of the reader may here be directed to the special statutory provisions for the awarding of injunctions against corporations abusing their powers, or becoming insolvent, as contained in article II., title IV., chapter VIII., part III., of the Revised Statutes, 2 R. S., 462 to 467, inclusive. As these powers go, however, rather to the right to the remedy itself than the mode in which it is obtainable, a mere reference to them is all that is necessary on the present occasion.

§ 98. *Preliminary Remarks.*

As in the last, so in the subject of the present chapter, an intimate relation exists between the provisional and the final relief sought by the party invoking the powers of the court. Each presents, in its treatment, the same difficulty, in drawing the exact distinction between those considerations which more immediately relate to the former, and those bearing upon the latter, rendering it a matter of considerable difficulty to draw any definite line of separation.

As far as possible, however, that separation will be attempted, and the citation of cases in the present chapter, bearing on the question of ultimate relief, will be confined, as far as practicable, to those points of view which strike at the root of the whole proceeding, and which, therefore, demand immediate consideration at the outset, rather than those more peculiarly incident to subsequent stages of the suit, when commenced.

By section 218, injunction by order is, as will be seen, substituted for the previous procedure, by writ of injunction; though technically altered in form, the remedy remains, however, in its essential characteristics, the same as under the former equity practice.

(*a.*) From whom Obtainable.

Under the same section, the order for this purpose may be made, either:

By the court in which the action is brought;

By a judge of that court;

Or, by a county judge.

But, when made by a judge, it may be enforced as an order of the court.

In relation to the powers of a county judge, in this respect, see heretofore, books I. and IV. It must be borne in mind, however, that those powers are limited, and strictly confined to the granting of the remedy *ex parte*, in the first instance; or to the vacating of it, when granted, without notice, under section 324. The county judge cannot grant an order, or hear a motion upon the subject, upon notice, nor can he entertain an opposable application to dissolve or vacate his order when granted.

A county judge has also no power to entertain an application for an injunction to suspend the general and ordinary business of a corporation—section 224.

A judge of the court, in which the action is brought, is competent to act, either in or out of court, at chambers or at special term. In practice, the application is almost invariably made to the single judge. The power of the general term to entertain such a motion, is, however, asserted in *Drake* vs. *The Hudson River Railroad Company*, 2 C. R., 67. In *The Town of Guilford* vs. *Cornell*, 4 Abb., 220, that branch of the court also exercised this authority, by continuing a temporary injunction, pending an appeal to the Court of Appeals from their decision, reversing the judgment of the special term, by which that injunction was granted. This, it was held, was a fresh injunction, and that fresh security was necessary. See likewise, *Hoyt* vs. *Carter*, 7 How., 140.

In one specific case, the general term is alone competent to entertain the application, *i. e.*, in the case of an injunction sought against a state officer, or board of officers, to restrain the execution by them, of any law of this state. See Laws of 1851, ch. 488, § 1, p. 220.

But, to enable the judge or court to act in the premises, such court must, of course, have jurisdiction of the subject of the action. Where, therefore, the existence and validity of a patent comes into question in the action, it has been held that an injunction granted by one of the state courts cannot be sustained. *Tomlinson* vs. *Battel*, 4 Abb., 266; *Deming* vs. *Chapman*, 11 How., 382.

On the removal of a cause into the federal courts, the order may, it would seem, provide for the continuance of an injunction previously granted. *Lidell* vs. *Thatcher*, 12 How., 294.

(*b.*) In what Cases.—General Classification.

The injunctions obtainable under section 219, may be classified under three general divisions, which will be treated of *seriatim* in their order.

1. An injunction preliminary to, and forming the relief, or part of the relief, sought by the plaintiff in the action itself.

2. An injunction not immediately arising out of the controversy to be decided, but subsidiary in its nature, with a view to restrain subsequent acts of the defendant, tending to the prejudice of the plaintiff's rights, or the deterioration of the matter in controversy.

3. An injunction extraneous to the subject-matter of the suit between the parties, but by which a fraudulent removal or disposition of the defendant's property is sought to be generally prevented. This last description has a close connection with the subjects of execution, and supplementary proceedings, and has the direct tendency of giving to those ultimate remedies, a species of retroactive effect, by restraining, *pendente lite*, any disposition of the defendant's property which might ultimately tend to defeat the remedies of the plaintiff, when assertable. The rights of the latter to this peculiar form of protection, are now strengthened by the recent amendments made in the Code, granting an attachment in similar cases. See next chapter, under that head. See also *Mitchell* vs. *Bettman*, 25 Barb., 408.

§ 99. *Preliminary Injunction.*

Of the three several classes of injunctions, this is at once the most usual and the most important. As a general rule, it forms an essential and not unfrequently the principal object of the suit itself, and is applied for at its commencement.

To authorize the court to grant this remedy, the following conditions must be satisfied:

An action must be brought, preliminary to or simultaneously with the application.

Not merely must process be issued in that action, but the complaint must also be prepared.

The relief or part of the relief demanded by that complaint, must consist in restraining the commission or continuance of some act of the defendant, which, if committed or continued, will be injurious to the plaintiff.

It must appear by the complaint so drawn, that the plaintiff is entitled to the relief so demanded.

It is clear that, under these provisions, an injunction is only obtainable by a party standing in the position of plaintiff. A defendant, as defendant, is not competent to obtain one, even although he may have a case which would warrant such an interference on the part of the court. His only method of proceeding will be to serve a summons and com-

plaint in the nature of a cross action, and then proceed in that action in his character of plaintiff. *Thursby* vs. *Mills*, 1 C. R., 83.

In the same manner, an injunction of this nature can only, as a general rule, be obtained against a defendant in the action. It cannot properly issue against a person not a party. *Watson* vs. *Fuller*, 9 How., 425; *Rhoades* vs. *Woolsey*, 9 How., 510; *The People* vs. *The New York Common Pleas*, 3 Abb., 181. See also *Edmonston* vs. *McLoud*, 19 Barb., 356. But this does not affect the powers of the court to grant an injunction against the servants and agents of the party restrained, or to punish a violation of an injunction, when granted, on the part of such servants or agents, where knowledge of the injunction is brought home to them. *Vide The People* vs. *Sturtevant*, 5 Seld., 263 (277); affirming *same case*, 1 Duer, 512.

As under the former practice, the issuing or continuance of an injunction is never a matter of strict right, but rests, in all cases, in the discretion of the court. *McCafferty* vs. *Glazier*, 10 How., 475; *Van De Water* vs. *Kelsey*, 2 C. R., 3; *Bruce* vs. *Delaware and Hudson Canal Company*, 19 Barb., 371.

(*b.*) Plaintiff's Title to Relief.

A clear *primâ facie* right to the relief sought must, in the first place, appear upon the face of the complaint in all cases. This, by the section itself, is essential. Unless such a title so appears, by all proper and necessary averments, the injunction should not be granted in the first instance, or, if granted, it cannot stand. *Smith* vs. *Reno*, 6 How., 124; 1 C. R. (N. S.), 405; *Boughton* vs. *Smith*, 26 Barb., 635; *Olmsted* vs. *Loomis*, 6 Barb., 152; *Quin* vs. *McOliff*, 1 Abb., 322; *Chemical Bank* vs. *Mayor of New York*, 12 How., 476; 1 Abb., 79; *Thompson* vs. *The Commissioners of the Canal Fund*, 2 Abb., 248; *Hentz* vs. *Long Island Railroad Company*, 13 Barb., 646; *Hartt* vs. *Harvey*, 32 Barb., 55; 19 How., 245; 10 Abb., 321; *Holdane* vs. *Trustees of Village of Cold Spring*, 21 N. Y., 474.

And the title so averred must be actually existent at the time. *James* vs. *Oakley*, 1 Abb., 324; *Sebring* vs. *Lunt*, 9 How., 346; *Brooks* vs. *Stone*, 19 How., 395; 11 Abb., 220.

An injunction can only issue upon a complaint. Affidavits, without a complaint, are not a proper basis for the order. *The People* vs. *The New York Common Pleas*, 3 Abb., 181. See, however, *dictum* in *Morgan* vs. *Quackenbush*, 22 Barb., 72; where an affidavit on which an injunction had been granted contained in fact all the requisites of a complaint, including a prayer for relief.

And, in such complaint, the plaintiff must not merely show a case for temporary interference, but also, where injunction is the direct ob-

ject of the suit, a title to final relief of the same nature. *Corning* vs. *The Troy Iron and Nail Factory*, 6 How., 89; 1 C. R. (N. S.), 405; *Hulce* vs. *Thompson*, 8 How., 475; *Ward* vs. *Dewey*, 7 How., 17; *Wordsworth* vs. *Lyon*, 5 How., 463; *Crocker* vs. *Baker*, 3 Abb., 182; *Mott* vs. *The United States Trust Company*, 19 Barb., 568; *The Chemical Bank* vs. *The Mayor of New York*, 12 How., 476; 1 Abb., 79. And the relief, to which title is thus shown, must be prayed for in due form. *Hovey* vs. *McCrea*, 4 How., 31; *Olssen* vs. *Smith*, 7 How., 481. See, however, *Vincent* vs. *King*, 13 How., 234. And not merely must he show a title to relief in the premises, but also a title to such relief, as against the defendant sought to be enjoined. *McCafferty* vs. *McCabe*, 13 How., 275; 4 Abb., 57.

This rule, however, though true in general, is not in all cases rigorously applied. Where relief is prayed against the defendant, intermediate waste or misapplication of the fund in question in the action, or of any property which may be affected by the decree against him, may be restrained, although such restraint may form no part of the specific relief prayed in the action. See *Vermilyea* vs. *Vermilyea*, 14 How., 470, and other instances of similar relief being collaterally granted, therein referred to.

A plaintiff, coming into court for relief of this nature, must himself be free from fault, or it will be denied. *Mott* vs. *The United States Trust Company*, *supra*; *Fetridge* vs. *Wells*, 13 How., 385; 4 Abb., 144. *Vide Fetridge* vs. *Merchant*, 4 Abb., 156; *Comstock* vs. *White*, 10 Abb., 264, note; *Bennett* vs. *American Art Union Company*, 5 Sandf., 614; 10 L. O., 132; *Hobbs* vs. *Francais*, 19 How., 567. He must not either have aequiesced in the alleged injury, or he cannot obtain it. *Harrison* vs. *Newton*, 9 L. O., 347.

An injunction should not be granted or maintained, if inconsistent with the relief demanded by the complaint. *Townsend* vs. *Tanner*, 3 How., 384; 2 C. R., 6; *Austin* vs. *Chapman*, 11 L. O., 103.

Nor, as a general rule, should an injunction be granted or continued, where the plaintiff's title to relief, or the nature of his rights is uncertain, or is disputed by the defendant; or where actual injury or damage to the former is not clearly shown. *Goulding* vs. *Bain*, 4 Sandf., 716; *Austin* vs. *Chapman*, *supra*; *Bennett* vs. *American Art Union*, 5 Sandf., 614; 10 L. O., 132; *Harrison* vs. *Newton*, 9 L. O., 347; *Same case*, 9 L. O., 311; 1 C. R. (N. S.), 207; *Olmstead* vs. *Loomis*, 6 Barb., 152; *Fredericks* vs. *Mayer*, 1 Bosw., 227; *The Merrimac Manufacturing Company* vs. *Garner*, 4 E. D. Smith, 387; 2 Abb., 318; *Fetridge* vs. *Merchant*, 4 Abb., 156; *Rogers* vs. *Michigan Southern and Northern Indiana Railroad Company*, 28 Barb., 539; *La Chaise* vs. *Lord*, 10 How., 461; 1 Abb., 213; *Samuel* vs. *Buger*, 13 How., 342; 4 Abb.,

88. As to where no injury is shown, see also, *Auburn and Cato Plank Road Company* vs. *Douglass*, 5 Seld., 444; *Blake* vs. *The City of Brooklyn*, 26 Barb., 301; *Ellis* vs. *Duncan*, 21 Barb., 230; 11 How., 515; *Spring* vs. *Strauss*, 3 Bosw., 607; *Mills* vs. *Mills*, 21 How., 437. And especially so, in a case where it appears that the defendant is responsible to answer any claim of the plaintiff. *Stevenson* vs. *Fayerweather*, 21 How., 449; *Power* vs. *Alger*, 13 Abb., 284.

Where, however, the acts of the defendant in relation to the subject-matter of the suit may be attended with irreparable injury, or such defendant is irresponsible, an injunction may be so far granted as to restrain injury to the subject-matter in question, even though the plaintiff's title be disputed. *Spear* vs. *Cutter*, 5 Barb., 486; 4 How., 175; *Mallory* vs. *Norton*, 21 Barb., 424; *Brinton* vs. *Ward*, 19 How., 162; *Rector, &c., of Church of Holy Innocents* vs. *Keech*, 5 Bosw., 691. See also *Hunt* vs. *Mootry*, 10 How., 478; *Erpstein* vs. *Berg*, 13 How., 91; *Furniss* vs. *Brown*, 8 How., 59, cited in last chapter. Or, it may be done in a case of this description, where fraud is charged against the defendant. *Malcolm* vs. *Miller*, 6 How., 456; *Merritt* vs. *Thompson*, 3 E. D. Smith, 283.

A court will not, as a general rule, restrain the completion of works, from which injury is merely possible, but is not shown to be certain to accrue. *Commissioners of Highways* vs. *Albany Northern Railroad Company*, 8 How., 70. See also *Harrison* vs. *Newton*, *supra*. But otherwise, where the injury sought to be restrained is definite, and incurred at once, before that completion. *Wheeler* vs. *Rochester and Syracuse Railway Company*, 12 Barb., 227.

The remedy of injunction will not be extended, beyond what is necessary to protect the rights of the plaintiff in the premises. *Gallatin* vs. *The Oriental Bank*, 16 How., 253; *McCafferty* vs. *Glazier*, 10 How., 475. Nor will it be granted, where, in the granting, it will work injury to the defendant, not absolutely essential for the preservation of the plaintiff's rights; or, if originally granted, it will subsequently be modified accordingly. *Fredericks* vs. *Mayer*, 1 Bosw., 227; *Hamilton* vs. *The Accessory Transit Company*, 13 How., 108; 3 Abb., 255; affirmed, 26 Barb., 46; *Patten* vs. *The Same*, 13 How., 502; 4 Abb., 235; reversing *same case*, 4 Abb., 139; *Bruce* vs. *Delaware and Hudson Canal Company*, 19 Barb., 371; *Garnee* vs. *Odell*, 13 Abb., 264.

A member of a class of persons having a common interest, cannot maintain an injunction for his own individual benefit, for acts injurious to such class only, and not to himself individually, save as such member. *Smith* vs. *Lockwood*, 10 L. O., 12; *Thompson* vs. *The Commissioners of the Canal Fund*, 2 Abb., 248. To obtain relief of this nature, he must sue on behalf of himself and the class generally. See *Wood* vs.

Draper, 24 Barb., 187. Especially will such relief be denied, if, in its exercise, it would be prejudicial to the rights of other members. *Hamilton* vs. *The Accessory Transit Company*, 13 How., 108; 3 Abb., 255; affirmed, 26 Barb., 46.

An individual cannot, in like manner, obtain or maintain injunction for acts constituting an injury to the public, unless he can show separate damage to himself, or violation of his own private rights. *Smith* vs. *Lockwood*, 13 Barb., 209; 10 L. O., 232; *Harrison* vs. *Newton*, 9 L. O., 347; *Badeau* vs. *Mead*, 14 Barb., 328; *Parsons* vs. *The Mayor of New York*, 1 Duer, 439; *Doolittle* vs. *The Supervisors of Broome County*, 18 N. Y., 155; 16 How., 512; *Davis* vs. *The Mayor of New York*, 4 Kern., 506; *Anderson* vs. *The Rochester, Lockport, and Niagara Falls Railroad Company*, 9 How., 553. See also *Arkenburgh* vs. *Wood*, 23 Barb., 360; *Fitzpatrick* vs. *Flagg*, 5 Abb., 213; *Mutual Benefit Life Insurance Company* vs. *Board of Supervisors of New York*, 33 Barb., 322; 20 How., 416; *Roosevelt* vs. *Draper*, 23 N. Y., 318; affirming *same case*, 7 Abb., 108; 16 How., 137–288; *Korff* vs. *Green*, 16 How., 140; 7 Abb., 108, note; *Brooklyn City and Newtown Railroad Company* vs. *Coney Island and Brooklyn Railroad Company*, 35 Barb., 364.

Where private injury is shown to the plaintiff himself, the converse is of course the case, though the acts constituting that private injury may also be generally detrimental to the public. *Vide Penniman* vs. *The New York Balance Dock Company*, 13 How., 40; *Wetmore* vs. *Story*, 22 Barb., 414; 3 Abb., 262; *Mason* vs. *Brooklyn City and Newtown Railroad Company*, 35 Barb., 373.

The court will not grant an injunction to restrain an act already committed. *Reubens* vs. *Joel*, 3 Kern., 488; affirming *same case*, 2 Duer, 530; 12 L. O., 148; *Perkins* vs. *Warren*, 6 How., 341. Or to restrain a proceeding, in attempted exercise of a statutory authority, which, when taken, will, for want of an essential requisite, be void at law, and can therefore do no injury. *McDermott* vs. *Board of Police*, 25 Barb., 635; 5 Abb., 422. Nor against a merely apprehended trespass, in relation to which other proceedings are pending, or may be taken. *The Mayor of New York* vs. *Conover*, 5 Abb., 171; *The New York Life Insurance and Trust Company* vs. *The Supervisors of New York*, 4 Duer, 192; 1 Abb., 250; *The Chemical Bank* vs. *The Mayor of New York*, 12 How., 476; 1 Abb., 79; *Lewis* vs. *Oliver*, 4 Abb., 121; *Wilson* vs. *The Mayor of New York*, 4 E. D. Smith, 675; 1 Abb., 4.

Injunction will not be granted in aid of a forfeiture, for which judgment is prayed in the same suit. *Linden* vs. *Hepburn*, 3 Sandf., 668; 3 C. R., 165; 5 How., 188; 9 L. O., 80; *Lamport* vs. *Abbott*, 12 How., 340.

So also it will not lie in a case where a penalty is imposed, by contract or otherwise, or where the plaintiff has an adequate remedy at law, by an action for damages or otherwise, in respect of such act, and no injury is shown, for which compensation cannot be obtained. *Livingston* vs. *The Hudson River Railroad Company*, 3 C. R., 143; *Townsend* vs. *Tanner*, 3 How., 184; 2 C. R., 6; *Austin* vs. *Chapman*, 11 L. O., 103; *Bruce* vs. *Delaware and Hudson Canal Company*, 19 Barb., 371; *Rogers* vs. *Michigan Southern and Northern Indiana Railroad Company*, 28 Barb., 539; *Marshall* vs. *Peters*, 12 How., 218; *Campbell* vs. *Shields*, 11 How., 565; *Vincent* vs. *King*, 13 How., 234; *Barnes* vs. *McAllister*, 18 How., 534; *Skeel* vs. *Thompson*, 9 How., 478; *Hartt* vs. *Harvey*, 32 Barb., 55; 19 How., 246; 10 Abb., 321; *Balcom* vs. *Julien*, 22 How., 349; *Butler* vs. *Galletti*, 21 How., 465.

Nor will the issuing of an injunction be proper, in cases where an adequate remedy is given to the plaintiff by special proceeding, or by *certiorari*, *quo warranto*, or other analogous remedy in respect of the injury complained of. *Lewis* vs. *Oliver*, 4 Abb., 121; *The People* vs. *Draper*, 14 How., 233; 4 Abb., 333; 24 Barb., 265; *The Mayor of New York* vs. *Conover*, 5 Abb., 171; *Mace* vs. *The Trustees of Newburgh*, 15 How., 161; *Handley* vs. *The Mayor of New York*, 16 How., 228; 7 Abb., 11; *Betts* vs. *The City of Williamsburgh*, 15 Barb., 255; *Gillespie* vs. *Broas*, 23 Barb., 370; *The People* vs. *Sampson*, 25 Barb., 254; *Blake* vs. *The City of Brooklyn*, 26 Barb., 301; *Wilson* vs. *The Mayor of New York*, 4 E. D. Smith, 675; 1 Abb., 4; *Heywood* vs. *The City of Buffalo*, 4 Kern., 534; *Livingston* vs. *Hollenbeck*, 4 Barb., 9. See also *Bouton* vs. *The City of Brooklyn*, 15 Barb., 375; 7 How., 198; *Thatcher* vs. *Dusenbury*, 9 How., 32; *Hartt* vs. *Harvey*, 32 Barb., 55; 19 How., 246; 10 Abb., 321; *Kelsey* vs. *King*, 32 Barb., 410; 11 Abb., 180; *Hyatt* vs. *Bates*, 35 Barb., 308.

Nor, as a general rule, will the action of an inferior magistrate, or tribunal, in the exercise of special jurisdiction, be so interfered with. *The New York Life Insurance Company* vs. *The Supervisors of New York*, 4 Duer, 192; 1 Abb., 250; *Thompson* vs. *The Commissioners of the Canal Fund*, 2 Abb., 248. See also *Handley* vs. *The Mayor of New York*, and *Blake* vs. *The City of Brooklyn*, *supra*. See, however, *The Mayor of New York* vs. *Conover*, 5 Abb., 252; and *Cooper* vs. *Ball*, 14 How., 295, restraining further action, under proceedings, void for want of jurisdiction.

Nor, when jurisdiction has been duly acquired and duly exercised by an inferior officer, will his action in a special proceeding be restrained. See, as to dispossession proceedings, in respect to which such action is in fact prohibited by statute, *Smith* vs. *Moffatt*, 1 Barb., 65; *Wordsworth* vs. *Lyon*, 5 How., 463; 1 C. R. (N. S.), 163; *Hyatt* vs. *Burr*,

8 How., 168; *Duigan* vs. *Hogan*, 1 Bosw., 645; 16 How., 164; *Bokee* vs. *Hammersley*, 16 How., 461; *Marks* vs. *Wilson*, 11 Abb., 87; *Seebach* vs. *McDonald*, 21 How., 224; 11 Abb., 95. The only remedy of the tenant in such cases, is by *certiorari*. See also *Ward* vs. *Kelsey*, 14 Abb., 106.

It has been held, however, that, notwithstanding the statutory prohibition above referred to, proceedings of this nature may, nevertheless, be restrained by injunction, in either of the following cases, viz.: Where jurisdiction has not been duly acquired, or where surprise, fraud, or injustice is shown. *Cure* vs. *Crawford*, 5 How., 293; 1 C. R. (N. S.), 18; *Capet* vs. *Parker*, 3 Sandf., 662; 1 C. R. (N. S.), 90; *James* vs. *Stuyvesant*, 3 Sandf., 665, note; *Forrester* vs. *Wilson*, 1 Duer, 624; 11 L. O., 124; *Valloton* vs. *Seignett*, 2 Abb., 121.

As a general rule, the lawful exercise of ownership, or of rights or powers conferred by statute or otherwise, will not be interfered with by injunction, even though such exercise be productive of injury to another. To entitle a plaintiff to this remedy, the act to be restrained must not merely be injurious to him, but also wrongful in its nature. *Phœnix* vs. *The Commissioners of Emigration*, 12 How., 1; affirming *same case*, 1 Abb., 466; *Leigh* vs. *Westervelt*, 2 Duer, 618; *Williams* vs. *New York Central Railroad Company*, 18 Barb., 222; *Hartwell* vs. *Armstrong*, 19 Barb., 166; *Bruce* vs. *Delaware and Hudson Canal Company*, 19 Barb., 371; *Anderson* vs. *Rochester, Lockport, and Niagara Falls Railroad Company*, 9 How., 553; *Ely* vs. *The City of Rochester*, 26 Barb., 133; *Bayaud* vs. *Fellows*, 28 Barb., 451; *Carpenter* vs. *New York and New Haven Railroad*, 5 Abb., 277; *Auburn and Cato Plank Road Company* vs. *Douglass*, 5 Seld., 444; *Rector, &c., of Church of Holy Innocents* vs. *Keech*, 5 Bosw., 691; *New York Shot and Lead Company* vs. *Cary*, 20 How., 444; 10 Abb., 44; *Mowbray* vs. *Lawrence*, 22 How., 107; 13 Abb., 317; *Richards* vs. *Northwest Protestant Dutch Church*, 32 Barb., 42; 20 How., 317; 11 Abb., 30; *Cooper* vs. *First Presbyterian Church of Sandy Hill*, 32 Barb., 222; *Youngs* vs. *Ransom*, 31 Barb., 49; *Kelsey* vs. *Durkee*, 33 Barb., 410. See likewise *The People* vs. *Draper*, 24 Barb., 265; *People* vs. *Metropolitan Bank*, 7 How., 144.

So also even the undue exercise of an authority, granted by statute or belonging to a public body, will not be so restrained, unless such exercise be also manifestly illegal; nor will the question as to such validity, if doubtful, be allowed to be raised in a suit for an injunction. *Mace* vs. *The Trustees of Newburgh*, 15 How., 161; *Thompson* vs. *The Commissioners of the Canal Fund*, 2 Abb., 248.

The unlawful exercise of authority may, however, in extreme cases, be restrained, especially if immediate damage to the applicant can be

shown to accrue from such exercise, or where the suit is brought for the benefit of the whole class of persons prejudicially affected by such exercise. *Wyatt* vs. *Benson*, 4 Abb., 183; *Fuller* vs. *Allen*, 16 How., 247; 7 Abb., 12; *Shepard* vs. *Wood*, 13 How., 47; *Wood* vs. *Draper*, 24 Barb., 187; 4 Abb., 322; *Appleby* vs. *The Mayor of New York*, 15 How., 428; *Roberts* vs. *The Mayor of New York*, 5 Abb., 41; *The People* vs. *The Mayor of New York*, 32 Barb., 35; 19 How., 155; 10 Abb., 144. See also *same case*, 9 Abb., 253; *The People* vs. *Sturtevant*, 5 Seld., 263; affirming, *The People* vs. *Compton*, 1 Duer, 512; *State of New York* vs. *The Mayor, &c., of New York*, 3 Duer, 119; *Baldwin* vs. *The City of Buffalo*, 29 Barb., 396; *Milhau* vs. *Sharp*, 17 Barb., 435; *Same case*, 28 Barb., 228; 7 Abb., 220; *People* vs. *Law*, 34 Barb., 494; 22 How., 109; *Wetmore* vs. *Law*, 22 How., 130 (135); 34 Barb., 515; *Matthews* vs. *Mayor of New York*, 14 Abb., 209.

See also, as to the undue exercise of authority by private incorporations, *The People* vs. *Parker Vein Coal Company*, 10 How., 186; *Underwood* vs. *The New York and New Haven Railroad Company*, 17 How., 537.

And any act of the directors of a public company, in violation of their duty, such as an unauthorized sale of its property, may be restrained, on the application of a stockholder or corporator. *Abbot* vs. *Hard Rubber Company*, 33 Barb., 578; 21 How., 193; affirming *same case*, 20 How., 199; 11 Abb., 204.

In restraining acts of this description, by a corporation possessing both deliberative and executive powers, it must be borne in mind, that it is more peculiarly the taking of action to carry out an illegal resolution, and not the original passage of the resolution itself, that is restrainable. *Vide Whitney* vs. *The Mayor of New York*, 28 Barb., 233; *People* vs. *The Mayor of New York*, 32 Barb., 35; 19 How., 155; 10 Abb., 144. And the acts of such a body, ranging within the limits of a justifiable discretion, will not be interfered with. *People* vs. *Mayor of New York*, 32 Barb., 102.

A body of this nature will not, however, be permitted to nullify its own acts, or to interfere with rights acquired under a statute which is, in its nature, a contract; and any such action, if attempted, will be void, and the parties claiming under it, restrained. *Brooklyn Central Railroad Company* vs. *Brooklyn City Railroad Company*, 32 Barb., 358. But, not so with regard to acts of partial interference with an easement, not amounting to a clear and manifest violation of right. *Same* vs. *Same*, 33 Barb., 420.

On similar principles to the above, the acts of trustees, whilst acting within the limits of their trust, will not be restrained, in the absence of any danger shown to the fund. *Prior* vs. *Tupper*, and *Taylor* vs. *Ste-*

vens, 7 How., 415; *Spring* vs. *Strauss*, 3 Bosw., 607. Where, however, any evidence of fraud appears, the contrary will be the case, even though such fraud be denied. *Churchill* vs. *Bennett*, 8 How., 309. And, where the intermediate administration of the fund may still be permitted, its ultimate division may be restrained. See *Bishop* vs. *Halsey*, 13 How., 154; 3 Abb., 400.

The due use of partnership property will, in like manner, not be restrained, where security has been given, and no abuse is to be apprehended. *Dunham* vs. *Jarvis*, 8 Barb., 88; *Austin* vs. *Chapman*, 11 L. O., 103. So, also, where a partnership, alleged by the plaintiff, is denied by the defendant, and there is no proof that the fund is in danger. *Goulding* vs. *Bain*, 4 Sandf., 716. So, likewise, where, on the dissolution of a partnership, one partner has, by agreement, been intrusted with the winding up of the concern. *Weber* vs. *Defor*, 8 How., 502. See also *Jacquin* vs. *Buisson*, 11 How., 385. Where, however, there is no provision to that effect, a solvent partner is not, as of right, entitled to assume the administration of the funds, and he may be restrained, though a preference will be given to him on appointing a receiver. *Hubbard* vs. *Guild*, 1 Duer, 662. So, also, after dissolution, and in the absence of any completed arrangement for its continuance, the further use of partnership property may be restrained. *Smith* vs. *Danvers*, 5 Sandf., 669. The institution of cross suits, under such circumstances, will not be encouraged. *McCarthy* vs. *Peake*, 18 How., 138; 9 Abb., 164. Where, however, they actually subsist, it seems that an injunction against personal interference will be granted in both. *McCracken* vs. *Ware*, 3 Sandf., 688; 1 C. R. (N. S.), 215. Proceedings of a receiver, seeking to enforce a judgment against copartnership property, will not be interfered with by injunction. The proper course is, to apply in the suit in which he was appointed. *Van Rensselaer* vs. *Emory*, 9 How., 135; *Winfield* vs. *Bacon*, 24 Barb., 154.

Where, also, a party has been intrusted with the management of property, by contract between the parties, that management will not be interfered with, in the absence of any allegation of irresponsibility. *Newbury* vs. *Newbury*, 6 How., 182; 10 L. O., 52; 1 C. R. (N. S.), 400.

A grossly oppressive agreement may, however, be set aside, and the enforcement of securities obtained through its means enjoined. *Smedes* vs. *Wild*, 7 How., 309. In *The Cumberland Coal and Iron Company* vs. *Sherman*, 30 Barb., 553, an agent who had purchased property, in violation of his duty, and his sub-purchasers, with notice, were restrained from dealing with it pending the controversy.

An injunction will not be granted in one suit, where the same question has already been substantially decided in another. *Livingston* vs.

The Hudson River Railroad Company, 3 C. R., 143. But this rule, though generally applicable, will not prevent another application to the court in the same matter, where the complaint in the second suit, avers facts not in existence at the time when the first application was made. *The Mayor of New York* vs. *Conover*, 5 Abb., 252.

An injunction cannot now be obtained in one suit to stay the prosecution of another in the same court. The remedy, under such circumstances, where both suits are in respect of the same subject-matter, is to make an application in the suit itself for a stay of proceedings, on the usual notice; and the proper suit to be stayed, under such circumstances, will be that secondly instituted, or that in which legal, as contradistinguished from equitable relief, is sought to be enforced. See *Auburn City Bank* vs. *Leonard*, 20 How., 193; *Dederick* vs. *Hoysradt*, 4 How., 350; 3 C. R., 86; *Harman* vs. *Remsen*, 23 How., 174; *Hunt* vs. *Farmers' Loan and Trust Company*, 8 How., 416; *Bowers* vs. *Tallmadge*, 16 How., 325; *Farmers' Loan and Trust Company* vs. *Hunt*, 1 C. R. (N. S.), 1; *Foot* vs. *Sprague*, 12 How., 355; *Arndt* vs. *Williams*, 16 How., 244. So also as to a special proceeding already pending. *The Mayor of New York* vs. *Conover*, 5 Abb., 171.

See however *Grinnan* vs. *Platt*, 31 Barb., 328, where it was held that an action was maintainable to restrain the prosecution of a suit for foreclosure, under inequitable circumstances.

See also, as to restraining proceedings in ejectment, *Sieman* vs. *Austin*, 33 Barb., 9. Or a suit by the creditor of an insolvent corporation, with a view to obtain a preference. *Galway* vs. *United States Steam Sugar Refining Company*, 21 How., 313; 13 Abb., 211. Or a suit by a lien-holder to set aside a foreclosure by advertisement, on which he was not served, but where his lien was in fact valueless, and the proceeding vexatious. *Root* vs. *Wheeler*, 12 Abb., 294.

Injunction is not a proper remedy to restrain a multiplicity of actions. *Minor* vs. *Webb*, 10 Abb., 284. It should not be granted in a suit which in itself is imperfectly brought, to stay another not equally defective. *Lachaise* vs. *Marks*, 4 E. D. Smith, 610 (612); 10 How., 461; 1 Abb., 213.

Nor can an injunction be granted by one court, to stay proceedings in a previously instituted suit, pending in another court of the state, having power to grant the relief demanded. *Grant* vs. *Quick*, 5 Sandf., 612; *Bennett* vs. *Le Roy*, 6 Duer, 683; 14 How., 178; 5 Abb., 55; *Lehretter* vs. *Koffman*, 1 E. D. Smith, 664.

Under such circumstances, the tribunal which has first obtained jurisdiction of the controversy is to be preferred. Any other, if invoked, should deny any interference with its proceedings, and it is within the power of the first tribunal to direct the suspension of proceedings in

the other. *Rankin* vs. *Elliott*, 16 N. Y., 377; affirming *same case*, 14 How., 339; *Whitney* vs. *Stevens*, 16 How., 369; *Winfield* vs. *Bacon*, 24 Barb., 154; *Van Rensselaer* vs. *Emery*, 9 How., 135; *McCarthy* vs. *Peake*, 18 How., 138; 9 Abb., 164; *New York Shot and Lead Company* vs. *Carey*, 10 Abb., 44; 20 How., 444; *The Mayor of New York* vs. *Conover*, 25 Barb., 513; 5 Abb., 393.

Nor should a stay of proceedings be granted under similar circumstances. *Sorley* vs. *Brewer*, 18 How., 509.

Nor should proceedings in one action be interfered with at all by means of another, unless the two are coincident, and the relief sought in one, adequate to render due relief in the other. *Tarrant* vs. *Quackenbos*, 10 How., 244; *Bedell* vs. *McClellan*, 11 How., 172; *Wells* vs. *Smith*, 7 Abb., 261; *Chappel* vs. *Potter*, 11 How., 365.

Injunction will not lie to restrain the publication of the proceedings in another action. Where such a prohibition is necessary or proper, it must be applied for in that action itself. *Wood* vs. *Marvine*, 3 Duer, 674; 12 L. O., 276.

But, where a general suit was pending on behalf of all interested, necessarily involving the validity of the title of the plaintiffs to the relief sought by them, in subsequent and independent proceedings, their assertion of that title in those proceedings was restrained *pendente lite*. *New York and New Haven Railroad Company* vs. *Schuyler*, 17 How., 464.

The recovery of a former judgment, in respect of the same matter, is no cause for a stay of proceedings or injunction in a subsequent action, but the party should be left to set it up as a defence in regular form. *Jay's case*, 6 Abb., 293. But, where necessary for the purpose of administering equitable relief between the parties, action on such a judgment may be restrained. *Watt* vs. *Rogers*, 2 Abb., 261.

Where a party entitled to a decree has waived the benefit of it by entering into a new contract, his further proceedings under it will be stayed. *Van Wagenen* vs. *La Farge*, 13 How., 16.

Proceedings under a judgment, satisfied in fact, but fraudulently kept on foot, may be restrained, on application of a junior judgment-creditor. *Shaw* vs. *Dwight*, 16 Barb., 536. And so may proceedings on a judgment of an inferior court, void for want of jurisdiction. *Cooper* vs. *Ball*, 14 How., 295. Or where a judgment has been regularly taken in such a court, not having power to vacate it, but which, nevertheless, ought, on equitable grounds, to be opened. In such a case, its enforcement may be restrained, without prejudice to an action upon it by the holder. *Martin* vs. *Mayor of New York*, 20 How., 86; 11 Abb., 295; affirmed, 12 Abb., 243.

A court of this state, possessing general equitable jurisdiction, has

power to restrain a party to a suit pending before it, from commencing a suit against the adverse party upon the same subject-matter, in a foreign tribunal. *Field* vs. *Holbrook*, 3 Abb., 377. A suit for the direct purpose of restraining the prosecution of such an action, when already commenced, will not, however, be maintainable, though its pendency will not bar an application for collateral and independent relief. *Williams* vs. *Ayrault*, 31 Barb., 364.

On the dismissal of the complaint in an action, an injunction granted in it falls, *ipso facto*, with that dismissal, and nothing but a reversal will restore it. An appeal has not that effect, unless it is continued by special order. *Hoyt* vs. *Carter*, 7 How., 140. An injunction falls also *per se*, upon a discontinuance of the suit. *Hope* vs. *Acker*, 7 Abb., 308.

An amendment, changing the character of the action, does not, however, of necessity, destroy a previous injunction; but such amendment may be granted without prejudice, where such continuance is necessary to do justice in the premises. *Furniss* vs. *Brown*, 8 How., 59.

As to the power of the court, when necessary, to grant an injunction, having practically the effect of a mandate, see *People* vs. *Albany and Vermont Railroad Company*, 19 How., 523; 11 Abb., 136. See however *Ward* vs. *Kelsey*, 14 Abb., 106.

§ 100. *Subsidiary Injunction.*

This remedy, arising under the second branch of section 219, is only obtainable, where the act sought to be restrained is being done or threatened during the litigation. It does not extend to acts or threats prior to the institution of the suit. Where such are sought to be restrained, the remedy lies under the first, instead of the second clause of the section, and the injury must be alleged, and relief in respect of it prayed in the ordinary manner. *Hovey* vs. *McCrea*, 4 How., 31; *Malcolm* vs. *Gaul*, 6 How., 456.

To warrant an application of this nature, it must be made to appear: 1. That a litigation is pending between the parties; 2. That during that litigation, the defendant is doing, or is threatening, or is about to do the act sought to be restrained; 3. That such act is in violation of the plaintiff's rights, respecting the subject of the action; and, 4. That it tends to render the judgment ineffectual.

These conditions must all be shown to exist, or the section will not be satisfied. The proper way of showing this will be by affidavit, made in the suit itself. A complaint is not necessary, nor need any amendment of that originally filed be made to sustain the proceeding. It is strictly collateral in its nature, and though necessarily germain to the subject of the suit, does not form part of the original grievance sought to be re-

dressed. Where it does, the remedy must, as above shown, be pursued under the prior provision.

The assertion of this peculiar form of the remedy is accordingly of comparatively rare occurrence, and the recent reports contain no decisions bearing directly upon the subject. Where waste to the fund or property in question in the cause is apprehended, relief in respect of it will almost universally be sought at the outset of the suit, and grounds for such interference laid, by specific allegation in the complaint.

§ 101. *Extraneous Injunction.*

The remedy under the third branch of the section is, in like manner, assertable during litigation. It is, however, not confined to the conservation of the immediate subject-matter of the litigation itself. Being of wider application, the powers of a suitor in this respect have accordingly been made the subject of more extended discussion.

As in the last case, it is confined, by the terms of the section, to matter arising during the litigation. When so sought, it would seem that all that is sufficient, in order to obtain it, is the making of an affidavit in the suit itself.

In *Perkins* vs. *Warren*, 6 How., 341, an injunction of this nature had been granted on affidavit, in precise accordance with the powers of the section. It was reversed, however, by the general term, on the ground that the act sought to be restrained had in fact been completed, prior to the suit itself, and did not therefore occur "during the pendency of the action." See also *Olssen* vs. *Smith*, 7 How., 481; *Reubens* vs. *Joel*, 3 Kern., 488; *Pomeroy* vs. *Hindmarsh*, 5 How., 437; and *Sebring* vs. *Lant*, 9 How., 347.

This provision does, not, however, preclude the plaintiff from relief against acts or threats of the same nature, prior to the commencement of the suit. In respect of these, he has his remedy under the first clause of the section; but, in this case, the complaint must lay ground for that relief, in the usual manner. Where, on the contrary, his claim for relief lies under the present branch of the section, ground for that remedy must, as in the case of a subsidiary injunction, be laid by affidavit, without reference to the complaint. See *Malcolm* vs. *Miller*, 6 How., 456.

To be restrainable, under this section, the disposition of his property made by the defendant, must be with fraudulent intent; and, on a motion to dissolve, the question of intent will be the chief matter for consideration. *Brewster* vs. *Hodges*, 1 Duer, 609.

Where, too, the justice of the claim, for which the suit is brought, is doubtful, the court should refuse to interpose. *Reubens* vs. *Joel*, 3

Kern., 488; *Perkins* vs. *Warren*, 6 How., 341. See also *La Chaise* vs. *Marks*, 4 E. D. Smith, 610; 10 How., 461; 1 Abb., 213.

An injunction of this nature may, it would seem, be obtained, at the instance of a creditor at large, in a suit for that purpose. But he must sue, in such case, on behalf of his class. See *La Chaise* vs. *Marks*, *Reubens* vs. *Joel*, *supra*; *Jackson* vs. *Sheldon*, 9 Abb., 127. See likewise *Mott* vs. *Dunn*, 10 How., 225; but overruled by *Reubens* vs. *Joel*, on the question of joinder of both the legal and the equitable cause of action in the same suit. See also *Mitchell* vs. *Bettman*, 25 Barb., 408.

§ 102. *Application for.*

(*a.*) When Entertainable.

Under section 220, an injunction may, as will have been seen, be granted, at the time of commencing the action, or at any time afterwards, before judgment.

On the entry of judgment, the interlocutory powers of the court are, therefore, exhausted. Where the injunction is preliminary or subsidiary, such judgment will, in fact, have disposed of the whole question, as to the nature and extent of the relief to which the plaintiff is entitled. As regards one staying a general disposition of property of a defendant, an analogous remedy is provided in the course of supplementary proceedings. See hereafter, under that head.

The reader will, of course, draw the distinction between an application for an injunction, after judgment, in the action itself; and an injunction to restrain the enforcement of a judgment, in another action, applied for in a suit instituted for that purpose.

(*b.*) Affidavit.

In order to the granting of this remedy, it must, in all cases, appear "satisfactorily to the court or judge, by the affidavit of the plaintiff, or of some other person, that sufficient grounds exist therefor."

Considerable discussion has arisen as to whether a verified pleading will or will not be considered as an affidavit, and may or may not be read and used, as such, for the purpose of obtaining or sustaining, or of dissolving, an injunction; for the question is equally applicable to motions of that nature, and may be conjointly considered.

Under the Code of 1848, when a pleading was verified on belief only, such was not the case. *Benson* vs. *Fash*, 1 C. R., 50; *Roome* vs. *Webb*, 3 How., 327; 1 C. R., 114. The latter case, however, foreshadows the amendment of 1849, and holds that a verification in the old chancery form would be sufficient, and make the complaint itself part of the affidavit.

Since the amendment of 1849, when the present form of verification was prescribed, the reason above assigned no longer exists. A pleading verified in that form by the party is, to all intents, an affidavit, and for these purposes may be used as such. This point may be now considered as settled. See *Krom* vs. *Hogan*, 4 How., 225; *Schoonmaker* vs. *The Protestant Reformed Dutch Church of Kingston*, 5 How., 265; *Fisher* vs. *Woodruff*, 17 Barb., 224; *Smith* vs. *Reno*, 6 How., 124; 1 C. R. (N. S.), 405; *Minor* vs. *Terry*, 6 How., 208; 1 C. R. (N. S.), 384; *Florence* vs. *Bates*, 2 Sandf., 675; 2 C. R., 110; *Hascall* vs. *Madison University*, 8 Barb., 174; 1 C. R. (N. S.), 170; *Porter* vs. *Cass*, 7 How., 441; *Churchill* vs. *Bennett*, 8 How., 309; *Furniss* vs. *Brown*, 8 How., 59; *Penfield* vs. *White*, 8 How., 87; *Levy* vs. *Ely*, 15 How., 395; 6 Abb., 89; *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472.

By this series of cases, the contrary decisions of *Milliken* vs. *Cary*, 5 How., 272; 3 C. R., 250; and *Servoss* vs. *Stannard*, 2 C. R., 56, are unquestionably overruled.

The verification, to have this effect, must, however, be that of the party himself, or of some person having full knowledge of all the material facts, and swearing from that knowledge. Where the complaint was verified by the attorney, and it appeared on the verification, that all the statements in it were made on information, and none upon his personal knowledge, an injunction obtained upon it was dissolved. *Rateau* vs. *Bernard*, 12 How., 464. But, where an attorney verifying speaks to the facts from his own knowledge, the verification will be sufficient to sustain the proceeding. *Minor* vs. *Buckingham*, 8 Abb., 68.

In like manner, the material statements in the complaint, on which the plaintiff's right to the remedy of injunction is based, must, in such pleading, be made positively, and not stated to be upon information and belief. If merely the latter, they will not be available. *Jones* vs. *Atterbury*, 1 C. R. (N. S.), 87; *The People* vs. *The Mayor of New York*, 9 Abb., 253.

Where such is the case, the plaintiff's statement must be sustained, as under the old practice, by the affidavit of a third person. *Smith* vs. *Reno*, *supra*; *Crocker* vs. *Baker*, 3 Abb., 182; *Minor* vs. *Buckingham*, 8 Abb., 68.

The fact that statements made in a separate affidavit, either by the plaintiff himself or by another party, stating additional grounds for an injunction, do not bear directly on the plaintiff's right to relief in the action, will not constitute an objection. *Badger* vs. *Wagstaff*, 11 How., 562. But, though it is thus competent for him to fortify his original claims, he cannot, as regards the cause of action itself, enlarge them by

affidavit, or prefer others. *Hentz* vs. *The Long Island Railroad Company*, 13 Barb., 646.

In a separate affidavit, statements on mere information and belief, without disclosing the grounds of belief and sources of information, are equally unavailable. *Pomeroy* vs. *Hindmarsh*, 5 How., 437; *Livingston* vs. *The Bank of New York*, 26 Barb., 304; 5 Abb., 338. See the same point fully established by collateral decisions, heretofore and hereafter noticed under the heads of *Arrest* and *Attachment*.

(*c.*) SECURITY.

The plaintiff on applying for an injunction must, in all cases, be prepared with security. See sections 222, 224.

There exist three different kinds of security which such plaintiff may be called upon to give.

1. When provision is already made by statute, as to the security to be given, he must be prepared with the security so prescribed.

2. In ordinary cases, a written undertaking must be given on his part, with or without sureties, at the discretion of the judge, to the effect prescribed by section 222.

3. When the general and ordinary business of a corporation is sought to be suspended, he must give a written undertaking, with two sufficient sureties, to the effect prescribed by section 224.

These three classes will be considered in their order.

(*d.*) STATUTORY SECURITY.

The provisions saved by the commencing words of section 222, will be found in article V., title II., chapter I., Part III., of the Revised Statutes, 2 R. S., 188 to 191.

They relate to the staying of proceedings in a personal action after verdict or judgment, and they prescribe a special form of security to be given in such cases.

Under those provisions, proceedings are not to be stayed after verdict or judgment, unless,

1. The party seeking such injunction shall deposit in court the full amount of the verdict or judgment, as the case may be (sections 140, 141); and,

2. Shall give, in addition to such deposit, a bond, with one or more sufficient sureties, to the plaintiff in the judgment, in such sum as the officer allowing the injunction shall direct, conditioned for the payment of all damages and costs, awarded by the court at the final hearing of the cause. Section 141.

N. B. Under sections 142, 143, the deposit above prescribed may be

withdrawn by the plaintiff at law, on his giving security for its restitution on due application, if directed.

But, under section 145, the officer applied to may dispense with the deposit required by sections 140 and 141, and is empowered, in lieu thereof, to direct the execution of a bond with sureties, conditioned for the payment of the amount so required to be deposited, whenever ordered by the court. Or, if a bond is already required, in addition to the deposit, then to direct the enlargement of the penalty and condition of such bond as may be requisite. But, whenever a deposit is so dispensed with, the substituted or enlarged bond must be executed by at least two sufficient sureties.

By section 148, a special form of justification by such sureties is prescribed. Each must state in his affidavit that he is a householder resident within the state, and that he is worth a sum equal to the amount in which the bond shall have been required, over and above all debts and demands against him.

Under section 149, such bond, with the affidavit, must be filed with the clerk before the issuing of the injunction. On a breach of the condition, it is to be delivered out to the obligee. Section 150.

Under section 144, a similar bond for damages and costs is prescribed to be given, before staying proceedings in any action for recovery of real estate after verdict.

When, however, the injunction in question is applied for, on the ground that the judgment or verdict, proceedings on which are sought to be stayed, was obtained by actual fraud, the officer applied to has power to dispense with the deposit of any moneys, or the execution of any bond. Section 147.

In all cases to which the above provisions apply, security of this nature must still be taken, and the above provisions strictly complied with, or the injunction should not be granted, and, if granted, cannot stand. *Cook* vs. *Dickerson*, 2 Sandf., 691; *Chappel* vs. *Potter*, 11 How., 365.

A mere failure to perform a promise on which judgment was confessed, is not a fraud of the description contemplated by section 147, on which the giving of the above security may be dispensed with. To authorize this, the fraud must be of a gross nature, such as the substitution of one paper for another, a false representation of facts, or the like. *Cook* vs. *Dickerson*, *supra*.

Security of this nature is not necessary, on an application by a creditor of an insolvent corporation, to restrain other creditors from enforcing their judgments separately, and in derogation of a general proceeding for winding up its affairs under the statute. *Hutchinson* vs. *The New York Central Mills*, 2 Abb., 394.

If security given under the above provisions satisfies the essential requisites of the statute, it will be sufficient, though it may be given in the form of an undertaking, instead of in that of a penal bond. *The People* vs. *Lowber*, 7 Abb., 158. See also the converse of this proposition in *The Episcopal Church of St. Peter* vs. *Varian*, 28 Barb., 644. And, in the same case of the *People* vs. *Lowber*, it was held that these provisions do not extend to a case, where proceedings on a judgment are stayed by application to the general term in the same action, and that, on such a proceeding, security will not be necessary.

(*e.*) Ordinary Security.

In all cases except the preceding, and the special instance of interfering with the ordinary business of a corporation, the security prescribed by section 222 must be given.

This security consists of a written undertaking on the part of the plaintiff, with or without sureties.

It must provide that "the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto."

The condition of the undertaking should therefore be in the exact words given. The amount to be specified rests, as will be seen, entirely with the judge, though it is usual to insert it in the first instance. If so, it should be inserted in a sum sufficiently liberal to provide for all reasonable contingencies, the assessment of which must, of course, depend upon the peculiar circumstances of each case. If fixed too low, the risk is run that the judge may refuse his approval, necessitating the preparation and execution of a fresh undertaking, and the consequent delay of the remedy.

And, if the amount inserted be manifestly inadequate, it will form ground for dissolving the injunction (*Ryckman* vs. *Coleman*, 21 How., 404); 13 Abb., 398; or, for its modification, so as to prevent injury to the defendant. *Gurnee* vs. *Odell*, 13 Abb., 264.

The undertaking must, in all cases, be executed on the part of the plaintiff, whether it is taken with or without sureties, and the number and amount of such sureties rests in the judge's discretion. One surety is sufficient, if approved by that officer. The plaintiff, when he executes the undertaking alone, should acknowledge it, and annex an affidavit of justification, in the usual manner. If he does not, the undertaking should not be received. The sureties must, in like manner, acknowledge and justify. See rule 6, and heretofore, under the head of *Arrest*. A plaintiff resident out of the state ought also to be required to give a resident surety. See, on the above points, *Sheldon* vs. *Allerton*, 1 Sandf.,

700; 1 C. R., 93; *Courter* vs. *McNamara*, 9 How., 255; *Ward* vs. *Whitney*, 4 Seld., 442. It is not necessary, however, that such undertaking should be signed by the plaintiff in person, if the sureties are sufficient. *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472. See heretofore, under the head of *Arrest.*

Provided the essentials of the statute are complied with, a paper in the form of a penal bond, may be accepted as a sufficient undertaking. *The Episcopal Church of St. Peter* vs. *Varian*, 26 Barb., 644. See also *The People* vs. *Lowber*, 7 Abb., 158, before referred to.

Where an order to show cause is granted, with an *interim* injunction restraining the defendant, security may be, and it seems should be, required to be given, on the original granting of the order. *Methodist Churches of New York* vs. *Barker*, 18 N. Y., 463; *Sheldon* vs. *Allerton*, *supra.*

(*f.*) Security on Restraining Corporations.

The security prescribed to be given in this case, by section 224, is, as will be seen, substantially to the same effect as the ordinary undertaking under section 222. It presents, however, this distinction, *i. e.*, that the taking of sureties is no longer optional; but, in this case, the undertaking must be "executed by two sufficient sureties, to be approved of by the court or judge."

(*g.*) Disposal of Undertakings.

In all cases, the undertaking, of whatever nature, must be presented to the judge at the time of the application. It must, also, be approved by him, before the injunction is granted, and the usual course is for him to indorse his approval upon it at the time. Having approved it, he hands it back to the moving party, with the order, when granted.

It must then be filed by such party forthwith, with the clerk of the court—rule 4. See also section 423. In the case of statutory security, this filing ought to take place even before the injunction is issued. See 2 R. S., 190, section 149; but, under the present system it will, doubtless, be sufficient, if filed forthwith in the ordinary manner.

A party omitting to file such undertaking forthwith, as directed, omits it at his peril. If delayed for five days, his adversary is at liberty to move the court to vacate the proceedings for irregularity—rule 4.

This specific rule dates from the revision of 1858. But the filing was equally necessary, prior to that rule being passed. *Higgins* vs. *Allen*, 6 How., 30; *O'Donnell* vs. *McMurn*, 3 Abb., 391; *Sheldon* vs. *Allerton*, *supra.* The defect is, however, excusable, and does not, *per se*, nullify the proceedings taken. *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472.

The force of an undertaking given, is, it seems, spent upon a reversal of judgment in favor of the plaintiff by the general term, and does not extend to the expenses of an appeal to the Court of Appeals. *The Town of Guilford* vs. *Cornell*, 4 Abb., 220; *Hoyt* vs. *Carter*, 7 How., 140.

In the event of the subsequent insolvency of the sureties to the undertaking, the injunction granted on it may be vacated, in the discretion of the court. *Willett* vs. *Stringer*, 15 How., 310; 6 Duer, 686.

(*h.*) Manner of Application.

When obtained at the outset of the action, the order may, and generally will be granted by the judge *ex parte*, without any notice to the defendant. It would seem too that, even after appearance, and at any time before answer actually put in, it is equally competent for the judge to do so, if he thinks fit.

It is competent for the judge to grant the order before the summons is served, and to deliver it to be served therewith. But the summons must be served with the order, or the latter will be inoperative. Service of it without, or before that of the summons, is irregular. *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472.

It is not, however, imperative upon the judge to grant the order in this manner. If he deems it proper that the defendant, or one of the defendants should be heard, before granting the injunction definitively, it is competent for him to substitute for the positive relief, an order to show cause why it should not be granted. Section 223.

In all cases where the plaintiff's right to this relief is in any wise doubtful, or where the injunction, if granted, would be of immediate detriment to the defendant, this latter is the better, and is in practice the more usual course.

And, where the defendant has answered, an *ex parte* injunction can no longer be granted, but the application must be on notice or order to show cause. Section 221. Nor can an *ex parte* injunction be granted to suspend the general and ordinary business of a corporation (§ 224), unless, possibly, in the specific cases referred to in that section, the wording of which is somewhat obscure.

In any case, however, where the application is not entertained *ex parte*, the judge may either, as part of the order to show cause, or by a separate order, restrain the defendant in the mean time. Sections 221, 223.

Where the injury sought to be restrained is either existent or imminent, this course should be adopted. In all cases it will be better, and, where the intermediate restraint is likely to be productive of any injury or inconvenience to the defendant, it will be most advisable to prepare

and present to the judge the usual security. See *Methodist Churches of New York* vs. *Barker*, and *Sheldon* vs. *Allerton*, above cited. Where this precaution is neglected, it is by no means improbable that the temporary injunction may be refused. *Vide Androvette* vs. *Bowne*, 15 How., 75; 4 Abb., 440.

The order, whether absolute or to show cause, had better be prepared in anticipation, and must be signed by the judge. As to its service, when signed, see the next section.

When the injunction is not obtained *ex parte*, the ordinary notice of eight days must be given, in all cases where the time is not shortened by order to show cause. In those where the execution of any law by a state officer or board of officers is sought to be restrained, eight days' notice at least must be given. See Laws of 1851, chapter 488, section 2, page 921.

The course to be pursued on the hearing of an opposable application of this description, being in precise analogy with that on that of a motion to dissolve or vacate, both will be considered in a subsequent section, under that head.

(*i.*) Disposal of Affidavits.

On the injunction being granted, whether *ex parte* or after an opposed hearing, the affidavits on which it is so granted must be filed with the clerk of the court by the prevailing party, forthwith, and within five days at the latest. This is imperative. An omission to do so incurs the same penalty as an omission to file the security. See rule 4, and heretofore, under that head.

Such omission has, however, been held not to be a fatal defect, and that the court may relieve against it, with or without terms, when arising from inadvertence. *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472, above cited.

§ 103. *Service of Injunction.*

When obtained, the order for an injunction must be duly served upon the party restrained. That service must be personal, the proceeding being one to bring him into contempt. Section 418. Service on the attorney instead of the party, will not be merely insufficient for the purposes of enforcement, but positively irregular. It will not, however, invalidate the order. *Becker* vs. *Hager*, 8 How., 68. Where, however, the attorneys or agents of the party are sought to be restrained, service must be made upon them also, in addition to that upon the principal. That this service should be personal, is equally a matter of necessity.

A copy of the affidavit upon which the injunction is granted, must be served with it, or the proceeding will be open to the same objection. Section 220. *Penfield* vs. *White*, 8 How., 87. The injunction in supplementary proceedings is, however, "*sui generis*," and is not affected by the provisions in this chapter, either as to service or otherwise. *Green* vs. *Bullard*, 8 How., 313.

Where an order to show cause is granted with an *interim* injunction, the same service must of course be made. It is in fact necessary in all cases; as, even where no stay is granted, the proceeding being, in effect, a motion, copies of the moving papers must be served with the notice. See rule 49.

When the injunction is granted upon a verified complaint alone, service with it of that complaint and of the verification will be sufficient. If not already served upon the defendant, the summons must be served at the same time. If this is omitted, the injunction will be inoperative, and the service irregular. *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472, above cited.

In such cases it will, of course, be the most convenient course to serve all the papers together. This will effect a simultaneous commencement of the suit, nor will it be necessary to make a second copy of the complaint, although in strictness it is used in a double capacity. Nor, when the injunction has been granted on notice, and the complaint has been previously served in the action, will it be necessary to re-serve the latter as an affidavit. A notice should, however, accompany the order, that it is granted upon the complaint, of which a copy has been already served, as well as upon the other papers which may accompany it.

Where the injunction is granted by a judge or officer, ont of court, the original order, with the judge's signature, should be exhibited to the party or agent sought to be restrained, at the time when he is served with a copy of it, and of the affidavits. If not, the service will, as a general rule, be insufficient, as a basis of subsequent proceedings for contempt, though it may, in some cases, have a certain effect, by way of notice, for the purpose of saving the plaintiff's right. *Coddington* vs. *Webb*, 4 Sandf., 639; *Watson* vs. *Fuller*, 9 How., 425.

This doctrine, though, as a general rule, inflexible, admits, however, of some slight qualification. For instance, where a party designedly commits acts, in respect of which, he knows at the time, that an injunction has been issued, he may be punished for these acts, even though, at the time, the order restraining him has not yet been served or even entered. *The People* vs. *Compton*, 1 Duer, 512 (553); affirmed, 5 Seld., 263 (278). And it will be a contempt of court for a party, knowing such an order to have been made, to prevent, wilfully and by

open force, the making of such service. *Conover* vs. *Wood*, 6 Duer, 682; 5 Abb., 84.

See also, as to knowledge of an injunction, being sufficient to impose upon a party the duty of obeying it, so far, at least, as pecuniary rights are concerned, *Livingston* vs. *Swift*, 23 How., 1.

Where the order is the order of the court, and not of the single judge, it will be properly served by delivering a certified copy. In this case, no exhibition of the original order will be requisite. *The Mayor of New York* vs. *Conover*, 5 Abb., 244.

Where an injunction is directed against a corporation, it is binding, not merely on the corporate body, but also on the individuals composing it, who are equally liable for disobedience, as if they were named in the process. Service upon the mayor of the city of New York, was accordingly held to be sufficient, to bind every member of the corporation, individually, whose personal action, as such, the order was designed to control, and to render such members individually liable for a contempt, for acts of disobedience to that order. *Davis* vs. *Mayor of New York*, 1 Duer, 451. See also *The People* vs. *Compton*, 1 Duer, 512; affirmed, 5 Seld., 265, as above noticed.

§ 104. *Violation of Injunction.*

So long as an injunction exists, all parties enjoined are bound to obey it, and any act of disobedience will be punishable by attachment for contempt. The remedy of a party, aggrieved by its issuing, lies in appeal, or motion to dissolve, and not in disobedience. His only safe course is to obey, knowing that, if the process be wrongly issued, the law will afford him redress, *vide Davis* vs. *Mayor of New York*, 1 Duer, 451; *The People* vs. *Compton*, 1 Duer, 512; affirmed, 5 Seld., 263; *Grimm* vs. *Grimm*, 1 E. D. Smith, 190; 1 C. R. (N. S.), 218. And the fact of a subsequent dissolution of the injunction, will form no justification for a wilful breach of it, whilst existent. *Smith* vs. *Reno*, 6 How., 124; 1 C. R. (N. S.), 405.

A party in contempt may, it would seem, apply to the court for a dissolution, at any time, on any matter of positive right. *Smith* vs. *Reno*, 6 How., 124; 1 C. R. (N. S.), 405; *Smith* vs. *Austin*, 1 C. R. (N. S.), 137. But, as regards matters not of right, the rule is different, and, whilst in contempt, he cannot be heard, on application addressed to the favor of the court. *Krom* vs. *Hogan*, 4 How., 225.

To deprive him of his right to make the application, the disobedience must be wilful and actual, and not merely technical or excusable. *Gurnee* vs. *Odell*, 13 Abb., 264. And, if the plaintiff's case fails for want of equity, the motion will be granted on proper terms, notwithstanding

the contempt. *Field* vs. *Hunt*, 22 How., 329; 13 Abb., 320, as *Field* vs. *Chapman*.

Where an injunction has been granted on notice, and disobeyed, the court will not review the propriety of granting the injunction, in the first instance, on motion for an attachment against the defendant. If the original order was erroneous, he should have appealed from it; but, having submitted to the order, in the first instance, he was bound to obey it. *Grimm* vs. *Grimm*, 1 E. D. Smith, 190; 1 C. R. (N. S.), 218.

The obedience to be so rendered, must be positive and complete, nor will the court suffer any evasion or trick to be practised. An allegation that the acts restrained, were done by the authority of a third person, will constitute no excuse. *Krom* vs. *Hogan*, *supra*. And, where a party restrained had done nothing himself, but had knowingly stood by and connived at the act restrained, being committed by his own partner, he was held equally punishable for the disobedience. *Neale* vs. *Osborne*, 15 How., 81. So, also, where the party is restrained, it is not merely his duty to refrain himself, but to give all necessary directions to all who act at his instance, or under his control; and any act of theirs, which he knowingly allows to proceed, will be a contempt on his part. *The Mayor* vs. *Conover*, 5 Abb., 244.

In *Capet* vs. *Parker*, 3 Sandf., 662; 1 C. R. (N. S.), 90, it was laid down that no advice of counsel, and not even the declaration of the judge of an inferior court, can justify a party in disobeying an injunction order; and, if he does, an attachment will issue. See also, *The People* vs. *Compton*, *supra*.

An appeal from an order granting an injunction, does not stay the operation of the injunction, pending the appeal; notwithstanding which, an attachment will issue to punish the party enjoined, for any violation of that order, whilst it remains unreversed. *Stone* vs. *Carlan*, 2 Sandf., 738; 3 C. R., 103.

To be punishable as a contempt, the disobedience must, however, be wilful, and, if the order disobeyed be capable of a construction consistent with the innocence of the party of any intentional disrespect to the court, an attachment should not be granted. *Weeks* vs. *Smith*, 3 Abb., 211. See also, *Conover* vs. *Wood*, 5 Abb., 84; 6 Duer, 682.

In *Furniss* vs. *Brown*, 8 How., 59, a reference was granted, to take testimony in relation to an alleged violation of an injunction, before any final action was taken thereon. The same course was adopted in *The People* vs. *Compton*, 1 Duer, 512; and, on such a reference, the defendant, it was held, is bound to answer all such interrogatories as may be propounded to him.

Where, however, wilful disobedience is not brought home to the

party on the original order to show cause, such a reference will not be granted. *Conover* vs. *Wood*, *supra*.

In *Ross* vs. *Clussman*, 3 Sandf., 676; 1 C. R. (N. S.), 91, although the court said they did not intend to decide, whether simply confessing a judgment was a violation of an injunction, restraining a debtor from disposing of his property; it was held that, if such confession be made with the intent to change the disposition of the property to the creditor's prejudice, and has that effect, it will be a violation, and punishable accordingly. The defendant, in that case, was accordingly fined in the whole amount of the plaintiff's claim, with costs, counsel fee, and expenses, and was committed until the fine was paid.

Although a corporation cannot be punished for a contempt as in the case of a natural person, the same object may be effected, by means of a fine, or the sequestration of its property. *People* vs. *Albany and Vermont Railroad Company*, 20 How., 358; 12 Abb., 171.

The operation of an injunction cannot, however, be made retroactive. To be punishable, the act must either be committed, or knowingly continued or sanctioned, after knowledge of the restraint. *Same case.*

The course to be pursued for obtaining and enforcing an attachment of the above nature, when issuable, will be considered under the head of enforcement of orders, in the book devoted to the subject of *Execution*. The cases above referred to, of *The People* vs. *Compton*, and *Davis* vs. *The Mayor of New York*, will be found, however, to be full of information on the subject of this particular remedy.

Pending an appeal from a judgment of injunction, on which security has been given, the defendant cannot be punished for its violation. The power is suspended, but it revives, if the judgment be affirmed, not merely as to subsequent, but also as to intermediate acts. *Howe* vs. *Searing*, 6 Bosw., 684; 11 Abb., 28.

§ 105. *Defendant's Course to Oppose or Vacate.*

(*a.*) Opposition to Original Motion.

As will have been seen, the defendant is, in certain cases, secured the right of being heard on the plaintiff's original application. He is entitled to be so heard, as of right, where his answer has been put in before that application. Section 221. See also, as to applications seeking to suspend the ordinary business of a corporation, section 224. The judge may likewise direct that he be allowed that privilege, and grant an order to show cause accordingly. Section 223.

The rule, as to the papers which may be used on such a motion, is substantially the same as that on a motion to vacate or modify, as treated in the next division.

(*b.*) MOTION TO VACATE OR MODIFY.

When an injunction has been granted *ex parte*, the right to move to vacate or modify it, is expressly secured to the defendant by section 225.

The application must be made, on notice, to a judge of the court in which the action is brought. The ordinary notice of motion must be given, but, when the continuance of the injunction is productive of decided injury, there is nothing which restricts the proceeding from being brought on at an earlier period, by means of an order to show cause.

The defendant has his option between three methods of bringing on such application.

1. He may move, on the plaintiff's papers alone, without either answer or affidavits, on his own part.

2. He may move, on the complaint and answer alone, without affidavits; or,

3. He may move, on affidavits, either with or without an answer.

The first of these methods is proper, where the proceeding is impeached on the ground of defect in the plaintiff's application.

The second is more peculiarly applicable to those cases in which the equities of the complaint are denied by the answer, and the defendant elects to rest on that ground, without entering into any contest of fact.

The third is the more usual course, and is admissible, whenever the correctness of the plaintiff's statement of facts is impeached, or the effect of those facts sought to be avoided.

Before entering on these several classes, a few words on the subject of a motion of this nature, generally considered, will be in place.

As a general rule, this description of motion is duly applicable to an *ex parte* injunction. Where the order has been granted upon notice or order to show cause, it will be manifestly inadmissible. The defendant, in such case, had already had his opportunity of being heard, and cannot reopen the discussion.

This bar, however, cannot be considered as positive, nor can it be doubted but that, on a sufficient allegation of surprise, fraud, or an altered state of circumstances, such a motion may be admissible. Such will of course be the case where, on the original hearing, leave has been given to the defendant to renew his application, or to make a specific motion to vacate.

Independent of the motion granted by section 225, it has been held that it is competent for a defendant, manifestly aggrieved, to apply, under section 324, to the judge who granted the order, to vacate or modify it, without notice. *Bruce* vs. *The Delaware and Hudson Canal Com-*

pany, 8 How., 440, overruling the stricter construction in *Mills* vs. *Thursby*, 1 C. R., 121.

Under very urgent circumstances, this course will be admissible, especially where an *interim* modification is necessary, for the attainment of substantial justice. It is not, however, the better practice, and should only be allowed under urgent circumstances. *Bruce* vs. *The Delaware and Hudson Canal Company*, *supra*.

That such an application to the judge who granted the order, or an application to a judge out of court, is not a necessary preliminary to a motion to the court itself, is decided in *Woodruff* vs. *Fisher*, 17 Barb., 224.

Newbury vs. *Newbury*, 6 How., 182; 1 C. R. (N. S.), 409, clearly overrules the *dictum* in *Osborn* vs. *Lobdell*, 2 C. R., 77, that, on a motion of this description, it is necessary for the moving party to furnish formal proof of the existence of the suit and of the proceedings in it; unless, possibly, where the order is taken by default. See *Darrow* vs. *Miller*, 5 How., 247; 3 C. R., 241.

(*c.*) 1. Motion on Plaintiff's Papers.

This is the proper course, where the grounds for the order obtained are manifestly insufficient, or where the plaintiff's proceedings are impeachable for irregularity. When adoptable, it presents this manifest advantage, that, in opposing it, the latter cannot introduce additional evidence. He must stand or fall by his original papers. The defendant is, of course, equally precluded from the introduction of additional matter. The doing so would bring the application under another of the above classes.

In those cases in which the complaint, or the plaintiff's statement of his case on his affidavit, is manifestly defective, or where the papers on which the injunction is granted, fail to make out even a *primâ facie* case, either totally, or as against the applicant, a motion of this description is clearly the proper and the expedient course.

Where the defendant has a double defence to the application, first on the ground of defect, and also on the merits, and his motion on the former ground proves unsuccessful, it will be expedient for him to ask leave to renew the application, on the latter, and, if a sufficient case be shown, this leave may possibly be granted. It rests, however, entirely in the discretion of the court, and, unless entire good faith be shown, and a strong reason for such indulgence on the part of the court, it would not be safe to calculate upon that facility being extended. As a general rule, the party moving for a specific item of relief, is bound, on such application, to state all his objections, and to exhaust all his grounds for interference. See heretofore, under the head of *Motions*, and *Desmond* vs. *Woolf*, there cited.

(*d.*) 2. MOTION ON COMPLAINT AND ANSWER, WITHOUT AFFIDAVITS.

This class of motion is peculiarly applicable to those instances, where the answer of the defendant is purely negative, and does not assert matter in avoidance, and, being of this description, denies the whole equity of the complaint.

A little more difficulty attends the consideration of this branch of the question, arising out of the liability to confuse the office of an answer, strictly considered as a pleading, and the character of an affidavit, which, when used for the purposes of an application to vacate an injunction, may be attributed to that pleading, when verified; the immediate difficulty being as to when the plaintiff is or is not entitled to introduce affidavits in reply, where the motion to dissolve is made on verified answer alone. Where affidavits are used in connection with it, or where the answer is so verified as to deprive it of the force of an affidavit (see *Rateau* vs. *Bernard*, 12 How., 464), this question does not of course arise.

The general rule is, that where the whole equity of the complaint is denied by the answer, the defendant is entitled to a dissolution of the injunction, "*pendente lite*," until the plaintiff's title is established by proper evidence, on the regular hearing of the cause. *Florence* vs. *Bates*, 2 Sandf., 675; 2 C. R., 110; *Blatchford* vs. *The New York and New Haven Railroad Company*, 5 Abb., 276; *Carpenter* vs. *The Same*, 5 Abb., 277; *Finnegan* vs. *Lee*, 18 How., 186; *Powell* vs. *Clark*, 5 Abb., 70; *Clark* vs. *Law*, 22 How., 426; *Ryckman* vs. *Coleman*, 21 How., 404; 13 Abb., 398.

But, to have this effect, the denial of such equities must be full and specific, and must cover the whole ground. If facts are admitted which qualify a general denial; if the denial be evasively made; or if, on examination of the circumstances, the court deem that the facts warrant the continuance of the injunction, notwithstanding a formal denial may have been made, the rule will not be applied. *Vide Florence* vs. *Bates*, *supra*; *Hartwell* vs. *Kingsley*, 2 Sandf., 674; 2 C. R., 101; *Merritt* vs. *Thompson*, 3 E. D. Smith, 283; 1 Abb., 223; *Storer* vs. *Coe*, 2 Bosw., 661; *Litchfield* vs. *Pelton*, 6 Barb., 187; *Churchill* vs. *Bennett*, 8 How., 309; *Chappell* vs. *Potter*, 11 How., 365; *Crocker* vs. *Baker*, 3 Abb., 382 (383).

(*e.*) 3. MOTION ON AFFIDAVITS.

This, as before stated, is the more usual form in which a motion of this nature is brought up. It presents the advantage to the mover of being able, on the same occasion, to go over the whole ground of the case, whether on points of form or on the merits; as, of course, on a

motion of this description, every question of every nature is capable of being brought up for consideration.

It may be made, as appears upon the face of the section, upon affidavits, either with or without the answer. As before noticed, an answer verified by the party, or by an agent verifying from his own knowledge, is, to all intents and purposes, an affidavit, when it contains any specific statement of facts, and so far as such statement of facts is concerned. Where, or so far as it consists of bare denials of the plaintiff's case, as stated, it can scarcely be said to assume that character. It then simply fulfils the office of a pleading.

On the preparation of affidavits of this description, care must be taken to direct them especially to negative the title of the plaintiff to the specific remedy of injunction. Thus, where an injunction was granted to restrain a fraudulent disposition of property, it was held that the only question to be considered, on the motion to dissolve, was that of fraudulent intent, and that affidavits denying the debt of the plaintiff could not properly be received. *Brewster* vs. *Hodges*, 1 Duer, 609.

On a motion of this description (as in one founded on a denial of the whole of the equity), if the plaintiff's title to relief be fully denied by the defendant's affidavits, and the matter rests upon contending testimony, without any decided preponderance in his favor; or, *a fortiori*, if his case, or the injury alleged by him, be substantially disproved, the injunction cannot properly stand, but should be vacated, or modified, as the case may demand. *Perkins* vs. *Warren*, 6 How., 341; *Florence* vs. *Bates*, 2 Sandf., 675; 2 C. R., 110; *McCafferty* vs. *Glazier*, 10 How., 475; *Merrimack Manufacturing Company* vs. *Garner*, 4 E. D. Smith, 387; 2 Abb., 318; *Chappell* vs. *Potter*, 11 How., 365 (367).

The point next comes up for consideration as to whether, when the defendant moves on a verified answer alone, the plaintiff can be allowed to read affidavits or other proof, in reply, or in support of his original case.

When other affidavits are used by the defendant, either with or without such answer, there can be no doubt of this right. It is distinctly provided for in section 226.

But that section says that he may do so, when such motion is made on affidavit, "but not otherwise." On these words hangs the difficulty.

It has been decided in the following cases, that a broad distinction exists between the term affidavit and the term answer; and that, when the defendant moves upon his answer alone, the plaintiff cannot read affidavits in reply, or even his reply to such answer, and this, although such answer, being verified, acquires the force of an affidavit, and may be used as such, for the assertion of matter in evidence: *Hartwell* vs. *Kingsley*, 2 Sandf., 674; 2 C. R., 101; *Servoss* vs. *Stannard*, 2 C. R.,

56. See also opinion of Woodruff, J., dissenting, in *Merrimack Manufacturing Company* vs. *Garner*, 4 E. D. Smith, 387; 2 Abb., 318. See likewise, *Blatchford* vs. *The New York and New Haven Railroad Company*, 7 Abb., 322, based on the reasoning in *Servoss* vs. *Stannard* (p. 324), and *Minor* vs. *Buckingham*, 8 Abb., 68.

The decisions in *Blatchford* vs. *The New York and New Haven Railroad Company*, and *Hartwell* vs. *Kingsley*, have both the authority of decisions at general term (see note on latter, 2 Sandf., 674), and would accordingly seem to bind the Superior Court, and the Supreme Court in the first district.

There is, however, a very strong current of authority the other way, and much force in the view contended for, which is this: Where the answer is a mere defence, not setting up any new matter, and is used only as a pleading, and not for establishment of any new facts, the rule, as above laid down, is undoubtedly correct. Where, however, that answer goes beyond the mere office of a defensive pleading, and sets up matter in avoidance, on the statement of which new matter the defendant relies in opposition to the plaintiff's case; and the defendant uses the answer on the motion, not merely as a pleading, but also as an affidavit for the assertion of such new matter; there seems no valid reason whatever, why the plaintiff should not be admitted to contradict that new matter, merely because it happens to be technically proved by the verified answer of the adverse party, when he has unquestionably the right to do so if set up by the affidavit of a third party, by the separate affidavit of the defendant, or even by the very answer of that defendant, if not verified by himself, but by his agent. See *Minor* vs. *Buckingham*, 8 Abb., 68, *supra*. The above view is taken, and affidavits were admitted in reply to the defendant's answer, in the following decisions: *Krom* vs. *Hogan*, 4 How., 225; *Schoomaker* vs. *The Reformed Protestant Dutch Church of Kingston*, 5 How., 265; *Hascall* vs. *Madison University*, 8 Barb., 174; 1 C. R. (N. S.), 170; *Hollins* vs. *Mallard*, 10 How., 540; *Jaques* vs. *Areson*, 4 Abb., 282; *Powell* vs. *Clark*, 5 Abb., 70. See also generally, *Davis* vs. *Hackley*, 14 Abb., 64, note.

In *Powell* vs. *Clark*, *supra*, 5 Abb., 70 (73), it is said to have been decided, that the receipt of additional affidavits is a matter of discretion with the presiding judge, and such discretion ought surely to be exercised in favor of not allowing the mere assertion of a defendant to bar the plaintiff from the power of contradiction, when that right is unquestionably secured to him, if the same proof be introduced in another form.

But, in such a case, it has been held that the affidavits of the plaintiff in reply, whether responsive to the answer, or to affidavits on the part of the defendant, should be confined to the new matter so set up.

Powell vs. *Clark*, *supra*; *Florence* vs. *Bates*, 2 C. R., 110.—N. B. The report at 2 Sandf., 675, does not contain this part of the opinion.

The plaintiff's liberty to fortify his original case must, however, be confined to his claim, as set up in the complaint; he cannot enlarge that claim, or prefer others. *Hentz* vs. *The Long Island Railroad Company*, 13 Barb., 646.

(*f.*) GENERALLY AS TO MOTION.

It is competent for the plaintiff to abandon an injunction, when obtained, by notice to the defendant. *Shearman* vs. *The New York Central Mills*, 11 How., 269. Discontinuance of the suit has, of course, the effect of destroying it *per se*. *Hope* vs. *Acker*, 7 How., 308. In either case the injunction falls "*ipso facto*," and in neither will a subsequent motion to dissolve be either necessary or admissible.

It falls equally, on a judgment on the hearing in favor of the defendant. See *Hoyt* vs. *Carter*, 7 How., 140.

As to the power of the court, to provide against the removal of the cause into the United States Courts operating as a dissolution *per se*, *vide Liddel* vs. *Thatcher*, 12 How., 294.

In *Furniss* vs. *Brown*, 8 How., 59, an injunction granted on a complaint held bad for misjoinder, was, nevertheless, conditionally continued, in the event of the plaintiff's amending according to the leave given. See also, as to the allowance of a technical amendment, for the purpose of sustaining an injunction, *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472.

The subsequent insolvency of one of the original sureties may also, it would seem, be made ground for a motion for dissolution, unless fresh security be given. *Willett* vs. *Stringer*, 15 How., 310; 6 Duer, 686.

So also inadequacy in the amount of the security as originally given, will form ground for a dissolution, *Ryckman* vs. *Coleman*, 21 How., 404; 13 Abb., 398; or for a modification, *Gurnee* vs. *Odell*, 13 Abb., 264.

An order, continuing, modifying, or vacating an injunction, or granting one on notice, is, of course, reviewable by the general term. It cannot, however, be carried up to the ultimate tribunal, being a matter exclusively resting in the discretion of the court below. See *Vandewater* vs. *Kelsey*, 1 Comst., 533; 3 How., 338; 2 C. R., 3; *Selden* vs. *Vermilyea*, 1 Comst., 534; 3 How., 338; 1 C. R., 110. See also *Genin* vs. *Tompkins*, 1 C. R. (N. S.), 415.

If the injunction be vacated or modified, a copy of the order must, of course, be served by the defendant on the adverse attorney. If, on the contrary, the application be refused, or omitted to be made, the injunction remains in force until the hearing of the cause, when, if the

plaintiff's right to continued relief of this nature be made out, it will form part of the decree to be made; if not, it falls, *ipso facto*, as above shown.

As to how far a defendant may or may not move to vacate an injunction, whilst in contempt, see last section, under head of *Violation of Injunction*, and cases there cited.

§ 106. *Dissolution.—Liability of Sureties.*

In the event of the injunction being finally dissolved by the court, the defendant will, as a general rule, be entitled to a claim for damages in respect of its granting and continuance. His immediate remedy for this is by action on the undertaking. He may, however, if he so think fit, also assert his right, by action against the adverse party; but this mode is unusual.

His course for the purpose of asserting the remedy so given to him, is to obtain an order of reference, to ascertain the amount of damages which he has sustained (see Code, sections 222, 224), and to proceed to establish his claim before the referee. The plaintiff should have notice of the proceedings, but it seems that it is not imperatively necessary to notify the sureties, and that, without notice, they will be equally bound. *Dickerson* vs. *Cook*, 3 Duer, 324; *Methodist Churches of New York* vs. *Barker*, 18 N. Y., 463. It is, however, in the discretion of the court to order them to be notified, and it should, as a general rule, be done, as they ought to be heard on the question of damages, the report having the effect of liquidating them. *Wilde* vs. *Joel*, 15 How., 320; 6 Duer, 671.

This order may properly be obtained and proceeded upon after judgment. See case last cited. Before judgment, the application will be premature, even where the temporary injunction has been abandoned. Before the liability of the sureties attaches, the court must "finally decide that the plaintiff was not entitled thereto." *Shearman* vs. *The New York Central Mills*, 11 How., 269. And the same is the case, even when an adverse report has been made, so long as judgment is not entered upon that report. *Weeks* vs. *Southwick*, 12 How., 170. A discontinuance will give the right to proceed at once: *Hope* vs. *Acker*, 7 Abb., 308; *Carpenter* vs. *Wright*, 4 Bosw., 655; or a dismissal of the complaint. *Loomis* vs. *Brown*, 16 Barb., 325.

On a reversal of an injunction by the general term, the liability of the sureties will accrue forthwith, notwithstanding an appeal may have been taken to the Court of Appeals. Nor will an order for continuance of the injunction pending that appeal, avail to suspend it. Such order is, in effect, a new injunction, and, to render it available, a new undertaking

will be necessary. A restoration of the original injunction by the Court of Appeals might eventually serve the sureties by way of discharge from their liability, but the appeal itself does not avail to suspend it. *Town of Guilford* vs. *Cornell*, 4 Abb., 220.

In estimating the damages sustained by an injunction, counsel fees for defending the suit, and for moving to dissolve, may properly be included. *Coates* vs. *Coates*, 1 Duer, 664; *Willett* vs. *Scovill*, 4 Abb., 405; *White* vs. *Joel*, 15 How., 320; 6 Duer, 671; *Fitzpatrick* vs. *Flagg*, 12 Abb., 189. Also similar fees on an attachment for contempt. *Davis* vs. *Sturtevant*, 4 Duer, 148. But not counsel fees on an appeal to the Court of Appeals, from a reversal of the judgment: *Town of Guilford* vs. *Cornell*, *supra*; or for obtaining the injunction in the first instance. *Burnett* vs. *Phalon*, 21 How., 100; 12 Abb., 186.

If the injunction be, on the contrary, sustained, the defendant will be liable for interest, for money retained in his hands, when he might have paid it over to the plaintiff, or into court. *McKnight* vs. *Chauncey*, Court of Appeals; see Selden's notes, 12th of April, 1853, p. 60.

On the report of the referee being obtained, it should be confirmed, on special motion, and an application made to the court for leave to prosecute the bond. *Griffin* vs. *Slate*, 5 How., 205; 3 C. R., 213. As to what such report must necessarily contain, see *Taaks* vs. *Schmidt*, 19 How., 413.

But where the bond is one given under the Revised Statutes, such a reference is not necessary, and it can be sued on by the party without any preliminary proceeding. Leave of the court must, however, be equally obtained. *Higgins* vs. *Allen*, 6 How., 30.

A bond of this last description is, under the statute, to be delivered out to the defendant for prosecution. *Vide* 2 R. S., 190, § 150. An ordinary undertaking need not be taken out of the hands of the clerk, inspection and production being all that is necessary, to enable him to draw his complaint, and maintain his action. *White* vs. *Joel*, *supra*.

In *Willett* vs. *Scovell*, 4 Abb., 405 (407), judgment appears to have been entered against the sureties, on the confirmation of the report, without any action brought. The authority to do this seems, however, very questionable. See *Higgins* vs. *Allen*, and *Griffing* vs. *Slate*, above cited. Defences might exist to the undertaking, from which they cannot properly be precluded. *White* vs. *Joel*, *supra*.

In an action on a bond, under the Revised Statutes, the plaintiff's recovery will be limited to the amount of the penalty. An order that the defendant in the original action pay the amount of the judgment, in respect of which the injunction was granted, or that, in default, the plaintiff be at liberty to prosecute, is a prudent preliminary to the bringing of such action. *Dickerson* vs. *Cook*, 3 Duer, 324.

CHAPTER IV.

ATTACHMENT.

§ 107. *Statutory Provisions.*

THE Code of 1848 contained no provision whatever upon the subject of this remedy. On the amendment of 1849, those in relation to it were first inserted, forming chapter IV. of title VII., part II.

They run as follows:

CHAPTER IV.

Attachment.

§ 227. In an action for the recovery of money, against a corporation created by or under the laws of any other State, government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself, or, whenever any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his or its property, with intent to defraud creditors, as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of such defendant or corporation attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover.

Dates from 1857. Prior to that year, the provisions authorizing an attachment for removal of property out of the state, or for a disposal of it with intent to defraud, were omitted.

§ 228. A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 229. The warrant may be issued, whenever it shall appear by affidavit, that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with a like intent; or, that such corporation or person has removed, or is about to remove, any of his or its property from this State, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with the like intent, whether such defendant be a resident of this State or not.

It shall be the duty of the plaintiff procuring such warrant, within ten

days after the issuing thereof, to cause the affidavits on which the same was granted, to be filed in the office of the clerk of the county in which the action is to be tried.

The first division of the section, down to "keeps himself concealed therein with a like intent," was in the Code of 1849. The second, giving the remedy for the removal or concealment of property, was added on the amendment of 1857. The concluding sentence was subjoined on the amendment of 1860.

§ 230. Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be, at least, two hundred and fifty dollars.

Provision as to the undertaking, providing for the case of the attachment being set aside, inserted in 1862. Dates otherwise from 1849.

§ 231. The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses; the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time, to the sheriffs of different counties.

Form of section settled in 1851. Before that year, the sheriff was to attach all the defendant's property, without limitation, to the amount of the plaintiff's demand.

§ 232. The sheriff, to whom such warrant of attachment is directed and delivered, shall proceed thereon, in all respects, in the manner required of him by law, in case of attachments against absent debtors; shall make and return an inventory; and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action; and shall, subject to the direction of the court or judge, collect and receive into his possession, all debts, credits, and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name, or in the name of such defendant, as may be necessary for that purpose, and discontinue the same, at such times, and on such terms, as the court or judge may direct.

§ 233. If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects, as are provided by law, upon attachments against absent debtors.

§ 234. The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property, in this State, of such defendant, shall be

liable to be attached and levied upon, and sold to satisfy the judgment and execution.

§ 235. The execution of the attachment upon any such rights, shares, or any debts or other property, incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

§ 236. Whenever the sheriff shall, with a warrant of attachment or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching or levying upon such property, such officer, debtor, or individual, shall furnish him with a certificate, under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend, or any encumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant. If such officer, debtor, or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such orders may be enforced by attachment.

§ 237. In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose.

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment.

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell, under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges, in respect thereto, which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and, for that purpose, shall have all the authority which he had to seize the same under the attachment; and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes, and other evidences of debt, and the debts that

may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

At the expiration of six months from the docketing of the judgment, the court shall have power, upon the petition of the plaintiff, accompanied by an affidavit, setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached and the disposition thereof; and also the affidavit of the sheriff, that he has used diligence, and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any portion thereof; to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons shall not have been personally served on the defendant, the court shall make such rule or order as to the service of notice, and the time of service, as shall be deemed proper.

When the judgment and all costs of the proceeding shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

That portion of subdivision four which provides for the sale of uncollected assets, was first inserted on the amendment of 1859. The rest of the section, the concluding sentence included, dates from 1849.

§ 238. The actions herein authorized to be brought by the sheriff, may be prosecuted by the plaintiff, or under his direction, upon the delivery by him, to the sheriff, of an undertaking, executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs, and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify, by making affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities.

§ 239. If the foreign corporation, or absent, or absconding, or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or his agent on request, and the warrant shall be discharged, and the property released therefrom.

§ 240. Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same; and, if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached, remaining in his hands, shall be delivered or paid by him to the defendant, or his agent, and released from the attachment.

And where there is more than one defendant, and several property of

either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized, may apply to the officer who issued the attachment, for relief under this section.

The concluding sentence added to the original section on the amendment of 1862.

§ 241. Upon such an application, the defendant shall deliver to the court or officer an undertaking, executed by at least two sureties, who are residents, and freeholders or householders in this State, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be, at least, double the amount claimed by plaintiff in his complaint. If it shall appear by affidavit that the property attached be less than the amount claimed by the plaintiff, the court or officer issuing the attachment, may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And in all cases, the defendant may move to discharge the attachment, as in the case of other provisional remedies.

And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court or officer an undertaking, in accordance with the provisions of this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all the provisions of this section applicable to such undertaking shall be applied thereto.

The concluding provisions were added in 1862. The first sentence formed the whole section in 1849. The intermediate portion was added in 1857.

§ 242. When the warrant shall be fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.

§ 243. The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, under this title, as are allowed by law for like services and disbursements, under the provisions of chapter five, title one, part two, of the Revised Statutes.

The above are all the provisions of the Code on the subject of attachment.

By sections 232 and 233, however, the sheriff is directed to proceed, as provided by law, in the case of attachments against absent debtors. Under section 243 he is, also, entitled to the same fees and disbursements as are allowed by law in the same cases.

The references, so made, necessitate a citation of the provisions of the Revised Statutes on these subjects. Though the procedure, under those provisions, has fallen into comparative disuse, the attachment under the Code being for the immediate and sole benefit of the actual plain-

tiff, whereas, under the Revised Statutes, he proceeded not merely on behalf of himself but of his class in general, this portion of that procedure is, by these means, necessarily kept alive.

The provisions still retained in active operation by the references in sections 233 and 234, constitute a portion of article I., title I., chapter V., part II., of the Revised Statutes, sections 7 to 17, and 20 to 29, inclusive. *Vide* 2 R. S., 4 to 6.

They run as follows :

§ 7. The sheriff to whom any such warrant shall be directed and delivered, shall immediately attach all the real estate of such debtor, and all his personal estate, including money and bank-notes, except articles exempt from execution; and shall take into his custody all books of account, vouchers, and papers relating to the property, debts, credits, and effects of such debtor, together with all evidences of his title to real estate, which he shall safely keep, to be disposed of as hereinafter directed.

§ 8. He shall, immediately on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers, and papers taken into his custody, stating therein the estimated value of the several articles of personal property, enumerating such of them as are perishable; which inventory, after being signed by the sheriff and the appraisers, shall within ten days after such seizure be returned to the officer who issued the warrant; and the sheriff shall, under the direction of such officer, collect, receive, and take into his possession, all debts, credits, and effects of such debtor, and commence such suits and take such legal proceedings in the name of such debtor as may be necessary for that purpose, and which suits and proceedings may be continued by the trustees to be appointed as hereinafter directed, until a final termination thereof.

Amended, as it stands, by section 1 of chapter 354, of 1840.

§ 9. If any of the property so seized, other than vessels, be perishable, the sheriff shall sell the same at public auction, under an order of the officer who issued the warrant, and shall retain in his hands the proceeds of such sale, after deducting his expenses to be allowed by such officer, which proceeds shall be disposed of in the same manner as the property so sold would have been if it had remained unsold.

§ 10. If any goods or effects seized as the property of the debtor, other than vessels, shall be claimed by or on behalf of any other person as his property, the sheriff shall summon and swear a jury to try the validity of such claim, in the same manner and with the like effect as in case of seizure under execution.

§ 11. If, by their inquisition, the jury find the property of the goods and effects so seized to be in the person claiming them, the sheriff shall forthwith deliver them to the claimant or his agent, unless the attaching creditor shall by bond, with sufficient sureties, indemnify the sheriff for the deten-

tion of such goods and effects. In case of such indemnity, the sheriff shall detain such goods and effects, to be disposed of as hereinafter directed.

§ 12. If the property in such goods be found to be in the claimant, the costs and charges arising from such inquisition, to be allowed by the officer issuing the warrant, shall be paid by the attaching creditor; but if it be found to be in the debtor, then the costs and charges, to be ascertained in the same manner, shall be paid by the claimant.

Amended, as it now stands, by section 297, of 1841.

The two following sections were added by chapter 242, of 1841:

§ 13. It shall be lawful for the owners or masters of any ship or vessel, on board of which the goods of any non-resident, concealed, or absconding debtor shall have been shipped in good faith, for the purpose of transportation, without reshipment or transhipment in this State, to any port or place out of this State, to transport and deliver such goods according to their destination, notwithstanding the issuing of any attachment against such debtor, unless the attaching creditor, his agent or attorney, shall execute a bond with sufficient sureties to any or either of the owners or masters of the vessel on board of which such goods shall be shipped, conditioned to pay such owner or master all expenses, damages, and charges which may be incurred by such owner or master, or to which they may be subjected for unlading said goods from said vessel, and for all necessary detention of said vessel for that purpose. [1841, ch. 242, § 1.]

§ 14. This act shall not extend to any case where such owner or master, either before or at the time of the shipment of such goods, shall have received actual information of the issuing of such attachment, nor where the owner or the master of any vessel have in any wise connived at or been privy to the shipment of such goods, for the purpose of screening them from legal process, or for the purpose of hindering, delaying, or defrauding creditors. [Same, § 2.]

§ 15. (13.) When a vessel belonging to any port or place in this state, or any of the United States, or any share or any interest in such vessel, shall be attached; on the application, within thirty days thereafter, of any person claiming such vessel or share, or of his agent, the officer who issued the warrant may cause the vessel or share so seized to be valued by three indifferent men, to be appointed by such officer.

§ 16. (14.) Within two days after such appraisement shall be made, the claimant, or his agent, may execute a bond with sureties, to be approved by such officer, to the people of this State, in a penalty double the amount of such appraised value, conditioned that, in a suit to be brought on such bond, the claimant will establish that he was the owner of such vessel or share at the time of the seizure, and, in case of his failure to do so, that he will pay the amount of such valuation, with interest, from the date of the bond, to any trustees who may be appointed on such attachment; or in case none be appointed according to law, or the attachment be discharged, to such debtor or his personal representatives.

N. B. The machinery of trustees is no longer applicable to the present form of attachment, and the condition of the bond must, of course, be correspondingly altered.

§ 17 (15.) Upon such bond being executed and delivered to such officer, he shall order the vessel or share so seized to be discharged from the attachment, and the sheriff shall discharge such vessel or share accordingly.

N. B. The next two sections prescribe as to the nature of the suit to be brought upon such bond when given, and the proceedings thereon.

§ 20. (18.) Whenever a foreign vessel, or a share or interest in any foreign vessel shall be attached, such vessel or such share or interest may be valued in the manner above prescribed, upon the application of any person who shall, by his affidavit, swear that he is the owner thereof, or upon the application of the agent of such owner, who shall, by his affidavit, swear that he is such agent, and that he verily believes his principal to be the owner of the vessel, or share so attached.

§ 21. (19.) Such notice of such application shall be given to the attaching creditors, as the officer to whom the same is made shall deem reasonable.

§ 22. (20.) Within three days after such valuation shall be returned to the officer who directed the same, the creditors at whose instance the attachment issued shall execute a bond, with sureties, to be approved by such officer, to the person in whose behalf such claim shall be made, in double the amount of the valuation, with a condition to prosecute such attachment to effect, and to pay such damages as may be recovered against them, for seizing the said vessel, or share, in any suit that shall be brought against them within three months from the date of the bond, if it shall appear in such suit that the vessel, or share or interest therein, so attached, belonged, at the time of issuing such attachment, to the person in whose behalf such claim shall be made.

§ 23. (21.) Unless such bond be given as above prescribed, the officer who issued the attachment shall grant an order discharging the vessel, share, or interest so claimed from such attachment, and the same shall be discharged accordingly.

§ 24. (22.) If, after an attachment has been levied upon a foreign vessel, a valuation of the same, or of the share or interest therein seized, be made, no other warrant or attachment shall issue against the same vessel, as being the property, in whole or in part, of the same debtor, until the security above prescribed shall be given by the person requiring such warrant.

§ 25. (23.) If, after the execution of any such bond by an attaching creditor, the attachment shall be discharged, or the proceedings shall cease, by the omission to appoint trustees according to law, the debtor against whom such attachment issued, or his agent, shall be entitled to claim such vessel, share, or interest, or the proceeds thereof if the same shall have been sold, only upon his discharging the bond so executed by such attaching creditor, or by his executing to such creditor a bond, in a penalty double the valuation made as herein directed, with sureties to be approved by the officer who

issued the attachment, conditioned to indemnify such creditor against all charges and expenses in consequence of the bond so executed by him.

§ 26. (24.) If the bond of the attaching creditor be not discharged, or he be not indemnified as above directed, within one month after the debtor became entitled to claim such vessel, share, or interest, as above prescribed, such vessel, share, or interest may be sold by the sheriff in whose custody the same may be, upon an order of the officer who issued the attachment; and the proceeds of the sale shall be paid to the attaching creditor, who executed such bond for his indemnity.

§ 27. (25.) If no claim be made by any owner of a domestic vessel, or of a share in such a vessel, seized under any warrant of attachment, within thirty days after such seizure, and no bond be executed as herein directed by such claimant; or if no claim be made within that time, by or in behalf of the owner of any foreign vessel, or of a share therein, so seized, such vessel or share may be sold by the sheriff making such seizure, under an order of the officer issuing the attachment, to be granted upon the application of any attaching creditor, whenever, in the opinion of such officer, a sale may be necessary.

§ 28. (26.) When a share in any vessel, foreign or domestic, shall be seized, if no claim to such share be made by any owner thereof, as herein provided, within thirty days after such seizure, it may be sold by the sheriff, under an order of the officer issuing the attachment, to be granted on the application of any joint owner, or of his agent.

§ 29. (27.) Whenever a sale of perishable property, or of a vessel, or share of a vessel, shall be ordered by any officer, as herein authorized, he shall, in such order, prescribe the time, place, and notice of such sale, and how the same shall be published.

The fees to which the sheriff is entitled, as reserved by section 243, are not prescribed in detail by the provision of the Revised Statutes there referred to.

They will, however, be found in a subsequent portion of those statutes, title III. of chapter X., part III.

They form part of section 38, which prescribes the fees of the sheriff for the different services rendered by him.

The provisions immediately pertinent to the present subject run thus:

"For serving an attachment for the payment of money," or an execution, &c., "for collecting the sum of two hundred and fifty dollars or less, two cents and five mills per dollar; and for every dollar collected more than two hundred and fifty, one cent and two and a half mills.

"For serving an attachment against the property of a debtor, under the provisions of chapter V. of the second part" (or against a ship or vessel under other provisions, not pertinent on the present occasion), "fifty cents, with such additional compensation for his trouble and expenses, in taking possession of and preserving the property attached, as the officer issuing

the warrant shall certify to be reasonable; and, where the property so attached shall afterward be sold by the sheriff, he shall be entitled to the same poundage on the sum collected, as if the same had been under an execution."

"For making and returning an inventory and appraisal, such compensation to the appraisers, not exceeding one dollar to each per day, for each day actually employed, as the officer issuing the attachment shall allow; and the same compensation for drafting and copying the inventory, as is allowed for drafts or copies to attorneys in the Supreme Court."

(N. B.—There is no compensation allowed to attorneys in the Supreme Court, which would tally with this particular service. In Chancery, the allowance would be, for drafting, twenty-eight cents; for engrossing, fourteen cents; and for every other necessary copy, seven cents per folio.)

"For selling any property so attached, and advertising such sale, the same allowances as on sales on executions."

For these allowances see hereafter, under that head.

§ 108. *General Observations.*

The provisions of the Code, as above cited, are in close analogy with those of the Revised Statutes, granting a similar remedy in actions against foreign corporations. See article I., title IV., chapter VIII., part III., sections 15 to 36 inclusive, 2 R. S., 459 to 462, section 15 being amended by chapter 107 of 1849, p. 142. They are obviously framed on the same model, extending the operation of the previous remedy. Although that portion of the Revised Statutes is not formally repealed (*vide Campbell* vs. *The Proprietors of the Champlain and St. Lawrence Railroad Company*, 18 How., 412), it may fairly be considered as virtually superseded by the Code as it now stands.

The operation of that measure, as regards the remedy of attachment, given by the Revised Statutes in the cases of absconding, concealed, and non-resident debtors, and of debtors confined for crimes (see art. I. and II., title I., ch. V., part II., 2 R. S., 1 to 15 inclusive), is equally clear in fact, but is at the first glance less obvious. Not being repealed, those remedies are unquestionably still attainable, and a part of the machinery provided by the Revised Statutes is still retained, under the Code, as above noticed.

In the case of debtors confined for crimes, the Revised Statutes continue to afford the only resource, the Code being silent upon that subject. Those proceedings, however, are rather in the nature of preliminaries to an insolvent assignment, than steps taken in or for the purposes of an actual suit, and their consideration in the present work would therefore be out of place.

In the case of absconding, concealed, and non-resident debtors, the

remedies given by the Code may fairly be considered as substituted for those given by the Revised Statutes. That the former are in no wise controlled or limited by the latter, is expressly laid down in *Ready* vs. *Stewart*, 1 C. R. (N. S.), 297. The attachment, under the former practice, was in fact not a provisional remedy, but a special proceeding, resulting in the appointment of trustees, and in a transfer of all the debtor's property to such trustees, not for the benefit of the individual suitor, but to be divided amongst all creditors, *pari passu*.

Having none of the characteristics of an ordinary suit, but being strictly and to all intents a special proceeding, its consideration, in connection with the subject of provisional remedies, would be entirely out of place. Besides, this form of procedure is rapidly growing, if it has not already grown, practically obsolete. The superior facilities which the Code gives to a diligent creditor, are too obvious to require more than a mere allusion. Proceedings under that measure afford, too, another and a most important advantage. Being merely operative as a provisional remedy, accessory to an action commenced by summons, those proceedings are not jurisdictional. Any error in them is therefore capable of amendment, without affecting their validity, or the steps taken previous to such correction. Under the Revised Statutes, the attachment itself formed, on the contrary, the original process. The proceeding itself being statutory, a strict compliance with the statute, in all its requirements, was essential. Any mistake or omission in the original affidavits was, therefore, fatal to the whole, and, moreover, unamendable. It involved a failure to acquire jurisdiction. See *Furman* vs. *Walter*, 13 How., 348; *Staples* vs. *Fairchild*, 3 Comst., 41; *Payne* vs. *Young*, 4 Seld., 158.

A similar remedy exists in justices' courts; but, as before stated, the consideration of the practice of those tribunals is entirely beyond the scope of the present treatise, and will not therefore be entered upon.

The Revised Statutes also provide a remedy by attachment, for the enforcement of liens against ships or vessels, and the provisions there made have been the subject of numerous subsequent amendments by the legislature. This proceeding is not, however, provisional, or in any wise accessory to a suit. It is, on the contrary, strictly special, and provides a complete remedy, by sale of the vessel, and distribution of the proceeds amongst all the holders of similar liens, *pari passu*, without any preference in favor of the original promoter. Its consideration, in connection with the subject of provisional remedies, would, therefore, be equally out of place.

Not merely does the provisional remedy, provided by the Code, afford a most valuable facility to the suitor, but, in certain cases, it is essential to the enforcement of his rights. When service has been made by pub-

lication, judgment cannot now be entered, unless such an attachment has been issued, and an actual levy made under it. See rule 25.

Under the Revised Statutes, a non-resident was not competent to sue out an attachment, though, when one was already issued, he might come in under it, and participate in the division. *In re Coates*, 12 How., 344. See also, *In re Bonaffé*, 18 How., 15, and *same case*, 23 N. Y., 169; affirming, 33 Barb., 469. The fact of one partner being non-resident did not, however, disqualify the firm from initiating such proceedings, on the affidavit of one of its resident members. *Renard* vs. *Hargous*, 3 Kern., 259; affirming, *same case*, 2 Duer, 540.

Under the Code, however, a non-resident labors under no such disability. He may attach the property of another, in any action in which an attachment is issuable, without regard as to whether the cause of such action did, or did not, arise within this state. *Ready* vs. *Stewart*, 1 C. R. (N. S.), 297. And this equally applies to the case of a foreign corporation, so far as regards its rights as plaintiff. *Vide President of Bank of Commerce* vs. *The Rutland and Washington Railroad Company*, 10 How., 1 (7).

But a suit against a foreign corporation, cannot be maintained by a non-resident plaintiff, unless the cause of action shall have arisen, or the subject of the action shall be situated within this state. Code, section 427. Of course, in such a case, an attachment, under the Code, cannot stand, unless one of these two conditions be satisfied.

See as to the former of these two prerequisites, *Western Bank* vs. *City Bank of Columbus*, 7 How., 239; *Eggleston* vs. *Orange and Alexandria Railroad Company*, 1 C. R. (N. S.), 212; *McDonough* vs. *Phelps*, 15 How., 372; *Cantwell* vs. *The Dubuque and Western Railroad Company*, 17 How., 16; *President of Bank of Commerce* vs. *Rutland and Washington Railroad Company*, 10 How., 1, *supra; Bates* vs. *The New Orleans, Jackson, and Great Northern Railroad Company*, 13 How., 518; 4 Abb., 72.

See, as to the latter, the following decisions, holding that the mere fact of property of a foreign corporation being within the state, is not sufficient to warrant the issuing of an attachment. The subject of the action is the claim asserted by the plaintiff, and the satisfaction which he seeks out of the property, not the property itself. Unless the action itself be strictly *in rem*, jurisdiction will not, in such a case, be acquired against a foreign corporation, and an attachment, if issued, cannot stand. *Whitehead* vs. *Buffalo and Lake Huron Railroad Company*, 18 How., 218; *Campbell* vs. *Proprietors of the Champlain and St. Lawrence Railroad*, 18 How., 412.

§ 109. *When, and from whom Obtainable.*

The provisions to be considered in this division will be found in sections 227 and 228.

1. An attachment is only obtainable in an action for the recovery of money.

2. It is obtainable in that action, at the time of issuing the summons, or at any time afterwards. Being obtainable, however, "as a security for the satisfaction of such judgment as the plaintiff may recover," it follows, as a necessary consequence, that it must be applied for before the recovery of such judgment.

3. The officers competent to grant this remedy are, "a judge of the court in which the action is brought, or a county judge."

4. The remedy is obtainable in the following cases:

When the action is brought against a foreign corporation.

When it is brought against a defendant who is not a resident of this state.

When the defendant, in an action for the recovery of money, has absconded, or concealed himself. The meaning of these expressions is, however, more fully given in section 229, where it is prescribed that the affidavit must show in such cases, either that the defendant has departed from this state "with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein with a like intent."

When the defendant in such an action, being a person or corporation, is about to remove any of his or its property from this state, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud creditors.

In this last class, the remedy is equally obtainable, whether such defendant be a resident of the state or not. Section 229.

It is proposed to consider these several matters in the above order.

(*a.*) 1. Only Obtainable in an Action.

This remedy is, as will be seen, only obtainable by the plaintiff in an action, and that an action for the recovery of money.

It is therefore appropriate to the whole class of proceedings, to which the form of summons issuable under subdivision 1 of section 129, is appropriate.

It is also issuable in that class in which pecuniary damages are sought to be recovered. *Vide Hernstein* vs. *Matthewson*, 5 How., 196; 3 C. R., 139. And the court will give a liberal construction to the statute in order to sustain the attachment, when the action is substantially one for

damages, though other collateral relief be sought. *Ward* vs. *Begg*, 18 Barb., 139.

But where the summons is for relief, and does not ask judgment for any specified amount, an attachment will not stand, even though the complaint claim damages for a specified amount. *Gordon* vs. *Gaffey*, 11 Abb., 1.

Where the cause of action was for a conversion, but the plaintiff waived the tort, and sued for the value of the goods, the summons asking judgment for a money demand, an attachment was sustained. *Trenor* vs. *Fachiri*, unreported.

In *Floyd* vs. *Blake*, 19 How., 542; 11 Abb., 349, it was even held that in the case of a non-resident or absconding defendant, an attachment might issue, in an action for damages for assault and battery.

But the remedy is not applicable to that class of suits, in which the relief sought is not represented or representable in whole or in part by a mere money payment, as in suits for specific performance, injunction, and others of a like nature.

A suit for a partnership accounting is one of the latter class, and an attachment cannot properly issue, even though the plaintiff, in his affidavit, assumes to state that there is due to him a sum exceeding a specified amount. *Ackroyd* vs. *Ackroyd*, 20 How., 93; 11 Abb., 345.

(*b.*) 2. At what time Obtainable.

Attachment, as may be seen, is obtainable by the plaintiff in such an action "at the time of issuing the summons, or at any time afterwards." Section 227.

But, as before noticed, it follows by necessary implication, from the wording of the subsequent portions of the section, that it is only so obtainable before the recovery of judgment. The remedies of the plaintiff after judgment lie under execution, or supplementary proceedings.

A summons must accordingly be issued at the time of the application. The making it out and having it ready for service will, however, be a sufficient issuing. It should be presented to the officer applied to, together with the other papers. It is not essential that it should be delivered to the sheriff, either with or before the attachment. It may be served by any other authorized person; but it should simultaneously or previously be made out and placed in the hands of that person, with a *bonâ fide* intent to have it served, if practicable. *Vide Mills* vs. *Corbett*, 8 How., 500; *Conklin* vs. *Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49.

Where the affidavit on which an attachment was granted was sworn to before the date of the summons, the attachment was, on that among other grounds, set aside. *Burgess* vs. *Stitt*, 12 How., 401. The affida-

vit on that service, was, however, manifestly defective. Otherwise, there seems no reason why an attachment should not be obtainable on an affidavit sworn on a previous day, provided, at the time of the actual application, the summons has been issued.

The case of *Treadwell* vs. *Lawlor*, 15 How., 8, seems wholly to ignore the existence of the provision now under consideration, and, so far, cannot be considered as of authority.

See, however, below, as to the necessity of jurisdiction being acquired, by service or otherwise, before an attachment can be issued by a court of limited powers.

(*c.*) 3. From whom Obtainable.—Question of Jurisdiction.

The officers from whom an attachment is obtainable are, as appears by section 228, a judge of the court in which the action is brought, or a county judge.

When issued, the act is the act of the court itself, and not of the individual judge. Subsequent proceedings are, therefore, in no wise affected by the expiration of the latter's term of office, but may be continued with the same effect before any other. *Davis* vs. *Ainsworth*, 14 How., 346.

To enable the judge to act, however, the court of which he is a member must have jurisdiction of the controversy. A strict view, on this question, was taken by the Superior Court, in *Fisher* vs. *Curtis*, and two other cases, 2 Sandf., 660, 661, and *Granger* vs. *Schwartz*, 11 L. O., 346. It was there held that, unless that court had already obtained jurisdiction of the controversy by service, an attachment issued by it would be void. This view is, however, receded from, and *Fisher* vs. *Curtis* in terms overruled in *Gould* vs. *Bryan*, 3 Bosw., 626; which holds that the court in question has power to issue an attachment in such cases, before service, and to accompany the summons, and that the actual commencement of the suit is not an essential prerequisite. The attachment, however, so issued, cannot be executed, until the summons has been served. See similar view, in relation to the issuing of an injunction, *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472.

Where, however, jurisdiction had been acquired by the Superior Court, by service upon one of several joint debtors, it was held that an attachment might be issued against the property of the others, though non-resident. *Anon.*, 1 Duer, 662.

The Supreme Court will, as a general rule, be the more convenient forum of application, in proceedings against non-residents, and likewise in all cases where the attachment is sought to be enforced in more than one county, or out of the county of limited jurisdiction.

(*d.*) 4. In what Cases Obtainable. Against Foreign Corporations.

The power of the court to issue an attachment in cases where a foreign corporation is defendant is, as before stated, limited by the provisions of section 427, declaring when an action of this sort is or is not maintainable.

The Great Western Railroad Company of Canada enjoys, by statute, peculiar immunities in this respect. On filing a bond for the payment of any judgment against them, and on designating a person in Niagara county, on whom process can be served, their property in this state is exempted from attachment in suits for amounts not exceeding the penalty of such bond; and in suits exceeding that amount, they are entitled to ten days' notice of an application for an attachment against such property. *Vide* ch. 84 of 1857, vol. 1, p. 188.

As to the power to issue an attachment against a foreign insurance company, notwithstanding the provisions of section 427, see *Burns* vs. *Provincial Insurance Company*, 35 Barb., 525; 13 Abb., 425. See also, as to the jurisdiction of the court in a case between two foreign corporations, arising out of a contract to be performed within, though made out of, this state, *Connecticut Mutual Life Assurance Company* vs. *Cleveland, Columbus, and Cincinnati Railroad Company*, 23 How., 180.

(*e.*) Against Non-resident Debtors.

The question as to when a defendant will or will not be considered non-resident, within the meaning of this section, so as to render his property attachable, has given rise to considerable discussion.

It may now be considered as settled that, when the defendant has a family, and the residence of that family is actually out of the state, however near or convenient of access it may be, and he spends his nights, or even a portion of his time with that family, at such residence, he will be held to be non-resident, and his property will be attachable, even although he has a place of business within the state, and passes the whole of his business hours, and transacts the whole of his business, in the ordinary manner, at that place. See *Lee* vs. *Stanley*, 9 How., 272; *Barry* vs. *Bockover*, 6 Abb., 374; *Potter* vs. *Kitchen*, 6 Abb., 374, note; *Houghton* vs. *Ault*, 16 How., 77; 8 Abb., 89, note; *Chaine* vs. *Wilson*, 16 How., 552; 8 Abb., 78; affirmed, 1 Bosw., 673; 8 Abb., 103; *Greaton* vs. *Morgan*, 8 Abb., 64; *Bache* vs. *Laurence*, 17 How., 554.

These cases seem clearly to overrule *Towner* vs. *Church*, 2 Abb., 299. On examination they will not be found to conflict with *Haggart* vs. *Morgan*, 1 Seld., 422; affirming 4 Sandf., 198. That action was brought on a bond given to obtain a release of property attached under

the Revised Statutes, not under the Code, and the decision itself turned entirely on the principle of estoppel. See *Houghton* vs. *Ault*, and *Chaine* vs. *Wilson*, above cited.

In *Hurlbut* vs. *Seeley*, 11 How., 507; 2 Abb., 138, the converse of the above proposition was maintained, and, where the family of the party had continued to reside within the state, he was held to be still a resident, and an attachment against his property was set aside, notwithstanding his prolonged absence, for the purpose of setting up a collateral business in the state of Wisconsin, but intending, after the establishment of such business, to return.

The intention of the defendant as to ultimate residence formed one of the main grounds of this decision. See also *Heidenbach* vs. *Schland*, 10 How., 477, holding that an emigrant, coming to this country with the intention of settling permanently, was a resident, even though living in a boarding-house. A mere intention to change a defendant's residence will not, however, avail to change his *status* in this respect, whilst incomplete and not carried into effect. *Lee* vs. *Stanley*, 9 How., 272, *supra*. See also *Burrowes* vs. *Miller*, 4 How., 349. See generally, on the question of domicile, *Hegeman* vs. *Fox*, 31 Barb., 475.

An attachment is maintainable against the property of a non-resident or absconding partner, though another member of the same firm is still resident, and has been served with process. *Brewster* vs. *Honingsburgher*, 2 C. R., 50; *Baird* vs. *Walker*, 12 Barb., 298; 1 C. R. (N. S.), 329; *Anon.*, 1 Duer, 662.

Under such an attachment the sheriff may, it would seem, take possession of the partnership property, for the purpose of selling the interest of the non-resident partner therein. *Goll* vs. *Hinton*, 8 Abb., 120; *Hergman* vs. *Dittlebach*, 11 How., 46. The former case overrules in terms the special term decision in *Stoutenburgh* vs. *Vandenburgh*, 7 How., 229, and *Sears* vs. *Gearn*, 7 How., 383, holding that, in such case, it is the individual interest of the non-resident which is alone liable to seizure.

(*f.*) Against Absconding or Concealed Defendants.

In this class of cases, the right of the plaintiff to this remedy will turn mainly on the intent of the defendant. The departure from the state, or the concealment within it, must be shown to be either "with intent to defraud creditors, or to avoid service of a summons." Section 229. If such intent be disproved, or not clearly made out, the attachment cannot stand. *Vide The New York and Erie Bank* vs. *Codd*, 11 How., 221. See also *Warren* vs. *Tiffany*, 17 How., 106; 9 Abb., 66, before cited under the head of *Service by Publication*.

To warrant the issuing of an attachment, it is not essential that the

departure from the state should be secret, as was required under the Revised Statutes, or that the concealment should be prolonged; provided the intent either to defraud, or to avoid service, be made out to be existent at the time. Nor will the fact that the plaintiff has, in his affidavit, drawn a wrong conclusion from the facts, avail to impeach the attachment, provided either of such intents be apparent from the facts themselves. *Vide Morgan* vs. *Avery*, 7 Barb., 656; 2 C. R., 91; affirmed 2 C. R., 121; *Camman* vs. *Tompkins*, 1 C. R. (N. S.), 12; *Gilbert* vs. *Tompkins*, 1 C. R. (N. S.), 16; affirmed at general term, *Genin* vs. *Tompkins*, 12 Barb., 265. See likewise *Van Alstyne* vs. *Erwine*, 1 Kern., 331.

(*g.*) Fraudulent Removal or Disposition of Property.

In this case, also, the making out of the intent to defraud is clearly essential. The provision being comparatively recent, the decisions under it are less numerous than might otherwise have been expected.

In *Mitchell* vs. *Bettman*, 25 Barb., 408, decided immediately after the amendment, the expediency of taking this course, instead of moving for an injunction and receiver, under similar circumstances, is distinctly pointed out.

The remedy, under this provision, extends to all property in the hands of the defendant, whatever may be his title thereto, or even when it is wrongfully in his possession. *Treadwell* vs. *Lawler*, 15 How., 8.

A mere omission to state the intent of a conveyance upon its face, though suspicious, does not necessarily make it fraudulent; nor is neglect to defend an action, by means of which property is taken, a fraudulent disposition of it, so as to warrant an attachment, unless fraud or collusion in the suffering of such judgment be shown. *Rigney* vs. *Tallmadge*, 17 How., 556.

The statement of mere circumstances of suspicion will not either be sufficient. Fraud must be established by *primâ facie* legal proof, or the warrant will be set aside. *Mott* vs. *Lawrence*, 17 How., 559; 9 Abb., 196.

A mere threat to make an assignment granting preferences to others, unless the plaintiff would accept certain terms, if made in a mode which may be construed as referring to a lawful assignment, is not, when standing alone, and without proof of other contemporaneous or subsequent facts, tending to show a fraudulent intent, sufficient ground for an attachment. *Wilson* vs. *Britton*, 26 Barb., 562; 6 Abb., 97; reversing *same case*, 6 Abb., 33; *Dickerson* vs. *Benham*, 20 How., 343; 12 Abb., 158; affirming *same case*, 19 How., 410; 10 Abb., 390. See likewise *Belmont* vs. *Lane*, 22 How., 365; though what the actual decision was in that case, is left uncertain by the report. See, as to the

issuing an attachment in respect of a fraudulent assignment, and what will be sufficient evidence of a fraudulent intent, *Gasherie* vs. *Apple*, 14 Abb., 64; *Skinner* vs. *Oettinger*, 14 Abb., 109.

See, as to facts sufficient to authorize the issuing of a justice's warrant on the same ground, *Rosenfield* vs. *Howard*, 15 Barb., 546.

See generally, as to the facts necessary to be stated, in order to establish the existence of an intent to defraud creditors by means of a fraudulent disposition of property, *Towsley* vs. *McDonald*, 32 Barb., 604, already cited on the analogous subject of *Service by Publication*.

§ 110. *How Obtained.*

This remedy is obtainable by means of an *ex parte* application to one of the officers mentioned in the last section.

In order to obtain it, the summons, as before explained, must be made out and issued, previous to or at the time of such application.

The applicant must also be prepared with—

1. The affidavit required by section 229.
2. The security required by section 230.
3. The warrant itself, as directed by section 231.

It may also be expedient for him, in certain cases, to be prepared with and to file a notice of *lis pendens*.

And, inasmuch as by the section last referred to, the amount of the plaintiff's demand "must be stated in conformity with the complaint," it is proper, wherever practicable, that the complaint should, at the same time, be drawn. If not, care must be taken that this conformity be strictly observed, when subsequently preparing that document. Any departure may draw into serious question the regularity of the proceeding.

It is proposed to consider the above three requisites in their order.

(*a.*) 1. Affidavit.

The form of this document is clearly prescribed by section 229.

It must appear by such affidavit:

That a cause of action exists against the defendant.

The amount and grounds of the claim must be specified.

And the case must be brought, by clear and specific allegation, within one of the four different classifications mentioned in that section and section 227, and considered in detail in the last section of this work.

These three grand requisites must be fully and clearly complied with, or the application will be ineffectual, as regards the retention at all events, and probably as regards the original granting of the remedy.

The objection, it is true, will not be jurisdictional, in the strict sense of the word, as under the Revised Statutes; but still it will be equally the duty of the officer originally applied to, to refuse, and of the court, when applied to by the defendant, to set aside or reverse the warrant, if granted on proof deficient in this respect.

A bare allegation, in the mere words of the statute, will not suffice. Facts must be stated, by which the plaintiff's right to the remedy will appear by the affidavit. *Frost* vs. *Rider*, 9 Barb., 440. *Furman* vs. *Walter*, 11 How., 348, contains, it is true, a *dictum* (p. 354) apparently at variance with this principle; but an examination into the whole case, will show that it cannot fairly be considered as authority to the contrary.

And such an affidavit must not, as a general rule, be grounded on information and belief; at least, the grounds of the belief, and the sources of the information must be disclosed, so as to enable the judge to form his judgment as to whether the information be sufficient, and the belief well founded. *Vide Camman* vs. *Tompkins*, 1 C. R. (N. S.), 12; *Gilbert* vs. *The Same*, 1 C. R. (N. S.), 16; affirmed, *Genin* vs. *The Same*, 12 Barb., 265. See also, several other cases, above cited, under the heads of *Arrest* and *Injunction*.

As to the inefficiency of the mere opinion or belief of the plaintiff, as a ground for the granting of this process, see *Ackroyd* vs. *Ackroyd*, 20 How., 93; 11 Abb., 345.

Likewise as to an affidavit on information and belief only, and not stating the sources of the former, *Brewer* vs. *Tucker*, 13 Abb., 76; *Hill* vs. *Bond*, 22 How., 272.

But, if the main facts be made apparent by sufficient proof, the fact that the accessory statements are made on information and belief, will not render the affidavit insufficient. *Vide Donnelly* vs. *Corbett*, 3 Seld., 500. See also, as to an affidavit grounded wholly on information and belief, but where such information was ample and convincing, and the statement the best that could be made, under the circumstances, *Peel* vs. *Elliott*, before cited under the head of *Arrest*.

The affidavit, to be sufficient, should make out a clear *primâ facie* case, so as to satisfy the justice applied to, not merely personally, but judicially, and upon legal proof. *Mott* vs. *Lawrence*, 17 How., 559; 9 Abb., 196; *New York and Erie Bank* vs. *Codd*, 11 How., 221 (231).

If the statements of the affidavit be sufficient to make out a *primâ facie* case, so as to vest the officer with jurisdiction, the general principle will be applied, that the exercise of discretion by that officer will not be interfered with, on motion, or appeal on the original papers, though the court above may differ with him in the opinion he has formed. *Conklin* vs. *Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49.

But, if there is a total want of evidence on any essential point, or if the moving affidavit be generally insufficient, or fully disproved by the defendant, the proceeding will fail, and a motion to discharge will be granted, and the order for that purpose sustained on appeal. *Conklin* vs. *Dutcher*, *supra*; *New York and Erie Bank* vs. *Codd*, 11 How., 221, *supra*; *Burgess* vs. *Stitt*, 12 How., 401.

When sufficient in substance, a mere informality in the mode of statement will not render the affidavit insufficient. *Jamison* vs. *Beecher*, 4 Abb., 230.

A liberal view is taken as to the mode of statement of the existence of a cause of action in *Ward* vs. *Begg*, 18 Barb., 139.

And where, under a given statement of facts, it is doubtful which clause of the section is applicable to the intent of the defendant, the affidavit may charge that intent in the alternative. *Van Alstyne* vs. *Erwine*, 1 Kern., 331; *Camman* vs. *Tompkins*, 1 C. R. (N. S.), 12, and *Gilbert* vs. *Tompkins*, 1 C. R. (N. S.), 16, *supra*; affirmed, *Genin* vs. *Tompkins*, 12 Barb., 265.

In *St. Amant* vs. *De Beixcedon*, 3 Sandf., 703; 1 C. R. (N. S.), 104, the general requisites of the affidavit on which an attachment may be obtained, are thus stated by the general term of the Superior Court: "We consider it proper, in a remedy of so grave a character as this—the attachment, in effect, tying up the entire property of a party pending a suit—that the affidavit upon which the proceeding is authorized should be explicit, and made, in general, upon positive knowledge of the deponents, so far as to establish a *primâ facie* case. In general, there is no difficulty in obtaining the affidavits of the persons who give the information on which the plaintiff desires to proceed; and when such affidavits cannot be obtained, from the peculiar circumstances of the case, those circumstances must be stated, with all the grounds of suspicion, so as to satisfy the judge that the facts exist on which the attachment is sought, and that the plaintiff has produced the best evidence in his power to establish them."

There can be no question but that the strict views taken in this case will be a safe guide to be followed in preparing an affidavit for this purpose, and that they should be followed as far as, under the circumstances, is practicable.

In framing such an affidavit, care must especially be taken to bring it exactly within the scope of the section. Although an allegation in the bare wording of that section will not, as above shown, be sufficient, standing alone; but must, on the contrary, be accompanied by a statement of the facts relied on for that purpose, such an allegation should be made, in all cases, distinctly and positively, either preliminary to, or at the conclusion of, the statement of facts; and this, as regards each

of the grand requisites necessary to confer jurisdiction, as above stated. This should never be omitted, under any circumstances, making the statement under the third of those requisites in the alternative, whenever the facts stated admit of any doubt as to the legitimate inference to be drawn from them.

(*b.*) Security.

The plaintiff must also, at the time of the application, be prepared with the security required by section 230.

That security consists, as there prescribed, in a sufficient undertaking on his part, with or without surety, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to him, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified.

The minimum of that sum is fixed by the section at $250. As a general rule, the insertion of this sum will be sufficient; but it rests in the discretion of the judge, and, where the amount of the plaintiff's claim is large, or the taking of property under it is likely to be injurious to the defendant, it will be safer to insert a larger sum in the first instance. An omission to do this will expose the plaintiff to the risk of the security tendered being disallowed, and of having to renew his application. In cases where dispatch is an object, it will be especially necessary to attend to this caution.

The proper form of this security is an undertaking, following the exact wording of the section. It will be good, however, even if made in the form of a penal bond, provided it contain the conditions here required, and be otherwise regular; and any mere formal defects will be cured by amendment. *Conklin* vs. *Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49.

The usual affidavits of justification must, as in other cases, be annexed to the undertaking, and it must also be duly acknowledged before it is presented to the judge, or it will be his duty not to receive it. Rule 6.

Care should be taken to make the undertaking of sufficient amount in the first instance. But, if defective in this respect, it is within the power of the court to allow an amendment by filing a new undertaking. *Kissam* vs. *Marshall*, 10 Abb., 424.

(*c.*) Notice of Lis Pendens.

Where real property is sought to be attached, the plaintiff should also be prepared with, and must cause to be filed, immediately on the commencement of the action, a notice of *lis pendens*, in order to effect an immediate charge upon that property. See section 132, and, heretofore, book III., section 60 of this work, under the head of that proceeding.

But, where the property attached consists merely of personalty, and

no charge is sought to be established upon real estate, this precaution will be wholly unnecessary.

In the event of a subsequent discovery of any attachable interest, it may be subsequently taken.

Such a notice must not be filed before the warrant is issued. It may be so at any time afterward. Section 132. But, of course, it must be before judgment. *Vide supra*, on that head.

(*d.*) Warrant of Attachment.

The form of this document is prescribed by section 231.

It is to be directed to the sheriff of any county in which the property of the defendant may be.

And several warrants may be issued at the same time, to the sheriffs of different counties.

Such warrant, or each warrant, if more than one, must require the sheriff to whom it is addressed to attach and safely keep all the property of the defendant within his county, or so much as shall be sufficient to satisfy the plaintiff's demand, together with costs and expenses; and the amount of such demand must be stated in conformity with the complaint.

In *Camman* vs. *Tompkins*, 1 C. R. (N. S.), 12, it was held that the warrant is process in the progress of the cause, and must, as such, be issued in the ordinary form, and under the seal of the court.

In *Genin* vs. *Tompkins*, however, 12 Barb., 265, this view was overruled by the general term of the same court, in the same and other cases, and it was held, that the signature of the judge is all that is necessary; that a formal *teste*, the signature of the clerk, and the seal of the court, are not requisite; but that the signature of the plaintiff's attorney ought to be required. It was also held that no return-day need be inserted in the warrant. If more than one warrant is required, duplicates should be prepared, and the judge's signature obtained thereto.

If formally defective, this process is amendable. *Kissam* vs. *Marshall*, 10 Abb., 424.

The Code makes no provision for the possible case of its being discovered by the plaintiff, after the issuing of an attachment or attachments on the original papers, that the defendant has attachable property in another county, not comprised in the original warrant. There is no decided case upon the subject, but it might possibly be held sufficient to present the original papers a second time to the same judge, in order to authorize the issuing of a supplementary warrant. The words "at the same time," at the close of section 231, seem, however, to militate against this construction, and probably the safer course

would be to renew the proceeding, by way of a second original application, stating the fact that no sufficient levy has yet been made.

(*e.*) Application to Judge and Proceedings thereon.

The above papers being all prepared, application should be made to the judicial officer from whom the remedy is sought.

There should be presented to him the affidavit, the security, and the warrant or warrants to which his signature is desired. The summons should also be handed in to him at the same time, to show that it is actually issued; and, if prepared already, the complaint should be in court, to be produced if he asks for it, for the purpose of showing that the amount stated in the warrant is in proper conformity.

If satisfied with the papers, the judge signs the warrant or warrants, indorses his approval on the undertaking, and returns all the papers to the plaintiff's attorney. The latter should also sign the warrant at the time, or previously. *Vide Genin* vs. *Tompkins*, above cited.

The warrant or warrants, when signed, must be immediately lodged with, or forwarded to the sheriff or sheriffs, to whom they are addressed. It is not necessary that any other papers should be lodged with or forwarded with them.

It is needless to urge the necessity of this proceeding being taken with all practicable speed. The attachment first lodged with the sheriff will of course gain a precedence; and, where real estate is sought to be charged, the priority of the lien effected on it, will, in the same manner, depend upon the priority of lodgment. *Vide Learned* vs. *Vandenburgh*, 7 How., 379; affirmed, 8 How., 77.

In *Yale* vs. *Matthews*, 20 How., 431; 12 Abb., 379, it is also directly laid down that, where several attachments under the Code are actually levied on the same property, the one first delivered to the sheriff has priority, though it was the one last levied, and that the provision to that effect at 2 R. S., 366, sections 14, 15, applies in such a case. See also long note upon the subject at 12 Abb., 379. And an attachment served before the arrival of goods, will bind the surplus produce of them in the hands of a consignee, in preference to another, subsequently lodged and served after their arrival. *Patterson* vs. *Perry*, 5 Bosw., 518; 10 Abb., 82.

For the same reason, the immediate filing of a notice of *lis pendens* should, in this last class of cases, be forthwith attended to. The necessity of this proceeding is foreshadowed in *Learned* vs. *Vandenburgh*, though decided prior to the amendment in section 132, giving express authority for that purpose.

The affidavits on which the warrant was granted, and the undertaking, with the judge's approval indorsed, must also be filed by the

plaintiff's attorney with the clerk of the court. This should be done at once. It must, at the latest, be done within five days, or the proceedings will be liable to be set aside for irregularity, with costs. See rule 4.

If the summons has not already been served, or delivered to the sheriff, or to some other competent person for service, this must be done at once, where the defendant is a resident, or likely to be found within the jurisdiction.

Where such defendant is non-resident, an order for publication should be applied for, if not already made. An usual and convenient course will be to make that application, in such cases, simultaneously with that for the attachment.

One or the other of these courses must be taken, and should be so at once. If neither be adopted, it would seem as if it might ultimately impair the validity of the attachment itself, in the event of continued neglect, and of a refusal to appear on the part of the defendant. See *Hernstein* vs. *Mathewson*, 5 How., 196; 3 C. R., 169.

Any formal defects in the papers are amendable, in order to sustain the proceeding. *Kissam* vs. *Marshall*, 10 Abb., 424.

§ 111. *Sheriff's Proceedings on Warrant.*

The duties of the sheriff on such warrant, when issued, are prescribed *in extenso* by sections 232 to 246; and, also, by the collateral provisions of the Revised Statutes, made operative by the first two of those sections, and above cited in full.

The present section will be confined to those duties, as incumbent upon that officer before judgment. Those which devolve upon him afterwards are defined by section 237, and will be considered subsequently, at the close of this chapter.

It is not proposed to enter into these subjects in minute detail, but to refer the reader to the provisions themselves, as above given.

The chief heads of the sheriff's duty may, however, be thus shortly stated:

He must immediately attach all the debtor's real estate, and all his personal estate, including money and bank-notes (except articles exempt from execution), and must take into his custody all the books, accounts, vouchers, and papers relating to property of the defendant, together with the title-deeds of his real estate. 2 R. S., 4, § 7.

He must immediately make a full inventory of the property seized, and return it to the officer issuing the warrant, within ten days after the seizure. *Ibid.*, § 8.

He is to keep the property seized, or the proceeds of such as shall

have been sold, to answer any judgment which may be obtained in such action. Code, § 232.

He is, subject to the direction of the court or judge, to collect and receive all debts, credits, and effects of the defendant. Code, § 232, superseding in effect 2 R. S., 4, § 8.

He may take all necessary legal proceedings for that purpose, either in his own name or the name of the defendant, discontinuing them, if directed by the court. Code, same section, superseding same section of Revised Statutes.

But the plaintiff, if he think fit, is entitled to have such actions prosecuted by himself or under his own direction, on delivery to the sheriff of an undertaking, by way of indemnity, in the form, and with the sureties prescribed by the Code. Section 238.

If the property seized or any of it be perishable, it may be sold by the sheriff, and the avails held under the attachment. To warrant such a sale, however, an order must be obtained from the officer who issued the warrant. Code, § 233; 2 R. S., 4, § 9. Such order shall prescribe the time, place, and notice of sale, and mode of publication. 2 R. S., 7, § 27.

If the property seized, or any of it, be claimed by any third party, the sheriff is to have such claim tried by a jury, in the same manner as on similar claims under execution. If the inquisition find the property to be in the claimant, the sheriff must deliver it to him, unless the attaching creditor give a sufficient bond of indemnity. If such bond be given, the sheriff retains the goods. In this case, the attaching creditor must pay the claimant's costs of the inquisition. If the property be found in the debtor, the claimant is to pay them. Code, § 233; 2 R. S., 4, §§ 10 to 12.

The proceedings in case of attachment of a vessel or share of a vessel are more complicated. They are saved by section 233 of the Code. They will be found at 2 R. S., 4 to 7, inclusive, and have been above cited *in extenso*.

It will not be necessary to do more than refer to them on the present occasion. Their purport is this: The owners of a vessel, on board of which attached goods have been previously shipped, may, in the absence of fraud or connivance, transport and deliver such goods at their destination, unless the attaching creditor shall give an indemnity. 2 R. S., 4; §§ 13, 14.

On attachment of a domestic vessel, or of any share or interest in it, the owners may, within thirty days thereafter, apply for an appraisal of such vessel or share, and obtain a discharge of the attachment, on giving a sufficient bond in double the appraised amount. 2 R. S., 5, §§ 13 to 15.

The converse of this is provided in the case of a foreign vessel, or of a share or interest in it. Any person interested, or his agent, may apply for a valuation, on notice to the attaching creditor, and, within three days after such valuation, such attaching creditor must give bond in double the amount of such valuation, or the vessel or share will be released. 2 R. S., 5, 6, §§ 18 to 22.

The Revised Statutes go on to provide (§ 22), that, after such a valuation, no other attachment shall issue against the same vessel or interest, unless the attaching creditor give a similar bond. This may probably be required under the Code.

On discharge of an attachment of this nature against a foreign vessel, the debtor himself, or his agent, may claim delivery of the property, but not unless he discharges the attaching creditor's bond, or gives him a counter indemnity. In default of his doing either, within one month after such claim has accrued, the vessel may still be sold, and the proceeds handed over to the attaching creditor, who has given the indemnity bond. 2 R. S., 6, §§ 23, 24.

If no claim be made by the owner in either case, within thirty days after seizure, the vessel or share attached may be sold by order of the officer issuing the attachment, upon the application of any attaching creditor, in which order the time, place, and notice of sale, and mode of publication, shall be prescribed. 2 R. S., 7, §§ 25 to 27.

As to the duties which formerly devolved upon the trustees under an attachment, being now incumbent upon the sheriff, see *Mayhew* vs. *Duncan*, 31 Barb., 87.

Returning to the provisions of the Code itself, the following further demand notice.

The rights or shares of the defendant in the stock of any association or corporation, and all other his property within the state, are liable to attachment and sale to satisfy the judgment. Section 235.

The execution of the attachment upon any such property, or upon any debts or property incapable of manual delivery to the sheriff, is to be made by leaving a certified copy of the attachment, together with a notice of the property levied upon, upon the proper officer of such corporation, or the debtor or individual holding such property. Section 235. N. B. Where immediate dispatch is an object, it may be prudent to prepare these papers before hand, and hand them to the sheriff with the original attachment. It is, however, that officer's duty to make them, and certify to the copy. Where the information about such property is incomplete, the certificate prescribed by the next section should first be obtained, and the notice then prepared in conformity with it. *Vide Orser* vs. *Grossman*, 11 How., 520; 4 E. D. Smith, 443.

The corporation or individual served under the last cited section, is

bound, when the application is made, to furnish the sheriff with a full certificate and description of the property so attached. Section 236.

If he refuse to do so, he may be required by the court or judge to attend, and be examined on oath concerning it; and obedience to such orders may be enforced by attachment. Same section. By this provision, the more detailed proceeding prescribed by chapter 53 of the Laws of 1848, as regards proceedings against foreign corporations, seems in effect to be superseded.

The order for such examination may be obtained *ex parte*. It must be grounded on affidavit, proving, with sufficient detail and precision of allegation, service of the certified copy and notice, under section 235, and the refusal complained of. This order must, of course, be served personally, and the proceedings under it necessarily bear a close analogy to the examination of a third party, on supplementary proceedings under execution. See *Hopkins* vs. *Snow*, 4 Abb., 368. That examination will supersede and stand in place of the certificate. The attachment by which obedience may be enforced is, of course, the ordinary attachment for contempt.

Continued neglect to furnish a certificate, or insufficiency of such certificate, if furnished, would probably be held to amount to a refusal, and to authorize an examination in the above manner, on application, based on proof of the special circumstances.

In case of a refusal to hand over any rights or shares in the stock of a corporation, or to pay over any debt or other property incapable of such delivery, on the part of any party served with notice as above, an action will have to be brought, as the Code does not seem to give any summary remedy to obtain it.

The sheriff, having thus seized or taken proceedings to collect all the available property of the defendant, holds it in deposit, to abide the event of the suit, the plaintiff's lien taking precedence of any subsequent process lodged with him, whether by way of attachment or execution.

The duties of the sheriff, statutory or otherwise, having thus been defined, it remains to draw attention to the reported decisions bearing upon those duties, under the different principal heads laid down in the previous portion of this section.

(*a.*) Seizure and its Incidents.

When the defendant, at the time of the attachment, has sufficient property, and the sheriff knowingly omits to make a sufficient levy, he will be liable for the deficiency. *Ransom* vs. *Halcott*, 9 How., 119; 18 Barb., 56.

That levy may comprise, and the sheriff is bound to attach to a suffi-

cient amount, all legal or equitable interests of the defendant then vested and of a possessory nature, and whether in real or personal property. Thus, it has been held that a levy may comprise surplus moneys arising from a sale under a previous execution or attachment, *Wheeler* vs. *Smith*, 11 Barb., 345; money come to the sheriff's hands on payment of an execution issued by the defendant as plaintiff on such execution, *Muscott* vs. *Woodworth*, 13 How., 336; money paid into court by the defendant in a previous action, although loaned by another person for that purpose, *Salter* vs. *Weiner*, 6 Abb., 191; the possessory right of the mortgagor, on a chattel mortgage, reserving a right of possession until default, *Fairbanks* vs. *Bloomfield*, 5 Duer, 434. See also *Hull* vs. *Carnley*, 1 Kern., 506, hereafter cited, under head of *Execution*. And such levy may comprise property of a partnership, for the purpose of selling the attachable interest of one of the partners therein. *Vide Goll* vs. *Hinton*, 8 Abb., 120; *Hergman* vs. *Dittlebach*, 11 How., 46; overruling *Stoutenburgh* vs. *Vandenburgh*, 7 How., 229, and *Sears* vs. *Gearn*, 7 How., 383, as noticed above, in section 109.

Such levy may also comprise, and will bind an actual equitable interest of the defendant as *cestui que trust*, under a trust, passive in its nature. *Wright* vs. *Douglass*, 3 Seld., 564.

So also as to the mortgagor's equity of redemption in property covered by a chattel mortgage. *Hall* vs. *Lamson*, 23 How., 84.

It may likewise be made on a promissory note in course of prosecution, and, in such case, the sheriff will be entitled to be substituted as plaintiff, and to continue the action. *Russell* vs. *Ruckman*, 3 E. D. Smith, 419.

But if, before sale under the levy, the interest levied on determines, and another party becomes absolutely entitled, that party has the right to claim an immediate delivery, without tender of expenses. So held, as regards a chattel mortgagee, becoming entitled to absolute possession at a specific date. *Fairbanks* vs. *Bloomfield*, 5 Duer, 424, *supra*.

In relation to the priority of attachments ranking from the date of their delivery to the sheriff, see *Yale* vs. *Matthews*, 21 How., 431; 12 Abb., 379, above cited.

And as to an attachment so lodged, binding the surplus proceeds of a consignment of goods not then actually arrived, in preference to one subsequently lodged, and levied after their arrival, see *Patterson* vs. *Perry*, 5 Bosw., 518; 10 Abb., 182, *supra*.

But it has been held, that a levy on a money bond payable by instalments, will only bind one due at the service of the attachment, and will not prejudice any intervening liens on others subsequently accruing. *Syracuse City Bank* vs. *Colville*, 19 How., 385.

A contingent future interest, not possessory at the time, cannot be

made the subject of actual levy. *Bates* vs. *New Orleans, Jackson, and Great Northern Railroad Company*, 13 How., 516; 4 Abb., 72. See also *Jones* vs. *Bradner*, 10 Barb., 193.

To be leviable upon by a third party, a debt due to a non-resident from a non-resident corporation, must be existent within the state. If the whole transaction took place elsewhere, it cannot be seized. *Willett* vs. *Equitable Insurance Company*, 10 Abb., 193. Nor will the fact that the mere evidences of such a debt, due from such a corporation, happen to be within the state, avail to make the debt itself attachable. *Bates* vs. *The New Orleans, Jackson, and Great Northern Railroad Company*, *supra*. Nor are the bonds of a foreign corporation, executed and left in the hands of their agent, for the purpose of raising money, attachable in his hands. In that condition, they are neither a debt nor property. *Coddington* vs. *Gilbert*, 18 N. Y., 489; affirming *same case*, 5 Duer, 72; 2 Abb., 242.

Nor is property subject to a lien, attachable, as against the interest of the lien holder. *Frost* vs. *Rider*, 9 Barb., 440; *Brownell* vs. *Cornly*, 3 Duer, 9. The proper course, under such circumstances, is not to levy, but to serve a notice on the holder, under section 235, claiming any surplus.

A foreign statutory assignment is, however, no bar to a seizure on attachment in this state by resident creditors. *Willetts* vs. *Waite*, 13 How., 34.

The lien, under a seizure on attachment, accrues on personal estate from the time of actual levy; on real estate from the time of the delivery of the attachment to the sheriff. See *Learned* vs. *Vandenburgh*, 7 How., 379; affirmed 8 How., 77; *Ransom* vs. *Halcott*, 18 Barb., 56; 9 How., 119; *Patterson* vs. *Perry*, 10 Abb., 82. And a subsequent judgment, obtained in such action, relates back to the time of levy, taking its priority from that time. *Wilson* vs. *Forsyth*, 24 Barb., 105.

The custody of property, so levied upon, remains, *pendente lite*, with the sheriff to whom the attachment was originally issued, and does not pass to his successor. Ultimate process on the judgment must accordingly be directed to the former. *McKay* vs. *Harrower*, 27 Barb., 463.

The levy, under attachment, does not amount to a satisfaction of the debt. If, therefore, property attached be lost, *pendente lite*, without fault of the plaintiff or the sheriff, the defendant still remains liable. *McBride* vs. *Farmers' Branch Bank*, 28 Barb., 476; 7 Abb., 347.

Payment to the sheriff, in an action commenced by him, or which he is at the time entitled to prosecute, in respect of an attached debt, may constitute a good defence, as against the attachment debtor. *Russell* vs. *Ruckman*, 3 E. D. Smith, 419. But such payment must not be

voluntary, where the party making it has notice of an adverse claim to the fund. *Lyman* vs. *Cartwright*, 3 E. D. Smith, 117.

In levying, the sheriff acts at his peril, and will be liable if he seize the goods of a wrong party. And, on the question of property, his return, in another proceeding, will conclude him. *Kuhlman* vs. *Orser*, 5 Duer, 242. And a plaintiff who directs such a levy will also be liable. *Marsh* vs. *Backus*, 16 Barb., 483.

On a levy on partnership property, either on a debt against the firm, or one of its members, the sheriff becomes entitled to seize the partnership books. *Vide* 2 R. S., 4, section 7, above cited. His powers, in this respect, are, however, limited to safe custody. He cannot properly examine or suffer them to be examined by any one except the defendant, without special order of the court. Nor does his power extend to seize letters and correspondence. *Hergman* vs. *Dittlebach*, 11 How., 46.

Where required to make a levy on goods manifestly in the possession of a third party, he may require a bond of indemnity in the first instance before making such levy, without going through the form of summoning a jury. *Chamberlain* vs. *Beller*, 18 N. Y., 115.

Where the sheriff would himself be entitled to bring an action for the collection of property seized, he may continue the prosecution of an action for that purpose previously commenced by the debtor, either in the name of the latter, or in his own, by substitution. *Russell* vs. *Ruckman*, 3 E. D. Smith, 419.

Process of this nature fully protects the sheriff in all acts which he is enjoined to perform; nor, in a suit instituted by him, will he be required to do more than assert his authority under it. See *Kelly* vs. *Breusing*, 33 Barb., 123.

Nor can his action be properly interfered with by the court, as by requiring him to part with the property attached, in the absence of proof of irresponsibility. *Dodge* vs. *Porter*, 13 Abb., 253.

An order for the sale of perishable property, in an attachment under the Code, will be valid, if made by a judge of the court, though the term of office of the judge who originally granted the warrant has expired. *Davis* vs. *Ainsworth*, 14 How., 346.

On the recovery of judgment, the powers of the sheriff under the attachment merge in those acquired by him under the execution, when lodged in his hands. *Schieb* vs. *Baldwin*, 22 How., 278; 13 Abb., 469.

(*c.*) Attachments on Vessels.

Goods shipped on account of a debtor cannot, it has been held, be levied upon, till his title has been perfected by the delivery of a bill of lading. *Jones* vs. *Bradner*, 10 Barb. 193.

On withdrawal of goods so shipped, it has been held that the freight in respect of them must be paid. The bond required by the statute of 1841, above cited, had not, in this case, been given. But the decision is based on general principles, and does not inquire into the effect of such omission, or whether that statute is still in force under the Code. *Bartlett* vs. *Carnley*, 6 Duer, 194 (202).

As to the propriety of making an order for sale of an attached vessel, when no claimant has come forward, *vide Ready* vs. *Stewart*, 1 C. R. (N. S.), 297 (300).

(*d.*) Service of Notice under Section 235.

Where a party is a mere naked trustee of an invalid trust, notice need not be served upon him, but a levy against the actual owner will be sufficient. So held under the statute of 1842. *Wright* vs. *Douglass*, 3 Seld., 564.

The service of the notice prescribed by this section must be personal, or it will be wholly unavailing. *Orser* vs. *Grossman*, 4 E. D. Smith, 443; 11 How., 520.

And the notice so given must contain a proper description of the property sought to be attached, or the levy will not hold good. A mere general notice will not suffice. If such description cannot be given in the first instance, the officer must first obtain the certificate which he is entitled to require under section 236; or, if refused, examine the party applied to, and then serve the notice, based on such certificate or examination. *Kuhlman* vs. *Orser*, 5 Duer, 242; *Orser* vs. *Grossman*, *supra; Lyman* vs. *Cartwright*, 3 E. D. Smith, 117; *Wilson* vs. *Duncan*, 11 Abb., 3.

A notice of this description is the proper form of procedure, where goods sought to be levied upon are in the hands of a party entitled to a lien upon them, and, in such case, will bind the ultimate interest, subject to such lien. *Brownell* vs. *Carnley*, 3 Duer, 9. The right of the lien-holder, under these circumstances, is a qualified right; and on satisfaction of that lien, from the property itself or from other sources, the goods, or their surplus value, may then be taken. *Patterson* vs. *Perry*, 10 Abb., 82.

The execution of an attachment upon a promissory note in course of suit at the time, may be made in this manner, by service of a notice upon the attorney. *Russell* vs. *Ruckman*, 3 E. D. Smith, 419.

On the recovery of judgment, the powers of the sheriff, under the attachment, are merged in those acquired by him on execution, when lodged in his hands. He can no longer require a certificate, under the former process, though the same information is obtainable, under the latter. And, at the time of application, he is bound to disclose the

process under which he acts. *Schieb* vs. *Baldwin*, 22 How., 278; 13 Abb., 469.

(*e.*) CERTIFICATE.

In *Hoagland* vs. *Stodolla*, 1 C. R. (N. S.), 210, it was held that a certificate, when made under section 236, is conclusive, and that an order cannot be obtained for the further examination of the party who has given it. See also *Carroll* vs. *Finlay*, 26 Barb., 61; *Hopkins* vs. *Snow*, 4 Abb., 368.

But, if the plaintiff can bring a valid impeachment of its correctness, it seems that such conduct might be regarded as a refusal, and an order for examination might then be made. See *dictum*, to this effect, in *Carroll* vs. *Finley*, *supra*.

If the party applied to gives a merely negative certificate, an order for examination may be made, on a similar impeachment of the truth of such statement, if allowed to remain uncontradicted on the motion. *Hopkins* vs. *Snow*, *supra*.

It is decided, in the last case, that an examination of this nature, when admissible, will correspond with the rule as to examining a third party, on proceedings supplementary to execution. A claim by him of an exclusive interest in the property will arrest the examination, and the plaintiff's only remedy will then lie in an action against him.

§ 112. *Discharge of Attachment.*

The defendant has two modes by which, if he think proper, he may obtain a discharge of the attachment:

1. By a motion for that purpose.
2. By giving counter security to the plaintiff.

The first of these modes is appropriate, when the plaintiff's proceedings are impeached for irregularity; or sought to be set aside, on counter evidence, showing that the remedy is not properly obtainable, on the merits.

The second is proper, in those cases where the plaintiff's right to that remedy itself is not controverted, but the defendant, nevertheless, seeks to retain control of the property seized.

The two will be considered, *seriatim*, in their order

(*a.*) DISCHARGE UPON MOTION.

The right of the defendant to apply for a discharge, as in the case of other provisional remedies, is specially secured to him by the concluding provision of section 241, inserted upon the amendment of 1857. Before that year, the Code itself was silent upon the subject. The right, how-

ever, had been admitted, and motions of this nature entertained, from the very first, as falling within the general control of courts over their own process and proceedings, and, at an early date, it was decided that, on an application of this nature, the security prescribed by section 241 need not be given. *Vide Kilian* vs. *Washington*, 2 C. R., 78.

The fact that an assignment to a trustee for creditors has been executed by the defendant, does not, it has been held, deprive him of his right to make the application. See *Dickerson* vs. *Benham*, 20 How., 343; 12 Abb., 158; affirming *same case*, 19 How., 410; 10 Abb., 390.

The motion for this purpose may, as in other similar cases, be made in either of two modes—

1. Upon the original papers only, on the ground of irregularity or manifest insufficiency.

2. Upon the merits, on counter affidavits.

(*b.*) Motion for Irregularity or Original Defect.

The defendant, in this class of motions, moves on the plaintiff's papers only, and the latter cannot, under these circumstances, introduce evidence in rebuttal, or to strengthen his original application. The remedy stands or falls upon its original basis. If the defendant introduce evidence on his own behalf, the motion no longer falls under this class, but under the next, and affidavits may then be used by the plaintiff, either to sustain the original proceeding, or to rebut the case made by the defendant on his moving papers. See the above principles generally laid down in *Brewer* vs. *Tucker*, 13 Abb., 76; *Hill* vs. *Bond*, 22 How., 272; *Dickerson* vs. *Benham*, 20 How., 343; 12 Abb., 158; affirming *same case*, 19 How., 410; 10 Abb., 390; all above cited.

See also generally, as to what will or will not be a sufficient statement on the original papers, *supra*, section 110, and cases there cited.

The only exception to this rule seems to be that, where there has been a change in the relations of the parties since the original application was made, that change may be shown, in answer to it. *Dickerson* vs. *Benham*, *supra*.

(*c.*) Motion on Affidavits.

This is the more usual form of application, as it is of rare occurrence that the original papers should be so manifestly imperfect, as not to require some statement of facts on the part of the defendant, to show the irregularity or insufficiency complained of.

It has held in several instances, that the defendant's remedy in such cases cannot be asserted otherwise than on appeal to the general term, or by an application to the original judge to vacate his own order, and

that a motion grounded on affidavits in disproof, cannot be made at special term. *Vide Conklin* vs. *Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49; *White* vs. *Featherstonhaugh*, 7 How., 357; *Bank of Lansingburgh* vs. *McKie*, 7 How., 360; *Niles* vs. *Vanderzee*, 14 How., 547.

This view is, however, evidently too restricted, and has been overruled by a long series of decisions, which lay down the following principles:

The defendant may make a motion of this description, either to the judge who granted the order, or, in the ordinary manner, to a judge at special term. In either case, he may introduce affidavits on his own behalf, either to show want of jurisdiction or insufficiency in the plaintiff's case, or to contradict the statements of the latter by counter evidence, so as to test generally the propriety of issuing the attachment. *Morgan* vs. *Avery*, 7 Barb., 656; 2 C. R., 91, 121; *Camman* vs. *Tompkins*, and *Gilbert* vs. *The Same*, 1 C. R. (N. S.), 12, 16; *Genin* vs. *The Same*, 12 Barb., 265; *St. Amant* vs. *De Beixcedon*, 3 Sandf., 703; 1 C. R. (N. S.), 104; *Granger* vs. *Schwartz*, 11 L. O., 346; *Kilian* vs. *Washington*, 2 C. R., 78; *Furman* vs. *Walter*, 13 How., 348; *New York and Erie Bank* vs. *Codd*, 11 How., 221; *Houghton* vs. *Ault*, 16 How., 77; 8 Abb., 84, note; *President of Bank of Commerce* vs. *Rutland and Washington Railroad Company*, 10 How., 1. See also, the more recent cases of *Brewer* vs. *Tucker*, 13 Abb., 76; and *Hill* vs. *Bond*, 22 How., 272, above cited. See likewise, *Gasherie* vs. *Apple*, 14 Abb., 64; and section 241 itself, as amended in 1857, compared with sections 205, 225, and 226.

Where the defendant so moves, on affidavits stating new matter, it is competent for the plaintiff to introduce counter-affidavits in reply, in contradiction to such new matter, or in support of the case, made out upon his original application. See *Morgan* vs. *Avery*; *Camman* vs. *Tompkins*; *Gilbert* vs. *The Same*; *Genin* vs. *The Same*; and other cases cited in last sentence *passim*, and also the sections of the Code there referred to.

But, in the framing of such affidavit, the plaintiff will be strictly confined to matter in rebuttal of the defendant's allegations, or in support of his own original case. It is not competent for him to introduce fresh grounds in support of the remedy, which were not taken by him at the outset. *Granger* vs. *Schwartz*, 11 L. O., 346; *New York and Erie Bank* vs. *Codd*, 11 How., 221. See also, *Wilson* vs. *Britton*, 6 Abb., 33. On this point, the authority of this last case is not affected by the subsequent reversal of the order (6 Abb., 97; 26 Barb., 562), such reversal being grounded on the general merits.

An attachment issued with a fraudulent intent, and not *bonâ fide*, for the recovery of the plaintiff's debt, will be vacated. *Reed* vs. *Ennis*,

6 Abb., 393. And, if it be made manifest, that service cannot be made, and that an attachment must eventually prove ineffectual, a discharge of it may be proper. *Vide Hernstein* vs. *Matthewson*, 5 How., 106; 3 C. R., 139.

In *Rigney* vs. *Tallmadge*, 17 How., 556, a motion to discharge an attachment was entertained and granted on the merits, even after the case had been tried before a referee, and his report in favor of the plaintiff obtained, pending the motion.

But, in order to enable him to maintain the application, the defendant must still be interested in the subject-matter. Where, therefore, before levy, he had sold and delivered the goods subsequently taken, it was held he could not apply. *Furman* vs. *Walter*, 13 How., 348. An assignment to a trustee for creditors, will not, however, have this effect, there is still sufficient interest left in the defendant, to sustain the motion. *Dickerson* vs. *Benham*, above cited.

In the former case, the remedy of the party whose goods have been wrongly levied upon, does not lie by way of motion to set aside the proceeding, but in action for the trespass. *Boscher* vs. *Roullier*, 4 Abb., 396.

The same case is authority, that where the main ground of the plaintiff's case is disputed upon conflicting affidavits, the court will probably not interfere, on motion, but leave the point to be determined upon the trial.

A new ground for moving to vacate, is given by rule 4, in the event of a neglect on the part of the plaintiff, to file the undertaking and affidavits, within five days, as thereby required.

Omissions of this description are, however, of an amendable nature, and the plaintiff may be permitted to cure the defect, even on the hearing of the motion. See *Kissam* vs. *Marshall*, 10 Abb., 424; and, collaterally, on the subject of injunction, *Leffingwell* vs. *Chave*, 5 Bosw., 703; 19 How., 54; 10 Abb., 472.

When an attachment has been already granted, the subsequent removal of the cause into the United States Court, does not, *per se*, discharge it. The statute preserves it in force, but, whatever subsequent steps are necessary in relation to it, should be made the subject of a special application. *Carpenter* vs. *The New York and New Haven Railroad Company*, 11 How., 481.

A motion of the above nature cannot be entertained, after the attachment has been already discharged, on security given, under section 241.

The giving of that security admits its legality, and is, it seems, a bar to any subsequent application. *Vide Haggart* vs. *Morgan*, 1 Seld., 422; affirming *same case*, 4 Sandf., 198.

A general appearance in the action will, of course, have its usual

effect of waiving all mere irregularities. It will not, however, avail to destroy the defendant's right to move to vacate, on the ground of a fatal objection, on proper cause shown. The appearance had better, however, be special, and without prejudice to the objection taken. *Vide Granger* vs. *Schwartz*, *supra*.

When an attachment, on motion of the defendant, or a proceeding of the same nature, has once been vacated, after opposition and argument on the merits, another application on the part of the plaintiff, on substantially the same facts, whether before the same or another court, will not be entertained. *Schlemmer* vs. *Myerstein*, 19 How., 412.

(*d.*) Discharge upon Giving Security.

This mode of procedure is appropriate to those cases in which the attachment has been properly issued. *Vide New York and Erie Bank* vs. *Codd*, 11 How., 221 (227).

The sections applicable to it are 240 and 241.

By the former of these, an appearance, on the part of the defendant, is a necessary preliminary.

He may then apply to the officer who issued the attachment, or to the court, for an order to discharge it. Section 241.

Upon such application, he must deliver an undertaking executed by at least two sureties, residents and householders or freeholders in this state, approved by the court or officer.

Which undertaking must provide for payment to the plaintiff, on demand, of the amount of the judgment that may be recovered by him, not exceeding the sum specified in the undertaking.

But such sum must be at least double the amount claimed in the complaint, unless it appears by affidavit that the property attached be less than such amount. In that case, the court or officer may order an appraisal, and the amount of the undertaking must then be double the amount so appraised. Section 241.

The above sections do not provide for notice of the application for such appraisal being given to the plaintiff, nor for any right on his part to compel a justification by the sureties.

The application is *ex parte*. *Vide Sanborn* vs. *Elizabethport Manufacturing Company*, 22 How., 106; 13 Abb., 432. It is, however, clearly competent for the judge to allow the plaintiff to be heard, if he so think fit, and to direct some notice to be given to him. But when he is allowed to be heard, he is heard as *amicus curiæ*, and not as a matter of strict right. *Sanborn* vs. *Elizabethport Manufacturing Company*, *supra*.

Especially will it be proper to hear the plaintiff in the case of an appraisal. The undertaking, to be effectual, must, besides, be approved

by the court or officer, and he may withhold his approval or the granting of the order, which is optional and not imperative, till fully satisfied that justice is done. It is of course his duty to demand the usual justification and acknowledgment on the part of the sureties. See rule 6.

On an action on a bond of this description, the defendant will be estopped from denying the validity of the original process. *Haggart* vs. *Morgan*, *supra*.

Security of this description once given, is final. Although the sureties may subsequently become insolvent, the court cannot, it seems, order additional security to be given. *Dudley* vs. *Goodrich*, 16 How., 189; 7 Abb., 26. See, as to the amount of liability of sureties in similar cases, *Renard* vs. *Hargous*, 2 Duer, 540; affirmed, 3 Kern., 259.

By giving security of this nature, the defendant waives his right to move to discharge the attachment on any other ground. *Vide supra*, and *Haggart* vs. *Morgan*, there referred to.

After judgment, security of the above nature can no longer be given on the part of the defendant, even though an appeal has been taken by him. *Spencer* vs. *Rogers' Locomotive Works*, 13 Abb., 180.

As to the liability of the sureties on an undertaking of the above description, and as to its continuance, even where the defendant has been ordered, and has failed to furnish further sureties, see *Jewett* vs. *Crane*, 13 Abb., 97.

(*e.*) Result of Discharge.

By special provision in section 240, where security is given, and by natural operation of the order of discharge in all other cases, the defendant becomes entitled to have all property seized released from the attachment and restored, and all proceeds of sales and moneys received by the sheriff, paid over to him or to his agent, unless other rights intervene, or, in the latter case, unless the court make a different direction on the subject.

§ 113. *Question as to Rights of other Creditors.*

In *Fraser* vs. *Greenhill*, 3 C. R., 172, it was held that where an attachment has been issued, any other creditor of the same party may come in, on petition, and seek to be made a defendant, for the purpose of litigating any general questions as to the right to the whole fund, and such an order was made accordingly. *Carwell* vs. *Neville*, 12 How., 445, does not bear directly upon the question, merely holding that an application of this description cannot be made before judgment.

Fraser vs. *Greenhill*, if supported, really seems to amount to a practical repeal of the peculiar provisions of the Code, under which this pro-

ceeding is one for the exclusive benefit of the attaching creditor; and to a complete practical restoration of the machinery of the proceeding under the Revised Statutes, which was one for the benefit of creditors in general.

The law, as thus laid down, seems also open to most serious objection, on the following grounds:

The claims of subsequent creditors are totally beside the controversy between the parties before the court. Any question on that subject is purely incidental, and has nothing to do with the rights, either of the plaintiff, or the defendant, as between themselves. That controversy can be determined without bringing other parties in, and surely it seems a great hardship on a plaintiff to encumber his suit with unnecessary parties; either seeking to raise collateral issues, manifestly prejudicial to the rights he has obtained, by his superior diligence; or fighting about a surplus, to which no one can have any claim whatever, until he have been first paid his debt and costs in full. To leave the subsequent creditors to their remedy as against the sheriff, and to the independent assertion of their rights as between each other, seems far more consonant to sound principles and sound practice; and a proceeding in the nature of interpleader, would afford at once indemnity to the sheriff, and satisfaction to the parties, without encumbering the case of the original suitor with controversies with which he has no concern, and difficulties from which his superior diligence ought properly to have afforded him protection, and was evidently meant to do so by the legislature. See general principles, as to a plaintiff's right to proceed, without impediment, by reason of discussions between co-defendants, as laid down in *Woodworth* vs. *Bellows*, 4 How., 24; 1 C. R., 129.

The above views are confirmed by the case of *Judd* vs. *Young*, 7 How., 79, where it was held that, in an action on contract, express or implied, for the recovery of money, a person interested cannot claim to be brought in as a party; and such claim was there refused, on behalf of parties claiming an interest in a surplus in the hands of the defendant. Section 122 must, it was there held, be confined to actions for the recovery of real or of specific personal property. See also, to the same effect, *Tallman* vs. *Hollister*, 9 How., 508.

§ 114. *Effect of Judgment.*

The course to be pursued in the event of judgment being entered in favor of the plaintiff, is pointed out in detail in section 237.

As that part of the proceeding falls more strictly under the head of *Execution*, a mere cursory notice is all that is necessary on the present occasion.

The sheriff is to satisfy the plaintiff's demand out of the property attached, if sufficient.

He has to pay over for that purpose any moneys collected. Subdivision 1.

If any balance remains due, and an execution has been issued on the judgment, he is to proceed to sell under the execution. On a sale of shares, he is empowered to execute a certificate of transfer.

If any of the attached property has passed out of his hands, he is to repossess himself of it, and any person withholding such property is liable in double damages.

Until the judgment is satisfied, he is to proceed to collect the assets levied upon, and to prosecute any bonds taken, applying the proceeds toward the judgment.

After six months from the docketing of the judgment, he may, on application, grounded upon the petition of the plaintiff, accompanied by affidavit of the proceedings had, and upon his own affidavit, that he has used due diligence to collect, and that there still remain in his hands uncollected assets, he may be ordered to sell the same. The defendant is entitled to notice of this application, as prescribed in the section.

For the purpose of authorizing the sheriff to proceed as above, an execution should be lodged in his hands in the usual manner.

It was considered in *Keyser* vs. *Waterbury*, 3 C. R., 233, that, as soon as an execution is so lodged, the attachment is virtually at an end; but this seems clearly inconsistent with the special directions in section 237.

In *Hanson* vs. *Tripler*, 3 Sandf., 733, 1 C. R. (N. S.), 154, it was held that an attachment, and supplementary proceedings on execution, might be carried on at the same time, in the same case, subject to the questions as to the relative rights of the parties being settled, in an action by a receiver under those proceedings, in the event of a conflict arising.

The rendering of judgment puts an end to the defendant's right to regain possession of the property, on giving counter security. See *Spencer* vs. *Rogers' Locomotive Works*, *supra*.

(*a.*) Rights of Defendant.

After payment of the judgment, and all costs of the proceeding, any residue of the attached property is to be paid or delivered by the sheriff to the defendant. Section 237, concluding clause.

If, on the contrary, the defendant recover judgment in the action, he is entitled to a redelivery to him by the sheriff, of all the attached property, and of all proceeds thereof, or moneys collected, and of all bonds taken by the sheriff (except those given under section 238 for

his indemnity, in the event of the prosecution of any actions by the plaintiff). The attachment is to be thereupon discharged and the property released therefrom.

The defendant may, too, under these circumstances, be entitled to prosecute a claim for damages against the plaintiff, and against his sureties, under the undertaking prescribed in section 230, by action on such undertaking in the usual manner.

§ 115. *Sheriff's Return and Fees.*

On the full execution or discharge of the warrant, the sheriff is to return the same, and his proceedings thereon, to the court in which the action was brought. Section 242.

His fees for his services thereon are those for similar services under the Revised Statutes. Section 243.

The provisions on that subject have been before cited under section 107.

He is entitled to the usual poundage on all moneys collected by him.

On the sale of property, he is entitled to the same fees and disbursements as on sales on execution.

But where he neither collects nor sells he cannot claim poundage, and is merely entitled to a fee of fifty cents for the levy, and to his reasonable expenses, and a compensation for his trouble in taking possession of and preserving the property levied upon. Such compensation is to be settled by the officer issuing the attachment, even although the suit be settled, and the demand of the plaintiff be realized. He, the sheriff, should apply to have such compensation fixed at once, and is entitled to receive it from the plaintiff, without waiting for the determination of the action. *Hoge* vs. *Page*, 11 How., 207. And the plaintiff's attorney is liable. *Birkbeck* vs. *Stafford*, 23 How., 236. See also, and as to the rate of compensation to be so fixed, *Alburtis* vs. *Dudley*, 21 How., 456; 12 Abb., 361. His disbursements must be specified on oath. *Mayhew* vs. *Duncan*, *infra*.

This position has, however, been controverted, and it has been held that, under such circumstances, the sheriff is entitled to the same commissions as a trustee under the Revised Statutes, *i. e.*, five per cent. and all necessary disbursements. *Trenor* vs. *Fachiri*, 20 How., 405; 12 Abb., 136; *Mayhew* vs. *Duncan*, 31 Barb., 87; 10 Abb., 289, as *Mayhew* vs. *Wilson*.

It may be well contended that the view in the former class of decisions is preferable, and that the case falls within the special provision as to the sheriff's fee, there referred to, especially where all that has been done consists of a mere service of notices, or, at the most, a keep-

ing of the property, for which compensation is fully provided. The duties of a trustee, under the former process of attachment, were of a very different and far more responsible nature, embracing not merely security to the plaintiff, but the realization and administration of the property attached.

CHAPTER V.

APPOINTMENT OF RECEIVER, AND OTHER REMEDIES.

§ 116. *Statutory and other Provisions.*

THE original Code of 1848, and the amended Code of 1849, did not provide as to the details of this subject, but contained a mere general reservation of the existent powers of the court, according to the former practice.

The present provisions of the Code run as follows:

§ 244. (200.) A receiver may be appointed,

1. Before judgment, on the application of either party, when he establishes an apparent right to property, which is the subject of the action, and which is in the possession of an adverse party; and the property, or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had without application to the court;

2. After judgment, to carry the judgment into effect;

3. After judgment, to dispose of the property, according to the judgment, or to preserve it during the pendency of an appeal; or when an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment;

4. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases of the property within this state of foreign corporations;

5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act.

When it is admitted, by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs, or is due to another party, the

court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order, requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the court.

When the answer of the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order, as it enforces a judgment or provisional remedy.

Receivers of the property, within this state, of foreign corporations, shall be allowed the same commissions as are allowed by law to the trustees of the estates of absconding, concealed, and non-resident debtors.

The concluding sentence dates from the amendment of 1862—the prior portions from that of 1858.

The section was framed in its present shape on the amendment of 1851. It was in some respects less, in others, *i. e.*, as regards the reservation it still contained of the former provisional remedies, more comprehensive than at present. In 1852, the phraseology was somewhat changed, and the reservation in question stricken out. In 1857, the last clause but one was amended by adding the word "judgment," and in 1858, the form was finally fixed as it stands, with the exception of the addition since made, as above noticed.

The general powers of a receiver, when appointed, are thus provided for by rule 92 (76 of 1854):

Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands, and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course, that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving, at least, ten days' public notice of the time and place of such sale.

The subject of receivership on proceedings supplementary to execu-

tion, belongs to a subsequent division of the work, and the enactments of the Code, in relation to that form of the remedy, will there be cited.

The provision in relation to the receivership of a delinquent corporation, referred to in subdivision 4 of section 244, will be found in section 444. It provides for such an appointment, after judgment of dissolution. It therefore does not fall properly under the class of provisional remedies. It is, on the contrary, a necessary incident and consequence of such judgment, when pronounced, and will therefore present itself for consideration in its due place, in a subsequent portion of the work.

The receiverships, in similar cases, provided for by special statute, as referred to in the same subdivision, are, in their nature, parts of or incident to special statutory proceedings, though the powers of the court, for such purposes, are exercisable in a suit, as well as on petition. As such, they do not fall under the class of provisional remedies, incident to the ordinary progress of a suit. They belong rather to the class of proceedings for the winding up of an insolvent's estate, and the receivers appointed are, in effect, trustees for that purpose.

It will not therefore be necessary, or consistent with the scope of the present work, to cite those statutory provisions *in extenso*, the more so, as they are numerous and complicated. An indication of them, for the convenience of the student, may not, however, be out of place.

The general provisions upon the subject will be found in articles II. and III. of title IV., chap. VII., part III., of the Revised Statutes; 2 R. S., 462 to 472 inclusive. See especially, sections 36, 41, 42, and 65 to 89.

These provisions have been made the subject of numerous amendments or additions. See especially, chapter 222 of 1842; chapter 239 of 1844; chapter 295 of 1832; chapter 71 of 1852, p. 67; amended by chapter 403 of 1860, p. 699; chapter 224 of 1854, p. 502; chapter 226 of 1849, p. 340; amended by chapter 69 of 1855, p. 101, and chapter 365 of 1859, p. 880. See also chapter 348 of 1858, p. 592.

In proceedings of this nature, the Supreme Court seems to be the proper forum. In *Day* vs. *The United States Car-Spring Company*, 2 Duer, 608, the Superior Court disclaimed jurisdiction, in a suit for the purpose of winding up the affairs and distributing the assets of a foreign corporation. Its jurisdiction was also considered to be doubtful in a proceeding for dissolution of a domestic incorporation, though the point was not expressly decided, the motion being denied on another ground. *Kattenstroth* vs. *The Astor Bank*, 2 Duer, 632.

That the county courts have no jurisdiction to appoint a receiver in a statutory proceeding, in relation to the property of a corporation, is expressly decided in *Wheaton* vs. *Gates*, 18 N. Y., 395.

§ 117. *Appointment and its Incidents.*

The appointment of the receiver, under subdivisions 2 and 3 of section 244, is more properly an incident of the judgment in the action, or of the proceedings for its review, than a provisional remedy. The observations in the present chapter will, therefore, be more especially devoted to proceedings before judgment, under subdivision 1, leaving those after judgment to be considered in their natural connection. Only one observation need be made as to the latter, viz., that, when applied for on special motion, the formal incidents of the application and the course of procedure will be the same. When the provision forms part of the judgment itself, no special motion will, of course, be necessary; but, even then, it may often be requisite to go through the same forms, as far as the action of a referee and the taking of security are concerned.

Receiverships of the property of dissolved corporations and under supplementary proceedings, fall also, as has been before remarked, beyond the scope of the present chapter.

(*a.*) Application, Mode of.

The application must be made on motion in the ordinary mode, on notice to the adverse party. *Vide Kemp* vs. *Harding*, 4 How., 178; *Dorr* vs. *Noxon*, 5 How., 29.

In most cases in which such an application is admissible, it will have formed part of the relief demanded in the complaint.

It may then be grounded on that document itself, when verified. In most cases, however, affidavits will be requisite, either in connection with or independent of the complaint, as the facts warranting the granting of the remedy will have to be brought forward clearly and fully, so as to satisfy the court of its propriety.

The motion will not be proper before the answer of the defendant has been put in, as, until then, it cannot be known whether and to what extent he disputes the plaintiff's claim. See *Field* vs. *Ripley*, 20 How., 26.

After answer, the motion will be founded on the pleadings, either with or without affidavits.

The application may, under the terms of the subdivision, be made by either party. Usually the plaintiff is the mover upon the occasion.

The moving papers must show a clear *primâ facie* right in the applicant to the property claimed, or to some sufficient interest in it, and also a reasonable apprehension of its being lost or injured, so as to bring the case within the terms of the section. Both are essential to

the granting of the remedy, and, if either be insufficiently shown, or adequately disproved by the adverse party, the application will doubtless be refused. *Vide Goodyear* vs. *Betts*, 7 How., 187; *Austin* vs. *Chapman*, 11 L. O., 103. See also *The People* vs. *The Mayor of New York*, 10 Abb., 111; reversing *same case*, 8 Abb., 7; *Field* vs. *Ripley*, 20 How., 26; *Galway* vs. *United States Steam Sugar Refining Company*, 21 How., 313; 13 Abb., 211. The plaintiff must also show an actual present interest in the property itself, sought to be reached by the receivership. *Smith* vs. *Wells*, 20 How., 158. On the other hand, a party who does not possess such an interest, will not be heard in opposition to the motion. *Wall Street Fire Insurance Company* vs. *Loud*, 20 How., 95.

The application is only proper in actions for relief; in those on a mere money demand, the remedy is inadmissible. Since 1858, this prohibition forms part of the section itself, but, before that amendment, the practice was in fact the same. The remedy is only appropriate where specific property is either claimed or sought to be administered under the direction of the court, and not where a mere money judgment is applied for. Although the prohibition does not extend to it in terms, an application of this nature will be equally inadmissible in an action for mere damages.

It is not an appropriate remedy, nor can it be properly applied for in an action of ejectment. *Thompson* vs. *Sherrard*, 22 How., 155; 12 Abb., 427.

The moving papers, as in other cases where a provisional remedy is sought, should state facts to warrant the application. Mere information and belief, standing alone, will not, as a general rule, be sufficient. *Vide Livingston* vs. *The Bank of New York*, 26 Barb., 304; 5 Abb., 338.

The motion may, of course, be either brought on upon full notice, or on order to show cause; but, unless imminent danger to the fund be shown, the former is the more usual, and will be the more proper course. The application may, from its very nature, be not unfrequently combined with one for an injunction, though ordinarily the latter remedy will be applied for separately, at an earlier stage of the proceedings.

It will, of course, not be proper or admissible, before the actual commencement of the action, unless in very rare and urgent instances. *Kattenstroth* vs. *The Astor Bank*, 2 Duer, 632; *McCarthy* vs. *Peake*, 18 How., 138; 9 Abb., 164.

Such an interference can only be warranted, in the most extreme cases, where immediate injury is threatened, and a mere injunction will not afford adequate relief. *McCarthy* vs. *Peake*, *supra*. And, as a general rule, a receiver will not be appointed, unless a necessity for that

mode of interference by the court be shown. *The People* vs. *The Mayor of New York*, 10 Abb., 111; reversing *same case*, 8 Abb., 7; *Hamilton* vs. *The Accessory Transit Company*, 13 How., 108; 3 Abb., 255; affirmed, 26 Barb., 46; *Patten* vs. *The same*, 13 How., 502; 4 Abb., 235; reversing *same case*, 4 Abb., 139.

Where the title of the applicant to the property in question is disputed in good faith, a receiver will not usually be appointed, unless positive and immediate injury is shown, making the interference of the court for its intermediate preservation necessary or proper. *Austin* vs. *Chapman*, 11 L. O., 103; *Goodyear* vs. *Betts*, 7 How., 187; *La Chaise* vs. *Lord*, 10 How., 461; 1 Abb., 213; 4 E. D. Smith, 612, note; *Goulding* vs. *Bain*, 4 Sandf., 716; *Bishop* vs. *Halsey*, 13 How., 154; 3 Abb., 400; *Field* vs. *Ripley*, 20 How., 26.

A bare denial of fraud on the part of the defendant, or the putting in of a doubtful defence, will not, however, *per se*, prevent the granting of the application. *Churchill* vs. *Bennett*, 8 How., 309; *Quick* vs. *Grant*, 10 L. O., 344.

A *primâ facie* case being shown by the applicant, the merits of the action will not otherwise be inquired into, the proceeding being merely for conservation of the fund, and not by way of adjudication of the controversy. *Sheldon* vs. *Weeks*, 2 Barb., 532; 1 C. R., 87; *Conro* vs. *Gray*, 4 How., 166; *Todd* vs. *Crooke*, 1 C. R. (N. S.), 324.

Where two parties are equally interested in the same fund, and an injunction has been obtained by one, the granting of an injunction and receiver on the application of the other will be almost of course, though a prayer for that relief has been omitted to be inserted in his complaint. *McCrackan* vs. *Ware*, 3 Sandf., 688; 1 C. R. (N. S.), 215.

The proper use of joint property by one joint tenant, will not, as a general rule, be restrained, or a receiver appointed, unless abuse be reasonably apprehended, or in cases where security has been given for a due accounting. *Dunham* vs. *Jarvis*, 8 Barb., 88. But, where there is any doubt of the safety of the fund, the application will almost be as of course.

Pending a partnership, or in a suit where partnership is alleged on one part and denied on the other, a receivership will not be granted, unless the fund be shown to be in danger. *Goulding* vs. *Bain*, 4 Sandf., 716.

But where one partner seeks redress against the fraud of another, the application will be proper. *Cary* vs. *Williams*, 1 Duer, 667.

And, upon a dissolution, the granting will be almost a matter of course, even though negotiations may have been pending for a new arrangement. *Smith* vs. *Danvers*, 5 Sandf., 669; *Hogg* vs. *Ellis*, 8 How., 473; *Jackson* vs. *De Forest*, 14 How., 81.

The same will be the case in a suit by one partner for a dissolution, on facts warranting a proceeding for that purpose. *Wetter* vs. *Schlieper*, 4 E. D. Smith, 707; 15 How., 268; 6 Abb., 123. See also *Jackson* vs. *De Forest*, *supra*.

So also upon the insolvency of a partnership, whether limited or special. *Dillon* vs. *Horn*, 5 How., 35; *Levy* vs. *Ely*, 15 How., 395; 6 Abb., 89.

So likewise in a case of fraudulent dealing with its property, by the directors of a corporation. *Abbot* vs. *American Hard Rubber Company*, 33 Barb., 578; 21 How., 193; affirming *same case*, 20 How., 199; 11 Abb., 204.

On a dissolution on the ground of insolvency of some of the partners, although a solvent partner is not entitled as of right to the administration of the assets, a preference will be given to him as receiver, where his capacity and integrity are unquestioned. *Hubbard* vs. *Guild*, 1 Duer, 662. See also, as to the rights of a surviving solvent partner, *Jacquin* vs. *Buisson*, 11 How., 385.

In winding up the affairs of an insolvent copartnership, preference will be given to an application, where the suit is on behalf of all the creditors of the firm, as against one where a judgment-creditor files a bill in his own behalf only. *La Chaise* vs. *Lord*, 10 How., 461; 1 Abb., 213; 4 E. D. Smith, 612, note; *Jackson* vs. *Sheldon*, 9 Abb., 127; *Dambman* vs. *The Empire Mill*, 12 Barb., 341. See also *Wheeler* vs. *Wheedon*, 9 How., 293, as to a suit in hostility to an assignment.

In the absence of actual fraud or imputation of insolvency, the action of special assignees, in collecting the trust estate, will not be interfered with by appointment of a receiver, even though the ultimate division of the amount collected be restrained. *Spring* vs. *Strauss*, 3 Bosw., 608; *Bishop* vs. *Halsey*, 13 How., 154; 3 Abb., 400.

Nor will the ordinary operations of a corporation be similarly hampered. *Vide Hamilton* vs. *The Accessory Transit Company*, 13 How., 108; 3 Abb., 255; affirmed, 26 Barb., 46.

The rights of the legal owner or mortgagee of property will not be interfered with by a receivership. *Bayaud* vs. *Fellows*, 28 Barb., 451; *Patten* vs. *The Accessory Transit Company*, 13 How., 502; 4 Abb., 235; reversing *same case*, 4 Abb., 139. See also *Manning* vs. *Monaghan*, 1 Bosw., 459.

When a previous suit is pending in another court, the action of that court will not be impeded by way of receivership. *McCarthy* vs. *Peake*, 18 How., 138; 9 Abb., 164; *Thompson* vs. *Van Vechten*, 5 Duer, 618. But, in the latter case, a receiver was appointed of the surplus sale moneys of a vessel under libel in the United States District Court, after satisfaction of the claims of the libellants. And, as between two

applications, in two different suits, pending in the same court, though, *cæteris paribus*, preference will be given to that in which a reference was first directed, yet the rule is not unflinching, and that most for the benefit of the general body may be selected, or the appointment will be extended to both. The parties should, however, be heard. *Lottimer* vs. *Lord*, 4 E. D. Smith, 183.

On the ordinary creditor's bill it is, it seems, a matter of course to appoint a receiver. *Lent* vs. *McQuin*, 15 How., 313. See *Roberts* vs. *Albany and West Stockbridge Railroad Company*, 25 Barb., 662. But see cases above cited, as to the preference that may ultimately be given to a receiver representing the general body of creditors, over one only appointed for the protection of a specific interest.

(*b.*) Proceedings on Decision of Motion.

If a receivership be granted, the prevailing party, of course, draws up the order, which will direct a reference to appoint a receiver, as moved for, with the usual powers and the usual directions; and that the referee take from such receiver the necessary and usual security, and file the same in the proper office; and that, upon the filing of his report and of such security, the receiver be thereupon vested with all his rights and powers, as such, according to the rules and practice of the court.

Having entered and served such order, the moving party obtains and serves an appointment from the referee, for proceeding under the order.

He then prepares, for the purposes of the hearing, a formal proposal, giving the names and addresses of the proposed receiver, and of his sureties.

He should likewise have ready an affidavit, stating the particulars of the property over which the receivership is to extend, and the value of that property, so far as he is able to state it, in order to guide the referee in fixing the amount of security to be given.

The opposing party is entitled, on his part, to present a similar proposal, and it is, of course, competent for him to introduce any other evidence, tending to show the real value of the property, or to disprove any statements on the part of the applicant. He cannot, however, any longer dispute the right to an actual appointment, the time for that branch of the controversy being past.

That the old practice of a reference being taken in the above manner is still existent under the code, and that the actual appointment of the receiver rests, as heretofore, with the referee, and not with the court, see *Wetter* vs. *Schlieper*, 7 Abb., 92. The same case also decides that relationship to one of the parties is not, *ipso facto*, a disqualification of

a party proposed. See also, as to a reference being the proper mode of procedure, *McCarthy* vs. *Peake*, 9 Abb., 167, note.

Having heard the allegations and proofs of the parties, the referee then proceeds to make his decision, appoints the receiver, and fixes the amount of security to be given. Having signified such decision to the prevailing party, that party should immediately proceed to draw up the proper security. It is ordinarily taken in the form of a penal bond, executed by the sureties, conditioned that the receiver shall duly collect the trust fund, account for it yearly, or whenever required, and obey all orders of the court. The sureties must annex the usual affidavits of justification and acknowledgment, as required by rule 6.

The bond, thus prepared, must be submitted to the referee for his approval, and, of course, if he think fit, he can direct notice to be given to the adverse party, and may take any reasonable steps to satisfy himself of the solvency of the sureties.

When his decision is come to, he draws up his report, and files it, together with the security, as approved by him. The report appoints the receiver in terms, and states that the security has been taken, and annexed to and filed with it.

On the filing of these documents, the receiver's appointment and title to the trust funds is complete; and no assignment is necessary to divest the title of the party or debtor as to personal property, and to vest that property in him. The order itself has that effect. *Porter* vs. *Williams*, 5 Seld., 142; 12 How., 107; affirming *same case*, 5 How., 441; 9 L. O., 307; 1 C. R. (N. S.), 144; *People* vs. *Hurlbut*, 5 How., 446; *Van Rensselaer* vs. *Emery*, 9 How., 135; *Bostwick* vs. *Beizer*, 10 Abb., 197; *Wilson* vs. *Allen*, 6 Barb., 542; *In re Berry*, 26 Barb., 55; *Moak* vs. *Coats*, 33 Barb., 498. And he may compel its delivery by order of the court; but, to bring the party into contempt, he must make a personal demand. *Panton* vs. *Zebley*, 19 How., 394.

And, not merely so, but such vesting dates back, by relation, to the granting of the original order of reference. From that time, the property is under the control of the court, and the order operates as a sequestration *per se*. *Rutter* vs. *Tallis*, 5 Sandf., 610; *West* vs. *Fraser*, 5 Sandf., 653; *Roberts* vs. *The Albany and West Stockbridge Railroad Company*, 25 Barb., 662; *Steele* vs. *Sturges*, 5 Abb., 442; *Lottimer* vs. *Lord*, 4 E. D. Smith, 183; *In re Berry*, 26 Barb., 55. See this principle applied, in a contest for precedence between two appointments, in different proceedings, *Deming* vs. *New York Marble Company*, 12 Abb., 66. But, although the granting of an order has this effect, the receivership cannot be made to take effect from the commencement of the suit, and the insertion of a clause to that effect in the order, will be irregular and improper. *Artisans' Bank* vs. *Treadwell*, 34 Barb., 553.

The order has also the same effect, as regards the rents of the debtor's real estate. *Vide Porter* vs. *Williams*, *supra*. The title to such real estate does not, however, vest in this manner, though the right passes to him. See *Owen* vs. *Smith*, 31 Barb., 641. To vest the title in the receiver, for the purposes of assertion, a conveyance from the debtor or party himself will be necessary, and such conveyance will only pass the property, subject to all then existing liens, and to the rights of the holders for their enforcement. *Chatauque County Bank* vs. *Risley*, 19 N. Y., 369. See also *Chatauque County Bank* vs. *White*, 2 Seld., 236; *Smith* vs. *Lansing*, 22 N. Y., 520. But, on the right being acquired by the receiver, the court will compel a conveyance. *Moak* vs. *Coats*, 33 Barb., 498. N. B. See chapter 163 of 1851, p. 308, confirming all assignments of this nature, executed under the old Court of Chancery, or Supreme Court in equity.

As regards personal estate also, it may frequently save trouble, though not strictly necessary, to obtain an assignment from the debtor himself, and it can never be detrimental. As to the similar effect of such an assignment, *vide Fessenden* vs. *Woods*, 3 Bosw., 550.

But the appointment of a receiver does not alter the title to the funds over which his powers extend. Where, therefore, income sought to be seized by him was wholly or partially inalienable, it was held that the question could not be determined in the proceeding under which he was appointed, but must be made the subject of a separate suit. *Genet* vs. *Foster*, 18 How., 50.

Although no confirmation of the report, or further action of the court is necessary, in order to perfect the appointment of the receiver, or his title to the trust funds, but, on the contrary, both are completed on the filing of the report and security; still there can be no doubt that, on a proper application, it is competent for the court itself to set aside or review those proceedings. To warrant such an interference, it must, however, be clearly shown that the appointment is not suitable or proper, or that there has been fraud or collusion in the proceedings, otherwise the discretion lodged in the referee will not be interfered with. *Vide Lottimer* vs. *Lord*, 4 E. D. Smith, 183 (192); *Wetter* vs. *Schlieper*, 7 Abb., 92 (95).

When made, the appointment cannot be questioned collaterally, and when consented to by the party himself, his debtors cannot question its regularity. *Tyler* vs. *Willis*, 33 Barb., 327; 12 Abb., 465.

Nor can the original order be drawn into question, upon a motion for a mere formal substitution of a fresh receiver. *Fassett* vs. *Tallmadge*, 13 Abb., 12.

§ 118. *Duties and Powers of Receiver.*

A receiver, special or general, when appointed, is the officer of the court, and not of the party at whose immediate instance that appointment takes place. He is bound to act in all things with a view to the equitable interests of all parties entitled, and to follow such directions as the court may give. *Lottimer* vs. *Lord*, 4 E. D. Smith, 183; *Van Rensselaer* vs. *Emery*, 9 How., 135; *Curtis* vs. *Leavitt*, 10 How., 481; 1 Abb., 274; *Angell* vs. *Silsbury*, 19 How., 48.

He has the right of employing his own counsel for his direction. *Lottimer* vs. *Lord*, *supra;* or he may employ the counsel of either party, where their interests are not adverse, but not otherwise. *Bennett* vs. *Chapin*, 3 Sandf., 673.

When doubtful as to the extent or nature of his duties, he is entitled to apply to the court for its instructions. *Vide Curtiss* vs. *Leavitt*, 10 How., 481; 1 Abb., 274. See also, as to such an application by a trustee, *Coe* vs. *Beckwith*, 31 Barb., 339; 19 How., 398; 10 Abb., 296.

Or such instructions may be given, at the instance of third parties. *Vide Hubbard* vs. *Guild*, 2 Duer, 685.

But, in making such an order, the strict line of the receiver's duty will be followed, and no departure allowed from it, on any considerations of expediency. *Brown* vs. *New York and Erie Railroad Company*, 22 How., 451.

When appointed in relation to partnership property, it will be his duty to wind up the business. He cannot continue to carry it on, unless temporarily, and under the special direction of the court. *Jackson* vs. *De Forest*, 14 How., 81.

When goods subject to prior liabilities have come into his possession, he is bound to account for the proceeds, to the proper party entitled to such priority. *In re North American Gutta Percha Company*, 17 How., 554; 9 Abb., 79; *Rich* vs. *Loutrel*, 18 How., 121; 9 Abb., 356.

On selling real estate, his acts, under the direction of the court, will be valid, notwithstanding he may have personalty in his hands, applicable to payment of part of the claims which he represents. *Chatauque County Bank* vs. *White*, 2 Seld., 236. For an unlawful sale of property, if made, both he and the plaintiff, if the latter interfere, will be liable. *Vide Manning* vs. *Monaghan*, 1 Bosw., 459.

A receiver, like any other fiduciary, cannot himself buy, at a sale made by him. Any purchase, if made by him, will inure for the benefit of his *cestui que trusts*, at their election. *Jewett* vs. *Miller*, 6 Seld., 402.

In letting, he must let to the best advantage, or an arrange-

ment made by him will not be sustained. *Lorillard* vs. *Lorillard*, 4 Abb., 210.

In making payments under an order, he must act strictly within its legal limits, and not upon any equitable views of a claim submitted to him. *Vide Brown* vs. *The New York and Erie Railroad*, 19 How., 84. Nor will the court anticipate a final adjudication upon the rights of contesting parties, by directing an intermediate payment. *Hubbard* vs. *Guild*, 2 Duer, 685.

In relation to the prosecution or defence of suits, the theory that the receiver is an officer of the court, and acts, as such, under its direction and protection, has been strictly maintained.

A receiver cannot properly commence a suit without the previous direction of the court. If so, he acts at his peril, and, if unsuccessful, will be charged with the costs. *Phelps* vs. *Cole*, 3 C. R., 157; *Smith* vs. *Woodruff*, 6 Abb., 65. Having obtained such leave, he is then bound to proceed. *Winfield* vs. *Bacon*, 24 Barb., 154. But, of course, the mere granting of such leave does not alter the nature of or strengthen the claim to be so asserted. *Williams* vs. *Lakey*, 15 How., 206.

He may sue the debtor himself, for a conversion of property after his appointment. *Gardner* vs. *Smith*, 29 Barb., 68. And, when appointed on a general creditor's bill, he may maintain trover for property belonging to the defendants, without showing an assignment from all of them. *Wilson* vs. *Allen*, 6 Barb., 542.

In a suit of this latter nature, or on supplementary proceedings, he represents the whole body of creditors, and must act in the interest of all. *Same case.* See also *Porter* vs. *Williams*, and *Chatauque County Bank* vs. *White*, *supra*; *Bostwick* vs. *Beizer*, 10 Abb., 197.

Before suing a receiver, the claimant should also obtain the leave of the court (*Hubbell* vs. *Dana*, 9 How., 424); and, if sued without such leave, it will be a contempt of court, and he may obtain an order restraining the action. *De Groot* vs. *Jay*, 30 Barb., 483; 9 Abb., 304, reversing *Jay's case*, 6 Abb., 293. This right may, however, be waived by general appearance. *Hubbell* vs. *Dana*, *supra*. See also *Jay's case*, 6 Abb., 293, *supra*, reversed, but not on this point. And an omission to obtain such leave, though improper, is one of contempt purely, and does not affect the legal right of the party. *Chatauque County Bank* vs. *Risley*, 19 N. Y., 369.

A proceeding against the receiver, must also be taken by the party immediately entitled, or relief will be denied. *In re North American Gutta Percha Company*, 17 How., 544; 9 Abb., 79. See also *Rich* vs. *Loutrel*, 18 How., 121; 9 Abb., 356.

A receiver, suing or being sued in good faith, stands on the same footing as an executor or trustee, and is not liable for costs, where

there is no mismanagement or bad faith on his part. *St. John* vs. *Denison*, 9 How., 343; *Marsh* vs. *Hussey*, 4 Bosw., 614. See also, Code, section 317.

A receiver acting for creditors, is, by statute, expressly authorized to disaffirm, treat as void, and resist any act, transfer or agreement, made in fraud of the rights of the creditors whom he represents, for the benefit of such creditors; and any party committing such a fraud is declared liable to him in the proper action. *Vide* chapter 314 of 1858, p. 506, §§ 1, 2.

A receiver is accordingly, and was even before such statute, held entitled to bring an action in the nature of a general creditor's bill, to set aside any fraudulent assignment or act of the debtor, or of others seeking to withdraw or impair the estate or property covered by his receivership. *Porter* vs. *Williams*, 5 Seld., 142; 12 How., 107; affirming 5 How., 441; 9 L. O., 307; 1 C. R. (N. S.), 144; *Chatauque County Bank* vs. *White*, 2 Seld., 236; *Bostwick* vs. *Beizer*, 10 Abb., 197; *Seymour* vs. *Wilson*, 15 How., 355 (357), (though the report is generally unsatisfactory.) See also, *Shaver* vs. *Brainard*, 29 Barb., 25. By these cases, the decisions to the contrary of *Seymour* vs. *Wilson*, 16 Barb., 294, and *Hayner* vs. *Fowler*, 16 Barb., 300, are clearly overruled.

A foreign receiver has been held entitled to the same powers of bringing suit as a domestic receiver. *Runk* vs. *St John*, 29 Barb., 585. Of course it will not be necessary for him to obtain any previous leave, unless from the tribunal under which he acts.

In order to obtain leave to sue, a receiver should present a petition to the court, verified by affidavit, stating the nature of his claim and the reasons why it is expedient to enforce it, and praying for the leave required. The application is of course *ex parte*, and the order, though proper to be entered, need not be served. The same course may be adopted by a claimant against the estate, or other party entitled to sue the receiver, and desiring leave for that purpose.

Where a receivership was directed to continue, pending any appeal to be taken from the decree of the court at special term, it was held that an ulterior appeal to the Court of Appeals was also comprised in the continuance. *McMahon* vs. *Allen*, 14 Abb., 220.

In the case *In re Paddock*, 6 How., 215, it was held that, although the court may remove trustees or receivers for insolvency, it is not absolutely bound to do so; and, in that case, an application for such purpose was refused, the fund not appearing to be in danger, and the insolvency of the receiver having been known to the parties before his appointment.

In *Bennett* vs. *Chapin*, 3 Sandf., 673, the following principles are laid down, in reference to the duties of a receiver, as regards accounting.

He cannot make rests in his accounts, with a view to his commission, which must be calculated on the aggregate of his receipts and payments.

He is entitled to charge commission on choses in action actually in his hands, and delivered over by him to the parties, before realization, on a final settlement of his accounts.

He is entitled to those commissions at the rates allowed to executors and administrators by the Revised Statutes, 2 R. S., 93, *i. e.*,

For receiving and paying out all sums of money not exceeding $1,000, 5 per cent.

For receiving and paying out all sums of money not exceeding $4,000, 2½ per cent.

For all sums above $5,000, 1 per cent.

That is, for receiving, half these rates, and for paying out, one half.

And also for all his actual disbursements properly incurred. *Howes* vs. *Davis*, 4 Abb., 71.

See also as to the right of the receiver of an insolvent mutual insurance company to be allowed commissions, on the value of deposit or premium notes come to his hands, and surrendered by him to the makers, by order of the court. *Van Buren* vs. *The Chenango County Mutual Insurance Company*, 12 Barb., 671.

(*a.*) Insolvent Corporations.

Although it has, for the reasons above stated, been considered by the author as foreign to the purpose of the work, to go at any length into the questions relating to special statutory receiverships of insolvent corporations, still, as the statutes on the subject have been cursorily referred to, a similar cursory glance at the recent decisions bearing on the subject, though without professing to go fully into it, may not be inappropriate.

See generally, as to cases of insolvent banks, *Matter of Reciprocity Bank*, 22 N. Y., 1; *In re Knickerbocker Bank*, 10 How., 341; *In re Empire City Bank*, 10 How., 498; in *same matter*, 6 Abb., 385; 4 Abb., 118; *The Bowery Bank case*, 16 How., 56; 5 Abb., 415; *In re Empire City Bank*, 18 N. Y., 199; 8 Abb., 192, note; *Jones* vs. *Robinson*, 26 Barb., 310.

As to proceedings against insolvent corporations in general, *Conro* vs. *Gray*, 4 How., 166; *Dambmann* vs. *The Empire Mill*, 12 Barb., 341. A receivership effects *per se* a dissolution. *Fuller* vs. *Webster Fire Insurance Company*, 12 How., 293; *Bangs* vs. *McIntosh*, 23 Barb., 591.

As to the effect of the accompanying sequestration, *Corning* vs. *The Mohawk Valley Insurance Company*, 11 How., 190; *Angell* vs. *Silsbury*, 19 How., 48; *Bangs* vs. *McIntosh*, *supra*; *Mann* vs. *Pentz*, 3

Comst., 415; *Rankin* vs. *Elliott*, 16 N. Y., 377; affirming 14 How., 339; *Brinton* vs. *Wood*, 19 How., 162.

The receiver, in such cases, is bound by, and cannot disaffirm any lawful acts of the late corporation. *Emmet* vs. *Reed*, 4 Seld., 312. Nor can he plead for them the defence of usury. *Curtis* vs. *Leavitt*, 15 N. Y., 9; *Same case*, 17 Barb., 309; *Hyde* vs. *Lynde*, 4 Comst., 387; *Brouwer* vs. *Harbeck*, 1 Duer, 114.

But by their illegal acts he is not bound, and may impeach them. *Gillett* vs. *Moody*, 3 Comst., 479; *Talmage* vs. *Pell*, 3 Seld., 328; *Gillett* vs. *Phillips*, 3 Kern., 114. This principle is not impeached, though, on collateral points, these decisions are questioned and reviewed in *Leavitt* vs. *Blatchford*, 17 N. Y., 521.

As to the power of the receiver of a mutual insurance company to make assessments on premium notes, *vide Bangs* vs. *Gray*, 2 Kern., 477; reversing 15 Barb., 264; *Shaugnessey* vs. *The Rensselaer Insurance Company*, 21 Barb., 605; *Hyatt* vs. *McMahon*, 25 Barb., 457; *Devendorf* vs. *Beardsley*, 23 Barb., 656. As to restrictions on this power, and the necessity of its regular exercise, *vide Bangs* vs. *McIntosh*, 23 Barb., 591; *Williams* vs. *Babcock*, 25 Barb., 109; *Williams* vs. *Lakey*, 15 How., 206; *In re Campbell*, 13 How., 481; *Bell* vs. *Shibley*, 33 Barb., 610. As to when an assessment will not be necessary on a note, indorsed over before losses accrued, *vide White* vs. *Haight*, 16 N. Y., 310.

As to the discharge of a receivership, on proof of restored solvency, *vide Terry* vs. *Bank of Central New York*, 15 How., 445. As to its denial on an insufficient application, see *Livingston* vs. *The Bank of New York*, 26 Barb., 304; 5 Abb., 338.

When proceedings of this nature have once been instituted by the attorney-general, it is not in his power to discontinue them. That discretion rests with the comptroller. *In re Mechanics Fire Insurance Company*, 5 Abb., 444.

The same case is authority that the receiver, in these proceedings, should be required to give security in all cases.

§ 119. *Other Provisional Remedies.*

The remedies provided by the latter part of the section, in relation to funds or property admitted by a defendant to be in his possession, and for the making and enforcement of an order for their deposit or delivery; and likewise those by which the satisfaction of an admitted portion of a partially disputed claim may be enforced, will hereafter be considered in their appropriate place, and in connection with the proceedings in that stage of the action.

The remainder of the old provisional remedies have fallen into dis-

use, and seem to be formally swept away by the omission of the former general reservation, on the amendment of 1852. In cases, however, in which a failure of justice would otherwise occur, they may still be held as existent, under the general saving clause in section 408.

The writ of *supplicavit*, it seems, had not ceased to exist as a provisional remedy, under the Code of 1849. *Forrest* vs. *Forrest*, 5 How., 125; 10 Barb., 46; 3 C. R., 141; 1 9 L. O., 89.

The questions as to that of *ne exeat* have already been considered under the head of *Arrest*.

BOOK VI.

CHAPTER I.

OF THE PLEADINGS, GENERALLY CONSIDERED.

Preliminary Observations.

The present division of the work, and those immediately succeeding, will be devoted to this all-important matter. It will be treated first in its more extended aspect, as respects the principles and forms applicable to pleading in general, whether affirmative or responsive. This branch of the question forms the subject of the present book. The minor details, as applicable to each particular stage, will be considered in those which follow.

§ 120. *Statutory Provisions.*

The portion of the Code by which the pleadings in an action are regulated, is contained in title VI., part II., consisting of six chapters. Part of these provisions are of general, part of particular application. The author has, on reflection, considered it the more convenient course to cite the whole of that chapter at the outset, recalling the attention of the student to those portions of it by which specific pleadings are regulated, in the subsequent chapters, when necessary.

Before entering, however, upon the citation of the chapter in question, two other provisions demand also a special reference, as intimately connected with the subject of the present book.

The first of these provisions is contained in the title and preamble of the measure itself, expressing its general intention.

They run thus. The title is:

An Act to simplify and abridge the practice, pleadings, and proceedings of the Courts in this state.

The preamble:

Whereas, it is expedient that the present forms of actions and pleadings,

in cases at common law, should be abolished; that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding, in all cases, should be established, therefore, &c.

The second provision alluded to is contained in section 69 (62), (the first section of part II.,) which carries out the general abolition, proposed in the preamble. It runs thus:

§ 69. (62.) The distinction between actions at law, and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action.

Dates from 1849. The same in 1848, except that the prevention of private wrongs was referred to as well as their redress.

The germ of this radical and important change in the formal administration of justice within this state, will be found in the provision of the Constitution, adverted to at the close of this section.

We now proceed to the citation of the title of the Code above referred to.

TITLE VI.

Of the Pleadings in Civil Actions.

CHAPTER I. The Complaint.
II. The Demurrer.
III. The Answer.
IV. The Reply.
V. General Rules of Pleading.
VI. Mistakes in Pleading and Amendments.

CHAPTER I.

The Complaint.

§ 140. (118.) All the forms of pleading heretofore existing, are abolished; and, hereafter, the forms of pleading in civil actions, in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act.

Dates, as it stands, from 1852, but the substance was in the original Code, with a verbal change in 1849.

§ 141. (119.) The first pleading on the part of the plaintiff, is the complaint.

§ 142. (120.) The complaint shall contain:

1. The title of the cause, specifying the name of the court in which the action is brought. the name of the county in which the plaintiff desires the

trial to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

The introduction and first subdivision of this section have come down unchanged.

The second stood thus, in 1848 and 1849:

"2. A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

In 1851, it was amended, as it now stands.

The last subdivision has come down unaltered.

Chapter II.

The Demurrer.

§ 143. (121.) The only pleading on the part of the defendant, is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

§ 144. (122.) The defendant may demur to the complaint, when it shall appear upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action.

§ 145. (123.) The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

In 1848, this section closed with the word "disregarded." The concluding sentence was added in 1849.

In 1848, the following section stood here:

"§ 124. After a demurrer, the plaintiff may amend, of course, and without costs, within twenty days. Upon the decision of the demurrer, the court may, if justice require it allow the plaintiff to amend, or the defendant to withdraw his demurrer, and to answer."

In 1849, this section was stricken out. The cases are provided for by section 172.

§ 146. (125.) If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff, upon filing with the clerk, on proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 246; but

where an application to the court for judgment is necessary, eight days' notice thereof must be given to the defendant.

Settled in its present form in 1849. Has come down uncorrected, notwithstanding the manifest superfluity of the word "on" before "proof of the service."

§ 147. (126.) When any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer.

§ 148. (127.) If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Dates from 1849, when the original section was slightly condensed.

Chapter III.

The Answer.

§ 149. (128.) The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

2. A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition.

Has been the subject of the following changes:

In 1848, the denial was to be specific, or of knowledge sufficient to form a belief.

The second subdivision called for a statement "in such a manner as to enable a person of common understanding to know what is intended."

In 1849, the denial was to be general or specific, or according to information and belief, or of any knowledge sufficient to form a belief.

In 1851, the denial was again required to be specific, according to knowledge, information, or belief, or of any knowledge or information sufficient to form a belief.

The second clause was altered as it stands now, except that the word "set-off" stood instead of "counter-claim," and the repetition was not to be "unnecessary."

In 1852, the form was fixed as it now stands.

§ 150. (129.) The counter-claim mentioned in the last section, must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action, arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action.

The defendant may set forth, by answer, as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated,

and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

The earlier portions of this section, so far as it provides in relation to the subject of counter-claim, were first inserted on the amendment of 1852.

The concluding sentence formed the section before that year, the provisions being less full and comprehensive. Verbal changes were made in it in 1849 and 1852, from which latter year, the section dates as it stands.

§ 151. The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

First inserted in 1849.

§ 152. Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose.

First inserted in 1849. It then stood simply thus:

"§ 152. Sham answers and defences may be stricken out on motion."

Altered as it stands in 1851.

In 1848, section 130 stood thus:

"§ 130. If the answer set up new matter, which is not replied to as provided in the next section, and the action be tried on complaint and answer alone, and judgment be given thereon for the plaintiff, the court may permit the defendant to withdraw, or amend the answer upon such terms as shall be just."

This provision was wholly stricken out on the amendment of 1849.

Chapter IV.

The Reply.

§ 153. (131.) When the answer contains new matter constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer; and the plaintiff may, in all cases, demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue.

And in other cases, when an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and, in that case, the reply shall be subject to the same rules as a reply to a counter-claim.

This section has been the subject of frequent amendments.

In 1848, the power to reply to new matter was general, with power to insert allegations of new matter not inconsistent with the complaint.

In 1849, the phraseology was changed, and a power to demur, for insufficiency, added.

In 1851, the whole phraseology of the section was revised, the power remaining substantially the same as in 1849, save only that denials were to be specific.

In 1852, the power to reply was restricted to matter constituting a counter-claim, a general as well as a specific denial being made admissible.

By chapter 44 of 1855, p. 54, the phraseology of the section was revised, and a general power of demurring to the answer was conferred.

In 1857, the section was again remodelled, and fixed in the form in which it now stands, save only as regards the last sentence, empowering the court to order a reply in certain cases, which was added in 1860.

§ 154. If the answer contain a statement of a new matter constituting a defence, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and, if the case require it, a writ of inquiry of damages may be issued.

First inserted on the amendment of 1849. Has come down unchanged, though, since 1852, inconsistent with the wording of section 153. The addition made to the latter section in 1860 restores it however, to comparative consistency.

§ 155. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

First inserted as it stands in 1849. The same observation applies to it as to the last, but in a somewhat modified degree.

Chapter V.

General Rules of Pleading.

In 1848 and 1849, this chapter began with a section as follows:

"§ 156. (133.) No other pleading shall be allowed than the complaint, answer, reply, and demurrer."

In 1848, the end ran, "than the complaint, demurrer, answer, and reply."

On the amendment of 1851, the section was stricken out, and the first sentence of section 156 of 1849 (132 of 1848), taken from that section and substituted for it, as under.

§ 156. (133.) Every pleading in a court of record must be subscribed by the party, or his attorney, and, when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

In 1848, this formed part of section 133. Verification was then necessary as to all pleadings, except demurrer. In 1849, it rested as now, in option in the first instance. In both years the section went on to prescribe the mode of verification.

In 1851, this portion was separated and passed in its present form.

§ 157. (133.) The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by the affidavit of the party, or, if there be several parties united in interest, and pleading together, by one at least of such parties, acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be

in the possession of the agent or attorney; or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and, when the State, or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted, when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

This section was separated from the previous portion, and passed in its present form, on the amendment of 1851.

In 1848, the provision was much more simple, all that was required being a statement of belief that the pleading was true, by the party, his agent, or attorney. Verification might be omitted, where the party would be privileged from testifying as a witness.

In 1849, the provision substantially assumed its present form, being revised and extended in 1851.

In 1854, the following special statute was also passed, on the subject of verification (chapter 75, p. 153), restoring a portion of the original system of 1848.

"§ 1. The verification of any pleading, in any court of record in this state, may be omitted, in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading."

In 1848, there followed at this place in the Code:

"§ 134. Neither presumptions of law 'nor matters of which judicial notice is taken, need be stated in a pleading.'"

In 1849, this was stricken out.

§ 158. (135.) It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a further account when the one delivered is defective, and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished.

In 1848, this section only applied to accounts where the items exceeded twenty in number, and the concluding provision was omitted.

In 1849, the restriction as to items was stricken out, and the germ of the last sentence was subjoined, but the word "not" was omitted in the first line.

In 1851, this manifest error was corrected, and the section passed in its present form.

§ 159. (136.) In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

§ 160. (137.) If irrelevant or redundant matter be inserted in a pleading,

it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain, by amendment.

In 1848, this section consisted of the first sentence only. The second was added by amendment in 1849.

§ 161. (138.) In pleading a judgment or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

§ 162. (139.) In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts, showing such performance, but it may be stated generally, that the party duly performed all the conditions on his part; and, if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. In an action or defence, founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party, a specified sum, which he claims.

In 1848 and 1849, this section consisted of the first sentence only, with a trifling verbal change in the latter year.

The second division of the section was added by amendment in 1851.

§ 163. (140.) In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute, by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

§ 164. (141.) In an action for libel or slander, it shall not be necessary to state in the complaint, any extrinsic facts, for the purpose of showing the application to the plaintiff, of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff; and, if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

§ 165. (142.) In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and, whether he prove the justification or not, he may give in evidence the mitigating circumstances.

§ 166. In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

Not in the original Code, but inserted, as it stands, on the amendment of 1849.

§ 167. (143.) The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of—

1. The same transaction, or transactions connected with the same subject of action;

2. Contract, express or implied; or,

3. Injuries, with or without force, to person and property, or either; or,

4. Injuries to character; or,

5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or,

6. Claims to recover personal property, with or without damages for the withholding thereof; or,

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

In 1848, the first subdivision was omitted, and there were differences in the structure and arrangement of the others.

In 1849, the first subdivision was added, and the remaining portions changed in phraseology and arrangement.

In 1852, the section was again remodelled and passed as it now stands.

§ 168. (144.) Every material allegation of the complaint not controverted by the answer, as prescribed in section one hundred and forty-nine, and every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, as prescribed in section one hundred and fifty-three, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require.

Dates from the amendment of 1852. In 1848, the provision was substantially the same, but adapted to the then arrangement of the measure. In 1849, there were some changes made in the wording.

Chapter VI.

Mistakes in Pleading, and Amendments.

§ 169. (145.) No variance between the allegation in a pleading and the proof, shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged, that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

Dates as it stands from 1849. The difference from the original provision of 1848 was merely verbal.

§ 170. (146.) Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

§ 171. (147.) Where, however, the allegation of the cause of action or defence, to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

§ 172. (148.) Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings, at any time within twenty days after it is served, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed; and if it appear to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over, upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth subdivision of section 144, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

In 1848, the provision was short and simple, merely providing for the right to one amendment of course.

In 1849, the mode of expression was corrected and made more definite.

In 1851, the provision substantially assumed its present form.

In 1859, the phraseology of the earlier portion was altered as it now stands.

§ 173. (149.) The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

In 1848, this provision was in substance the same, but with several verbal differences.

In 1849, several changes in expression were made, and the substance of the present section 174 was added.

In 1852, the section assumed its present form.

§ 174. The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this act, or by an order enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time

within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him, through his mistake, inadvertence, or surprise, or excusable neglect: and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the court may, in like manner and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

In the Code of 1848 this provision was wholly wanting.

It was first inserted in 1849 as part of section 173, with some verbal differences from its present form.

In 1851, the section of 1849 was divided, and this sentence separated, and passed as section 174 as it now stands.

§ 175. (150.) When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

§ 176. (151.) The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be revarsed or affected by reason of such error or defect.

§ 177. (152.) The plaintiff and defendant respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply; alleging facts material to the case, occurring after the former complaint, answer, or reply; or of which the party was ignorant when his former pleading was made.

The words at the close were first inserted on the amendment of 1849.

The above are all the provisions of the Code which bear directly upon the subject of pleading.

Title IV. of part II., which provides as to the place of trial of an action, when brought, bears a close relation to the same subject, inasmuch as that place of trial must be originally fixed, at the time of drawing up the complaint, and must, as provided by subdivision 1 of section 142, be specified upon the face of that document. The consideration of this branch of the subject, and the citation of the provisions relating to it will, however, be reserved for the next book, where it will be separately treated.

The following are the provisions of the rules, bearing directly upon the subject of pleading.

Rule 19. (86.) In all cases of more than one distinct cause of action, defence, counter-claim, or reply, the same shall not only be separately stated, but plainly numbered.

Rule 20, providing for the marking of the folios in the margin, and the indorsement with the title of the cause, and also providing that

all papers must be legibly written, must of course be especially attended to in so important a part of the case as the pleadings. This provision has been already cited and considered generally in book IV.

Rule 22, having reference to the necessary formalities on an application for time to answer or demur, will be cited and considered in its place in the succeeding book.

Rule 50 provides thus, in relation to motions under section 160:

Rule 50. (40:) Motions to strike out of any pleading, matter alleged to be irrelevant or redundant, and motions to correct a pleading, on the ground of its being "so indefinite or uncertain, that the precise nature of the charge or defence is not apparent," must be noticed, before demurring or answering the pleading, and within twenty days from the service thereof.

Before passing on to the consideration of the working of the above provisions, it may not be out of place to glance at the origin of the system thus established. It will be found in the Constitution of 1846, article VI.

By section 3, it is thus provided:

There shall be a Supreme Court, having general jurisdiction in law and equity.

By section 5, thus:

The legislature shall have the same powers to alter the jurisdiction and proceedings in law and equity as they have heretofore possessed.

By section 10:

The testimony in equity cases shall be taken in like manner as in cases at law.

And lastly, by section 24:

The legislature, at its first session after the adoption of the Constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the courts of record in this state, and to report thereon to the legislature, subject to their adoption and modification from time to time.

The Code is the result of the report of the commissioners thus appointed; the numerous amendments in it, from time to time, that of the power of adoption and modification thus vested in the legislature.

§ 121. *System established by Code.*

Of the various changes effected by the Code, that in the system of pleading is at once the most radical and the most searching.

In the present section, the general characteristics of this change will be adverted to; in those which follow, its details.

Before entering upon the former branch of consideration, a recapitulation of the provisions of the statute which bear upon it will be convenient.

The object of the Code is to simplify and abridge.

Its intent—

To abolish the present forms of actions and pleadings in cases at common law; and also the distinction between legal and equitable remedies.

And to establish an uniform course of proceeding in all cases. See title and preamble.

Section 69 goes still further, and abolishes—

1. The distinction between actions at law and suits in equity;

2. The forms of all such actions and suits theretofore existing;

And declares that thereafter there shall be but one form of action, denominated a civil action.

Section 140 abolishes all the forms of pleading theretofore existing;

And directs that the forms of pleading in civil actions, and the rules by which their sufficiency is determined, are thereafter to be those of the Code; and, lastly,

By sections 142, 143, 149, and 153, the nomenclature of these pleadings is established. That of the former Court of Chancery is generally adopted; that of the courts of common law generally abandoned.

Care must be taken, however, not to attribute to these changes, sweeping and important as they unquestionably are, a wider latitude than that which legitimately belongs to them. The Code, in its legitimate bounds, is confined to the subject of procedure only. To carry its effect beyond those bounds, is an error, not uncommon, but manifest.

The forms of common-law pleading are, no doubt, completely swept away.

So are the distinctions, in mere form, between the remedy of a plaintiff at law, and his remedy in equity.

The forms of equity pleading are also in terms abolished. The main features of that branch of procedure are, however, preserved, and re-established by specific enactment.

The system thus established is, in its formal characteristics, uniform, and is applicable to all actions, legal or equitable.

But, in essentials, the distinctions between the legal and equitable rights of suitors, between the appropriate mode of allegation of those rights, and between the remedies proper for their enforcement, remain as they were. These are neither abolished, nor are they capable of abolition.

These general propositions have been made, from time to time, the subject of so much discussion, and of such a cloud of decisions, that it would be an almost hopeless task, and certainly a great waste of time,

to attempt to advert to all which bear, either directly or by way of *dicta*, upon the subject. The citations below will, therefore, be confined almost entirely to those pronounced in the court of last resort, and to some few others, which, from their peculiar pertinency, seem to demand a more specific notice.

(*a.*) Uniformity of General System.

In *Giles* vs. *Lyon*, 4 Comst., 600; 1 C. R. (N. S.), 257, the importance of the preamble of the Code, and of keeping it in view, in interpreting its provisions, is strongly enforced, and the effect of the provisions above cited thus defined: "They," *i. e.*, law and equity, "were to be blended and formed into a single system, which should combine the principles peculiar to each, and be administered thereafter through the same forms, and under the same appellations."

The following further *dicta* show clearly the sense of the Court of Appeals upon the subject:

"The intent of the legislature is very clear, that all controversies respecting the subject-matter of the litigation should be determined in one action, and the provisions are adapted to give effect to that intent." An equitable defence was, therefore, held admissible to an action to enforce a judgment. *Dobson* vs. *Pearce*, 2 Kern., 156 (165); affirming *same case*, 1 Duer, 142; 10 L. O., 170. See also *Crary* vs. *Goodman*, 2 Kern., 266 (268), stating the doctrine in that case, as follows: "The question in an action, is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defence against the plaintiff's claim, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for."

"As the courts of the state are now constituted, they apply legal and equitable rules and maxims indiscriminately in every case. In a suit which could not formerly have been defended at law, but as to which the defendant would have been relieved in equity, he can now have the like relief in the first action." "It was always theoretically unreasonable (though practically less objectionable than has been supposed) that, in one branch of the judiciary, the court should hold that the party prosecuted had no defence, while, in another branch, the judges should decide that the plaintiff had no right to recover. The authors of the Code, aiming at greater theoretical perfection, have abolished the anomaly; and now, when an action is prosecuted, we inquire whether, taking into consideration all the principles of law and equity bearing upon the case the plaintiff ought to recover." *New York Central*

Insurance Company vs. *National Protection Insurance Company*, 4 Kern., 85 (90, 91).

In *Phillips* vs. *Gorham*, 17 N. Y., 270, it was held, upon similar principles, that a plaintiff may assert his claim in an action, both upon legal grounds, and also upon such as, before the Code, were purely of equitable cognizance. See also *New York Ice Company* vs. *North Western Insurance Company of Oswego*, 25 N. Y., 357 (360); 21 How., 296; 12 Abb., 414; and *Marquat* vs. *Marquat*, 2 Kern., 336.

"Whether the action depend upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction." If, under the former system, a given state of facts entitled a party to a decree in equity in his favor, the same state of facts, in an action prosecuted under the Code, will entitle him to a judgment to the same effect. If the facts are such that, at the common law the party would have been entitled to judgment, he will, by proceeding as the Code requires, obtain the same judgment. *Cole* vs. *Reynolds*, 18 N. Y., 74 (76). See likewise *Eno* vs. *Woodworth*, 4 Comst., 249 (253); 1 C. R. (N. S.), 262.

Again, in *Emery* vs. *Pease*, 20 N. Y., 62 (64), the rule is thus stated: "A suit does not, as formerly, fail, because the plaintiff has made a mistake as to the form of the remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed, because he has prayed for a judgment to which he is not entitled."

This class of cases clearly overrule the stricter views taken by the prevailing opinion in *Haire* vs. *Baker*, 1 Seld., 357, controverted by Foot, J. (p. 363); and also in the opinion of Selden, J., in *Reubens* vs. *Joel*, 3 Kern., 488 (491, *et seq.*), so far as that opinion seeks to impeach this action of the legislature, on the ground of the alleged unconstitutionality of section 69.

See also the same general principles laid down in the courts below, in *Bishop* vs. *Houghton*, 1 E. D. Smith, 566 (572); *General Mutual Insurance Company* vs. *Benson*, 5 Duer, 168 (176); *Arndt* vs. *Williams*, 16 How., 244; *Grant* vs. *Quick*, 5 Sandf., 612; *Gardner* vs. *Oliver Lee's Bank*, 11 Barb., 558; *Hinman* vs. *Judson*, 13 Barb., 629; *Marquat* vs. *Marquat*, 7 How., 417 (422), and numerous other cases. See likewise the more recent *dicta* in *Merritt* vs. *Carpenter*, 30 Barb., 61 (67); *Hartt* vs. *Harvey*, 19 How., 245 (257); 10 Abb., 321; *New York Ice Company* vs. *North Western Insurance Company*, 31 Barb., 72; 20 How., 424; 10 Abb., 34; *Auburn City Bank* vs. *Leonard*, 20 How., 193. As to the choice of alternative remedies under either system, see *Corning* vs. *Troy Iron and Nail Factory*, 34 Barb., 485; 22 How., 217.

(*b.*) But without Confusion of Previous Distinctions in Essentials.

Among the cases and *dicta*, by which this proposition is established, the following present themselves for more special notice:

The broad principle that the Code has failed to abolish, but has, on the contrary, recognized and provided for the essential differences which distinguished the two classes of legal and equitable actions, and that those distinctions only, which existed in mere matters of form, are really affected, is fully laid down and legal rules applied, the action being one upon a strict legal liability, in *Voorhis* vs. *Child's Executors*, 17 N. Y., 354 (358, 359, 361); affirming *same case*, 1 Abb., 43. "Cases" (it is said by Selden, J.) "are found so naturally to arrange themselves according to the classification which existed prior to the Code, that the distinction between legal and equitable actions is nearly as marked upon all the papers presented to the courts as formerly. The same names are not used, but the nature of the cases has not been changed, nor have the distinctions been abrogated."

In *Cole* vs. *Reynolds*, 18 N. Y., 74 (76), above cited, after stating the general proposition, that the distinction between actions at law, and suits in equity is abolished by the Code, it is added: "But while this is so, in reference to the forms and course of proceeding in the action, the principles by which the rights of the parties are to be determined remain unchanged."

See also, as to the application of the common-law principle as to limitations, in a suit substantially founded on a debt, though in form to enforce an incident equitable lien. *Borst* vs. *Carey*, 15 N. Y., 505.

See, likewise, *Reubens* vs. *Joel*, 3 Kern., 488 (498). Instead of being abolished, the essential distinction between actions at law and suits in equity are, by sections 253, 254, 275, and 276, expressly preserved. Actions at law are to be tried by a jury. Suits in equity by the court. Damages are to be given, as heretofore, in the former, and specific relief in the latter.

And in *Goulet* vs. *Asseler*, 22 N. Y., 225 (228), the same principles are not merely restated, but also applied to the distinction between different forms of an action at common law, for a direct, as distinguished from a consequential, injury. The rule is stated thus: "Although the Code has abolished all distinctions between the mere forms of actions, and every action is now in form a special action on the case; yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish." Again: "The mere formal differences between such actions are abolished. The substantial differences remain as before." See, in Supreme Court, *Barnes* vs. *Willett*, 19 How., 564; 11 Abb., 225.

The cases in the courts below, bearing upon this point, are numerous. A few may advantageously be noticed, but to cite all, would be, as above remarked, practically useless, and a real waste of time.

Amongst the more prominent may be noticed *Bishop* vs. *Houghton*, 1 E. D. Smith, 566, holding that while there is only one form of proceeding, whether the relief which a party seeks be legal or equitable, or both, still the inherent difference between legal and equitable relief still exists, and must exist, and the plaintiff must so frame his action as to enable the court to administer the particular relief to which he is entitled.

Similar principles are laid down in *Arndt* vs. *Williams*, 16 How., 244. That case also acknowledges the rule that, in cases where the equitable power of the court is exercisable, that power and jurisdiction is the paramount power, and the court, in the exercise of its equitable jurisdiction, may and does control legal rights. See also *Williams* vs. *Ayrault*, 31 Barb., 364.

Where the party has a common-law remedy which is sufficient in itself, a court will not interfere by suit in equity. *Vide Heywood* vs. *The City of Buffalo*, 4 Kern., 534; *Wilson* vs. *Mayor of New York*, 4 E. D. Smith, 675; 1 Abb., 4; *Kelsey* vs. *King*, 32 Barb., 410; 11 Abb., 180; *Hartt* vs. *Harvey*, 19 How., 245; 10 Abb., 321, and many other cases.

And, notwithstanding the attempt to combine law and equity, the action and administration of the court is, it has been held, perfectly distinct in affording legal or equitable remedies, as much so as when those remedies were to be sought in different courts. *Onderdonk* vs. *Mott*, 34 Barb., 106.

An action in the nature of a common-law action for debt, cannot be maintained by one firm against another, having a common member; when justice cannot be done, without an accounting on equitable principles. *Englis* vs. *Furniss*, 4 E. D. Smith, 587.

Nor, prior to the recent changes, could such an action be maintained on the promissory note of a *feme covert*. The proceeding must be of an equitable nature, and *in rem*. *Cobine* vs. *St. John*, 12 How., 333.

That a common-law judgment for damages cannot be taken on the trial of an equitable action, is held in *Sage* vs. *Mosher*, 28 Barb., 287, and *New York Ice Company* vs. *North Western Insurance Company*, 31 Barb., 72; 20 How., 424; 10 Abb., 34. See also, as to differences in mode of trial, *Lawrence* vs. *Fowler*, 20 How., 407 (415).

The same general principles as to the indestructibility of the natural and inherent distinctions between legal and equitable proceedings, essentially considered, and of the power of the court in these respects, are maintained in *Elmore* vs. *Thomas*, 7 Abb., 70 (72); *Merritt* vs.

Thompson, 3 E. D. Smith, 283 (294); *Tinney* vs. *Stebbins*, 28 Barb., 290; and *Coster* vs. *The New York and Erie Railroad Company*, 6 Duer, 43; 3 Abb., 332; also noticed 5 Duer, 677.

And, of the older cases upon the subject, it will suffice to draw attention to *Shaw* vs. *Jayne*, 4 How., 119; 3 C. R., 69; *Knowles* vs. *Gee*, 4 How., 317; *Hill* vs. *McCarthy*, 3 C. R., 49; *Merrifield* vs. *Cooley*, 4 How., 272; *Floyd* vs. *Dearborn*, 2 C. R., 17. Also especially to *Linden* vs. *Hepburn*, 3 Sandf., 688; 5 How., 188; 3 C. R., 65; 9 L. O., 80; *Burget* vs. *Bissel*, 5 How., 192; 3 C. R., 215; *Wooden* vs. *Waffle*, 6 How., 145; 1 C. R. (N. S.), 392; *The Rochester City Bank* vs. *Suydam*, 5 How., 216; *Milliken* vs. *Carey*, 5 How., 272; 3 C. R., 250 (a case in which a restricted view of the question is taken in other respects); *Carpenter* vs. *West*, 5 How., 53; *Howard* vs. *Tiffany*, 3 Sandf., 695; 1 C. R. (N. S.), 99; and *Benedict* vs. *Seymour*, 6 How., 298. The same may be said as regards *Fraser* vs. *Phelps*, 4 Sandf., 682, where it is laid down as follows: "As we have frequently had occasion to say, the Code has not abolished the essential distinctions between suits at law and in equity, nor ought it to be construed as limiting or abridging the powers which, in cases like the present, courts of equity have been accustomed to exercise." See also *Crary* vs. *Goodman*, 9 Barb., 657; *Dauchy* vs. *Bennett*, 7 How., 375; *Le Roy* vs. *Marshall*, 8 How., 373; *Cook* vs. *Litchfield*, 5 Sandf., 330; 10 L. O., 330; affirmed, 5 Seld., 279; *The Merchants' Mutual Insurance Company of Buffalo* vs. *Eaton*, 11 L. O., 140; 5 Duer, 101; *Bouton* vs. *The City of Brooklyn*, 7 How., 198; *Same case*, 15 Barb., 375; *Spencer* vs. *Wheelock*, 11 L. O., 329; *Dobson* vs. *Pearce*, 1 Duer, 142; 10 L. O., 170; affirmed, 2 Kern., 156, *supra*; leaving, without special citation, numerous other decisions, in which the same rule has been acted upon in spirit, if not enounced in terms.

(*c.*) Other Parts of Former System not Abolished.

The Code, it must be borne in mind, is only a system of procedure. It does not alter, or profess to alter, the law as it stood before, in any questions which affect the essential rights of the suitor, as contradistinguished from the formal mode of their assertion.

The essential distinctions between actions of different natures still subsist, and a case stated with a view to relief in one description of action, will not, as a general rule, be admissible as forming the basis for a recovery in another of a different nature, essentially, and not formally considered.

Thus, where the plaintiff such the defendant, *ex delicto*, for the wrongful detention of a draft, proof that the latter had rightfully collected it, was held to be a fatal variance, and that a judgment, for the

amount collected, *ex contractu*, would not have been proper, on allegations thus framed. *Walter* vs. *Bennett*, 16 N. Y., 250. See also *Mayor of New York* vs. *Parker Vein Steamship Company*, 21 How., 289; 12 Abb., 300; *Andrews* vs. *Bond*, 16 Barb., 633, and *Seller* vs. *Sage*, 12 Barb., 531. Nor will a plaintiff, having commenced such an action, *ex contractu*, for the purpose of obtaining an order for publication of the summons, be allowed to change the action afterwards into one sounding in tort, by means of an amendment. *Lane* vs. *Beam*, 19 Barb., 51; 1 Abb., 65.

Where, however, the complaint stated facts, constituting a tort, but demanded a mere money judgment, a recovery was sustained, as proper in either aspect of the case. *Hudson River Railroad Company* vs. *Lounsberry*, 25 Barb., 597. So also, where the complaint was framed in both aspects, *Yertore* vs. *Wiswall*, 16 How., 8; likewise generally, *Trull* vs. *Granger*, 4 Seld., 115.

A plaintiff, electing to sue in debt, for the value of property, exempt from execution, instead of in replevin for its recovery, takes the risk of the change, and the amount of his money recovery will be subject to the incidents of an ordinary money judgment. *Mallory* vs. *Norton*, 21 Barb., 424. See also, as to the distinctions between the rule of damages in an action for an escape, when brought as in debt, or as in case respectively, *Barnes* vs. *Willett*, 19 How., 564; 11 Abb., 225.

A claim to real estate, its rents or profits, cannot be tried, under the form of an action for money had and received. *Carpenter* vs. *Stilwell*, 3 Abb., 459.

An action cannot be maintained, in the ordinary form of *assumpsit*, for a partial breach of a special contract. To warrant that form of action, the agreement should have been performed, so as to leave a mere simple debt or duty between the parties. *Evans* vs. *Harris*, 19 Barb., 416. But, when such agreement has been performed, the plaintiff may sue either on the special or the implied promise at his election. *Farron* vs. *Sherwood*, 17 N. Y., 227.

Neither has the Code altered the former law, in respect to the essential distinctions between actions. Thus, an action against common carriers, though technically sounding in tort, arises, in fact, *ex contractu*, and a bankrupt's discharge will be pleadable. *Campbell* vs. *Perkins*, 4 Seld., 430. And, *per contra*, in an action for unlawful conversion of property, though arising out of an original contract of hiring, infancy will be no defence. *Fish* vs. *Ferris*, 5 Duer, 49. But, when the action essentially sounds in contract, the mere attempt to allege a conversion will not change its nature, so as to exclude the defence. *Munger* vs. *Hess*, 28 Barb., 75.

Nor does the Code, by the abolition of mere forms of action, avail to

give to a plaintiff a remedy, where none existed before. *Cropsey* vs. *Sweezy*, 27 Barb., 310; 7 Abb., 129. Nor does it operate to confound those which theretofore existed. See *Ten Eyck* vs. *Houghtaling*, 12 How., 523; *Onderdonk* vs. *Mott*, 34 Barb., 106.

And, though it has abolished all technical rules of pleading, the Code has not abolished those which are dictated by good sense, and are necessary to be observed, to carry out its own provisions. Thus, when an award was pleaded, it was held that its substance, at least, if not its letter, must be set out, so that the court might judge of its validity as a bar. *Gihon* vs. *Levy*, 2 Duer, 176.

Nor has that measure abolished any statutory requisitions as to pleading in particular cases, not inconsistent with its own provisions. Such requisitions are, in fact, saved in terms, by section 471. A party wishing to contest the validity of the incorporation of a company plaintiff, must, accordingly, still tender a special issue upon the subject. *Bank of Genesee* vs. *Patchin Bank*, 3 Kern, 309 (314). See, on same principle, *The People* vs. *Bennett*, 5 Abb., 384; affirmed, 6 Abb., 343. See likewise, *Van Buskirk* vs. *Roberts*, 14 How., 61, as to the order of pleading; though the point immediately decided, in that case, seems to be untenable.

It may be remarked, however, before passing to the next branch of the subject, that the Code has, in no wise, altered the power of a suitor to elect between different remedies, for the same cause of action, though, having once made his election, he may, thereafter, be compelled, as above, to abide by it. See cases, hereafter cited, in section 140, under head of *Election*.

So also, when a special covenant has been fully performed, a plaintiff may sue, at his election, either upon the special agreement itself, or on the implied *assumpsit* arising from its performance. *Farron* vs. *Sherwood*, 17 N. Y., 227. Or, in the same manner, for rent due under a deed, though the rule, in this case, is exceptional. *Ten Eyck* vs. *Houghtaling*, 12 How., 523.

A lessee, from whom possession is withheld by his lessor, is not driven to his ejectment, but may sue for damages; and this, either *ex contractu* on the contract, whether express or implied, or in tort, for the violation of the duty on the part of the defendant. *Trull* vs. *Granger*, 4 Seld., 115.

(*d.*) Former Modes of Pleading.

As a general rule, a decided preference may be considered as given by the Code to the antecedent forms of equity pleadings, over those at common law. The latter are, in fact, expressly stated as intended to be abolished, by the preamble, which is silent as to the former.

The greater analogy which pleadings under the Code bear to the former rules in equity, rather than to those at common law, is laid down in *Mayhew* vs. *Robinson*, 10 How., 162 (166); *Backet* vs. *Wilkinson*, 13 How., 102; *Hunt* vs. *Hudson River Fire Insurance Company*, 2 Duer, 481 (488); *Knowles* vs. *Gee*, 4 How., 317. Especially is this the case, in an action of an equitable nature. *Coit* vs. *Coit*, 6 How., 53.

But this principle must not be carried beyond its due limits, and is only applicable to the statement of facts in a pleading, and to the demand of relief, grounded upon that statement, and no further. Matter can no longer be inserted with the mere view of discovery. The former system of allegation, by way of pretence and charge, is also wholly inadmissible. The facts of the case are required, and nothing else. *Clark* vs. *Harwood*, 8 How., 470. And this rule is equally applicable to responsive pleading. It was applied, and an answer drawn in conformity with the old chancery rules, admitting the statements in the complaint, and stating various legal propositions and arguments in defence, held to be bad, in *Gould* vs. *Williams*, 9 How., 51.

On the other hand, the essentials which lay at the root of the old common-law system are, by no means, to be considered as abolished; and, on the contrary, the forms under that system may still, as regards the statement of a strictly legal cause of action, be most advantageously followed as precedents. Such a complaint should, in fact, contain the substance of a declaration under the former system. *Zabriskie* vs. *Smith*, 3 Kern., 322 (330). See this subject, more fully considered, in the succeeding sections.

But this following must be strictly confined to those instances in which, under the former system, the truth of the case was alleged on the face of the pleading. Mere formalities, and especially those which included the assertion of falsehoods, are abolished by the Code, and a statement of the truth of the case substituted in their place. *Ensign* vs. *Sherman*, 14 How., 439. See also *St. John* vs. *Pierce*, 22 Barb., 362.

The former common-law system of declaring for the same cause of action by means of various counts, is also wholly swept away by the new system. See last case, and numerous other decisions cited in the succeeding sections.

In fact, it has been held that, under the present system, and since the forms of actions are abolished, every action, whether at law or in equity, may be considered as one upon the case, founded upon the peculiar facts out of which the controversy arises, as set forth in the complaint. *Vide Minor* vs. *Terry*, 6 How., 208 (210, 211); 1 C. R. (N. S.), 384.

See a plea of the statute of limitations, in the old form, sustained in *Bell* vs. *Yates*, 33 Barb., 627.

§ 122. *Averments, Generally Considered.*

Simple as are the general features of the system thus established, its reduction into practical detail has been attended with much complication, and been made the subject of prolonged and grave discussions.

The result of those discussions, in their general aspect, will form the subject of the present book. Such considerations which separately affect any one or more of the different branches of pleading, separately considered, will be reserved for the subsequent chapters.

To the latter classification may be referred the subjects of demurrer, and of strictly responsive pleading. In affirmative allegations, there are of course numerous characteristics, which belong to the peculiar counter relations of the plaintiff or defendant, and which will be reserved in like manner. There are, however, some general features pertaining to the averment of facts, whether in support of or in opposition to the claim made by a plaintiff, which pertain to all stages alike, and which it is proposed now to consider.

The general features of the Code, in respect to averments of this nature, in pleading, whether affirmative or responsive, are so closely analogous as to be in substance identical. The complaint must contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." (Section 142, sub. 2.) The answer, "a statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition." (Section 149, sub. 2.) And the reply "may allege, in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defence to new matter in the answer," by which a counter-claim is pleaded. Section 153.

In a broad point of view, the same principles of averment will, for the future, govern the pleadings in all actions whatever, whether of common law or equitable cognizance; and indeed such was, in many respects, the case, even under the former system, with reference to those general rules which lie at the root of all good pleading whatever, whether legal or equitable, so far as such pleading consisted in the affirmative averment of facts.

But in the minor details, there still is, as there always has been, an inherent distinction between the appropriate mode of allegation in pleadings, directed, on the one hand, to the framing of one simple and dominant issue, or in those destined, on the other, to serve as the basis of special or complicated relief. The principles which apply to both in common will first be treated of, and the separate distinctions reserved for subsequent notice.

(*a.*) FACTS ONLY TO BE STATED.

The grand object of this portion of the Code is, as has been above seen, to substitute for the former refinements and intricacies of pleading, a bare, concise, and ordinary statement of the facts of the case relied on, whether affirmative or negative in its nature, and this, in clear and intelligible language, without repetition, introduction of legal subtleties, or indulgence in legal fictions.

The guage of "common understanding" imposed by the original measure was, it is true, soon abandoned, as too low in its requirements, and too uncertain in its nature to serve as the basis of a practical system of rules; the essential principle sought to be carried out by that requisition has, however, been kept in view and substantially established, and a real necessity is now imposed upon the pleader of making his pleadings concise, intelligible, and sufficiently explanatory of the matters on which an issue is tendered, to convey a real idea of the substance of that issue, to a person of ordinary intelligence and capacity, though destitute of technical, or even of substantial legal knowledge.

(*b.*) CONSTITUTIVE FACTS.

In the first place, the facts to be stated in every pleading, whether affirmative or negative, must be constitutive, *i. e.*, such as constitute either a cause of action, or a ground of defence or reply.

The whole of those facts must be stated, so as to leave no deficiency in the case, whether affirmative or negative, which is sought to be pleaded.

But, beyond this, no statement will be appropriate. Mere matters of evidence will be redundant; mere conclusions of law, stated in the place of facts, inadmissible.

The exact line of distinction between such facts as are or are not strictly constitutive, as distinguished from those merely probative in their nature, is occasionally difficult to draw. Few things have been more frequent in practice, as the cases show, than their utter confusion. To cite all those cases would at once be unnecessary and wearisome. A few of the more prominent *dicta* and decisions, in which the nature of constitutive, as distinguished from probative facts, is defined, will, however, be selected. A consideration of them will show that the proper rule upon the subject, though so apt to be confounded, is in reality simple, and easy of application.

The following will be found in *McKyring* vs. *Bull*, 16 N. Y., 297 (303). After noticing that, in England, it has been found conducive to justice, to require the parties virtually to apprise each other of the facts upon which they intend to rely, Selden, J., adds: "The system

of pleading prescribed by the Code appears to have been conceived in the same spirit. It was evidently designed to require of parties, in all cases, a plain and distinct statement of the facts which they intend to prove; and any rule which would enable defendants, in a large class of cases, to evade this requirement, would be inconsistent with this design;" the point there ruled being, that evidence of payment or part payment of the plaintiff's claim could not be received under a general denial, or unless payment was pleaded in terms.

The rule is well stated in *Garvey* vs. *Fowler*, 4 Sandf., 665; 10 L. O., 16: "The plaintiff must now state in his complaint all the facts which constitute the cause of action, and I am clearly of opinion that every fact is to be deemed constitutive, in the sense of the Code, upon which the right of action depends. Every fact which the plaintiff must prove, to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred, and every such averment must be understood as meaning what it says, and, consequently, is only to be sustained by evidence which corresponds with its meaning."

Again, in *Fay* vs. *Grimsteed*, 10 Barb., 321: "It is one of the principal objects of the Code of procedure to abrogate the old forms of pleading, and to bring the parties to a plain, concise, and direct statement of the facts which constitute the cause of action, or the defence, in place of the general statement heretofore in use." See also *Bridge* vs. *Payson*, 5 Sandf., 210; and *Stoddard* vs. *Onondaga Annual Conference*, 12 Barb., 573.

The following general views are laid down in *Mann* vs. *Morewood*, 5 Sandf., 557: "A complaint must set forth all the material and issuable facts, which are relied on as establishing the plaintiff's right of action, and not the inferences from those facts which, under the advice of his counsel, he may deem to be conclusions of law. The facts which are required to be stated as constituting the cause of action, can only mean real, traversable facts, as distingnished from propositions or conclusions of law, since it is the former, not the latter, that can alone, with any propriety, be said to constitute the cause of action." See also *Tallman* vs. *Green*, 3 Sandf., 437.

It would be difficult to find a more comprehensive definition of what pleadings ought to be under the Code, in all cases, and without reference to the peculiar nature of the relief sought, than that laid down in *Boyce* vs. *Brown*, 7 Barb., 80; 3 How., 391, in the following words: "The pleader may use his own language, but the necessary matter must be there, and be stated in an intelligible and issuable form, capable of trial. Facts must still be set forth according to their legal effect and operation, and not the mere evidence of those facts, nor arguments,

nor inferences, nor matter of law only." "Nor should pleadings be hypothetical, nor alternative," and many cases under the old practice are cited. "Good pleading should be material, single, true, unambiguous, consistent, and certain to a common intent, as to time, place, person, and quantity, and not redundant or argumentative." Again: "As a general rule, a pleading, to be good by the settled principles of pleading, as modified by the Code, must state the facts constituting a legal cause of action or ground of defence; and these should be set forth in a plain, direct, definite, certain, and traversable manner, and according to their legal effect."

In *Churchill* vs. *Churchill*, 9 How., 552, the rule is thus generally laid down: "The theory of the present system is, that the party pleading should know beforehand what are the facts upon which he will rely; and that the pleading shall contain these facts, stated plainly and concisely, without unnecessary repetition. Whatever more a pleading contains, is unauthorized, and may be stricken out." See *Clark* vs. *Harwood*, 8 How., 470; *Gould* vs. *Williams*, 9 How., 51. See likewise *Kelly* vs. *Breusing*, 33 Barb., 123, as to the avoidance of unnecessary detail.

In *Lawrence* vs. *Wright*, 2 Duer, 673, the proposition is thus stated: "All these errors in pleading" (*i. e.*, the substitution of legal conclusions for the facts out of which they arise) "will be avoided, if it be constantly remembered that the facts which the Code requires to be set forth, are not true propositions, but physical facts, capable, as such, of being established by evidence, oral or documentary; and from which, when so established, the right to maintain the action, or the validity of a defence, is a necessary conclusion of law—a conclusion which the court will draw, and which it is quite unnecessary for the pleader to state." See also, generally, as to this last principle, *Haight* vs. *Child*, 34 Barb., 186.

The necessity of a statement of the substantial facts which go to make up a cause of action, with legal precision; and the importance of the statement being made with direct reference to the nature of the particular remedy sought to be invoked, especially in that class of cases in which, under the former practice, the plaintiff had his election of different forms of action, is distinctly pointed out in *Yertore* vs. *Wiswall*, 16 How., 8.

In a case where the action was for a breach of duty, which was assumed, instead of its existence being specifically shown by the plaintiff the principle was thus laid down: "The difficulty is, the want of any statement of facts from which such duty arises. For an allegation of the duty is of no avail, unless, from the rest of the complaint, the facts necessary to raise the duty can be collected." *City of Buffalo* vs. *Holloway*, 3 Seld., 493.

The distinction between the statement of a fact or of a truth is thus drawn in *Drake* vs. *Cockroft*, 4 E. D. Smith, 34; 10 How., 377; 1 Abb., 203: "A fact, in pleading, is a circumstance, act, event, or incident; a truth is the legal principle which declares or governs the facts and their operative effect." In defensive pleading, the elementary rule is, that a plea or answer, which does not deny the facts alleged by the plaintiff, "must state facts which, if proved, would destroy the plaintiff's right to recover." If the plaintiff's allegations are sufficient in law, the defendant, whilst admitting them, cannot dispute his right to a recovery, "unless he avers new facts, which defeat their otherwise legal operation."

In cases "where the provisions of a public statute are relied on as creating a right of action or a valid defence, it is sufficient for the party to set forth the facts which, he is advised, bring his case within the statutory provisions, leaving the court to determine whether they apply or not, either upon a demurrer, or upon the trial." Of the law itself the court is bound to take judicial notice, and its applicability is not a fact, but a conclusion of law. *Vide Goelet* vs. *Cowdrey*, 1 Duer, 132 (139); *Haight* vs. *Child*, 34 Barb., 186.

Though the rule, as above, is well settled, there must, nevertheless, to sustain such an action, be a positive allegation of all facts necessary to bring the case within the statute; and likewise of all qualifications, if any, which it prescribes. *Brown* vs. *Harmon*, 21 Barb., 508.

The rule in pleading matter within the scope of a statute, is thus declared in *Williams* vs. *The Insurance Company of North America*, 9 How., 365 (373): When the statute declares that an act is void, if made in a particular manner, the objection need not be anticipated; but, where it makes the act void, unless made under specified circumstances, the rule is reversed, and the pleader, setting it up, must show those circumstances in the first instance.

As to the allegations necessary to sustain an action, on the judgment of a foreign court of inferior jurisdiction, see *McLaughlin* vs. *Nichols*, 13 Abb., 244.

(*c.*) Probative Facts.

That the substantive facts of the case, and those only, form the only proper subject of averment, in all pleading whatever, and especially in pleadings under the peculiar provisions of the Code; and that merely collateral or probative circumstances, not directly tending to establish the cause of action, in common-law cases, or to bear upon or modify the relief to be granted, where that relief is equitable or special, are inadmissible in all cases whatever, whether legal or equitable, is a leading

feature in, it may be safely said, every decided case, whether taking the stricter or the more liberal view of the general question.

To enter upon the subject in any detail here, would be to anticipate its fuller consideration in a subsequent chapter, under the head of *Irrelevancy or Redundancy.* A bare notice of some of the principal decisions which lay down the rule in general terms, irrespective of the remedy, is all that is required for the present.

In *Boyce* vs. *Brown*, above cited, the doctrine is broadly stated: It is laid down that the only proper subjects of averment are "issuable facts, essential to the cause of the action or defence, and not the facts or circumstances which go to establish such essential facts;" and that "facts only, and not the evidence of facts, should be stated." The same conclusions are drawn in *Shaw* vs. *Jayne*, 4 How., 119; 2 C. R., 69; and *Knowles* vs. *Gee*, 4 How., 317. See also *Allen* vs. *Patterson*, 3 Seld., 476 (478). The rule thus laid down, at an early period, has been universally followed in the numerous subsequent decisions. Amongst them *Williams* vs. *Hayes*, 5 How., 470; 1 C. R. (N. S.), 148; *Howard* vs. *Tiffany*, 3 Sandf., 695; 1 C. R. (N. S.), 99; *Glenny* vs. *Hitchins*, 4 How., 98; 2 C. R., 56; *Milliken* vs. *Carey*, 5 How., 272; 3 C. R., 250; and *Wooden* vs. *Waffle*, 6 How., 145; 1 C. R. (N. S.), 392, may be selected at random as some of the more prominent, though others are equally explicit. *Wooden* vs. *Strew*, 10 How., 48; *Eddy* vs. *Beach*, 7 Abb., 17; and *Dibblee* vs. *Corbett*, 9 Abb., 200, may also be referred to, as constituting part of an unbroken chain of decisions to the present time.

In the action of ejectment, the rule is especially strict upon this subject, as will hereafter be noticed. A good deal of discussion has, likewise, taken place on the subject of averments, tending to show the liability of a defendant to arrest. This point will be more fully brought out hereafter, under the heads of *Irrelevancy* and *Complaint.* The conclusion may be thus stated: Where the action sounds in tort, either inherently or by election of the plaintiff, facts tending to show arrestability, form in fact part of the cause of action itself, and, being thus constitutive, will be properly and necessarily averred. Where, on the contrary, the action sounds in contract, either inherently or by election, and a recovery is sought on the contract only, facts tending to show fraud on the part of the defendant, are purely collateral, and cannot properly be pleaded.

Still more objectionable will be the allegation of facts inadmissible in evidence. Under no circumstances will their insertion in a pleading be proper. *Vide Van Benschoten* vs. *Yaple*, 13 How., 97.

(*d.*) CONCLUSIONS OF LAW.

It is abundantly settled under the Code, that the real facts of the case form, and form alone, the proper subjects of pleading, whether affirmative or responsive, and that the bare allegation of a conclusion of law, standing alone, and unaccompanied by any statement of the facts upon which that conclusion is based, will neither suffice to establish a cause of action, nor to constitute a defence.

This rule is manifest upon the face of the *dicta* in *Boyce* vs. *Brown*; *The City of Buffalo* vs. *Holloway*; *McKyring* vs. *Bull*; *Mann* vs. *Morewood*; *Drake* vs. *Cockroft*, and *Laurence* vs. *Wright*, as already cited in the present section, under the head of *Constitutive Facts*. See also, generally, *Jones* vs. *Phœnix Bank*, 4 Seld., 228 (235).

The exact nature of an allegation, objectionable on this ground, is thus defined in *Hatch* vs. *Peet*, 23 Barb., 575 (583): "An allegation of a legal conclusion merely, is one which gives no fact, but matter of law only."

In *Ensign* vs. *Sherman*, 13 How., 35 (37), the following *dictum* occurs as to the entire insufficiency of a bare allegation of this nature: "An act which may or may not be right or lawful, according to the circumstances under which it is done, is not properly averred to be unjust or unlawful, by merely calling it such. The facts which make it a wrong, must be pleaded as they are to be proved, and from them the conclusion follows that the party is acting unlawfully in what he does." See also *Fairbank* vs. *Bloomfield*, 2 Duer, 349.

The succeeding may be cited as some among the very numerous decisions in which the rule, as above laid down, has been asserted and enforced.

The following affirmative allegations in complaints have been held defective on this ground:

A bare allegation that the defendant had violated a statute, without particularizing in what manner. *Smith* vs. *Lockwood*, 13 Barb., 209; 10 L. O., 232; 1 C. R. (N. S.), 319.

In an action for a statutory penalty, however, an averment of violation, in the words of the statute, is sufficient. *The People* vs. *Bennett*, 5 Abb., 384; affirmed, 6 Abb., 343; overruling *Morehouse* vs. *Crilly*, 8 How., 431.

A bare allegation that defendant was indebted to the plaintiff, for moneys received to his use, without stating any facts to show his liability. *Lienan* vs. *Lincoln*, 2 Duer, 670; 12 L. O., 29.

A bare allegation of violation of a landlord's covenant, accompanied by a statement of facts, sufficient to show violation, but insufficient to charge that violation on the defendant personally. *Schenck* vs. *Naylor*, 2 Duer, 675. See also *Van Schaick* vs. *Winne*, 16 Barb., 89 (95).

An allegation that the plaintiff was sole owner of a demand against a third party, without showing how he acquired such ownership. *Thomas* vs. *Desmond*, 12 How., 321; *Adams* vs. *Holley*, 12 How., 326 (330).

An allegation of a duty on the part of the defendant, without stating facts, showing such duty to be existent. *Corey* vs. *Mann*, 14 How., 163; 6 Duer, 679. See also *The City of Buffalo* vs. *Holloway*, *supra*.

An allegation of authority to sue for a foreign corporation, without showing how it was acquired. *Myers* vs. *Machado*, 14 How., 149; 6 Abb., 198; 6 Duer, 678.

A bare allegation of ownership of a note, without stating indorsement by the payee. *White* vs. *Brown*, 14 How., 282. So, likewise, a bare allegation that a counter-claim arose out of the transaction stated in the complaint, without showing in what manner. *Brown* vs. *Buckingham*, 21 How., 190; 11 Abb., 387.

In defensive pleading, the rule is equally clear, and a bare denial of liability, or of any other legal conclusion, legitimately drawn from the case, as stated by the plaintiff, will, if standing alone, be wholly unavailing.

The detailed consideration of this branch of the question, falls more appropriately under the head of frivolous or insufficient defences, as treated of in a subsequent chapter. The following may, however, be noticed here, as some of the more prominent decisions.

The utter insufficiency of a bare denial of indebtedness or liability, as against sufficient facts stated to show either, is manifest, and it is needless to anticipate the citation of the decisions on that subject.

A mere denial of ownership in the plaintiff, in answer to a complaint in which it is adequately alleged, is equally insufficient. *Witherspoon* vs. *Van Dolar*, 15 How., 266; *De Santes* vs. *Searle*, 11 How., 477; *Higgins* vs. *Rockwell*, 2 Duer, 650; *Drake* vs. *Cockroft*, 4 E. D. Smith, 34; 10 How., 377; 1 Abb., 203. Nor will it be aided by an allegation that another is the real owner, unaccompanied by any facts showing such to be the case. *Brown* vs. *Ryckman*, 12 How., 313.

So likewise, as to a mere denial of interest in premises, without stating facts, to disprove specific allegations showing its existence. *Bentley* vs. *Jones*, 4 How., 202. Or a bare charge of fraud against a plaintiff, without alleging any facts to prove its existence. *McMurray* vs. *Gifford*, 5 How., 14.

A bare averment of adverse possession, without stating in whom, or any facts relating to it, was, in like manner, held bad, in *Clarke* vs. *Hughes*, 13 Barb., 147. See also *Ford* vs. *Sampson*, 30 Barb., 183; 8 Abb., 332.

The principle is generally laid down in *Mullen* vs. *Kearney*, 2 C. R.,

18, as follows: "An answer which admits all the facts on which the plaintiff's cause of action is founded, and merely denies, generally, that the plaintiff has a cause of action, is frivolous, and will be stricken out."

A plea of the statute of limitations, in the old form, was sustained, as being a sufficient allegation of fact, and not the mere statement of a conclusion of law, in *Bell* vs. *Yates*, 33 Barb., 627.

(*e.*) Arguments and Inferences.

It is wholly unnecessary and improper, in stating the case of the party pleading, to allege the arguments, or any of them, by which it is supported. *Boyce* vs. *Brown*, *supra*; *Lewis* vs. *Kendall*, 6 How., 59; 1 C. R. (N. S.), 402; *Hastings* vs. *Thurston*, 18 How., 530; 10 Abb., 418; *Gould* vs. *Williams*, 9 How., 51; *Arthur* vs. *Brooks*, 14 Barb., 533.

Merely inferential statements are also equally inadmissible. The facts of the case, and those facts only, are all that is proper to be alleged. *Brown* vs. *Harmon*, 21 Barb., 508. To draw inferences and conclusions is wholly the province of the court. To support the case by arguments is the office of the advocate, and not of the pleader.

See *Rodi* vs. *President*, &c., *of Rutgers Fire Insurance Company*, 6 Bosw., 23; where the complaint was held to be demurrable, in consequence of the facts constituting the plaintiff's case, being stated in an inferential, instead of a direct manner

(*f.*) Sufficiency.

Whatever the nature of the pleading, whether affirmative or responsive, it must either show in terms, or must lay ground for the introduction of the whole case of the party pleading, and of all the evidence in his power by which that case is sought to be established, or a recovery on the adverse part defeated.

The principle as to a complaint is thus laid down in *Allen* vs. *Patterson*, 3 Seld., 476 (479): "Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated."

It is laid down with equal clearness as to defences, in *McKyring* vs. *Bull*, 16 N. Y., 297: "Neither payment nor any other defence which confesses and avoids the cause of action, can, in any case, be given in evidence as a defence, under an answer containing simply a general denial of the allegations of the complaint" (p. 304). Again: "section 149 should be so construed as to require the defendants, in all cases, to plead any new matter constituting either an entire or partial defence, and to prohibit them from giving such matter in evidence, upon the assessment of damages, when not set up in the answer" (p. 307).

The general principle is also broadly laid down in *Van De Sande*

vs. *Hall*, 13 How., 458 (460), thus: "The defendant must aver in his answer, every fact necessary to show a defence, partial or total; and every such necessary averment must be proved." See likewise, *Drake* vs. *Cockroft*, 4 E. D. Smith, 34 (37); 10 How., 377; 1 Abb., 203; *Carter* vs. *Koezeley*, 14 Abb., 147.

It is of course especially indispensable that every fact necessary to confer jurisdiction should appear upon the face of the record, and, when a subject of averment, should be alleged in terms. *Frees* vs. *Ford*, 2 Seld., 176. See *House* vs. *Cooper*, 30 Barb., 157; 16 How., 292; *Cumberland Coal and Iron Company* vs. *Hoffman Steam Coal Company*, 30 Barb., 159. See likewise *Mahoney* vs. *Gunter*, 10 Abb., 431; *McLaughlin* vs. *Nichols*, 13 Abb., 244; *Carter* vs. *Koezeley*, *supra*.

The same rule, *i. e.*, that the whole case of the party, whether plaintiff or defendant, so far as it is necessary either to constitute a cause of action on the one hand, or to establish a valid defence on the other, must in all cases, be set forth on the face of his pleading, and an issue tendered upon every material fact, or that such pleading will be defective, has been laid down in a multitude of cases, of which the following may be selected as a sample.

Where the right of a plaintiff is not *primâ facie* clear, but, on the contrary, susceptible of an adverse implication, that implication must be negatived by specific averments. *Tinkham* vs. *Borst*, 15 How., 204. Where a party sues under a special authority, statutory or otherwise, or *en autre droit*, his title so to sue must be distinctly averred in the body of his complaint, or that complaint will be defective, nor will a mere *descriptio personæ* in the title avail to cure the defect. It is not necessary, however, to aver the details, but merely the facts. *Sheldon* vs. *Hoy*, 11 How., 11; *Bogert* vs. *Vermilyea*, 6 Seld., 447; *Peck* vs. *Mallams*, 6 Seld., 509; *White* vs. *Low*, 7 Barb., 204; *Smith* vs. *Lockwood*, 10 L. O., 12; 1 C. R. (N. S.), 319; *Johnson* vs. *Kemp*, 11 How., 186; *Bangs* vs. *McIntosh*, 23 Barb., 591; *Palmer* vs. *Snedley*, 28 Barb., 468; *Hulbert* vs. *Young*, 13 How., 413; *Stewart* vs. *Beebe*, 28 Barb., 34; 7 Abb., 206, note; *Dayton* vs. *Connah*, 18 How., 326; *Gould* vs. *Glass*, 19 Barb., 179. See, as to the mode of such averment, *Crowell* vs. *Church*, 7 Abb., 205, note. A party so suing, must also, by proper averments, show that the subject-matter of the suit is within the scope of his authority. *Hyatt* vs. *McMahon*, 25 Barb., 457. In like manner, when a party is sued in such a character, the pleading must allege all necessary facts, to show a special liability, *vide Hall* vs. *Taylor*, 8 How., 428. See also *White* vs. *Joy*, 11 How., 36; reversed, 3 Kern., 183; but on the ground of waiver, and not on the general principle of averment.

See likewise, the converse of the foregoing proposition, and that a

mere *descriptio personæ* will not avail to change the rights of the plaintiff, when the averments in the body of the pleading show a personal, instead of a representative right to sue. *Merritt* vs. *Seaman*, 2 Seld., 168.

Where a specific act, such as disaffirmance of an infant's deed, after majority attained, is requisite to be proved as a condition precedent to any right to sue, such act must not only be proved, but also specifically averred. *Voorhies* vs. *Voorhies*, 24 Barb., 150.

Where the plaintiff sues in his own name, but for the benefit of his class, under the special power in section 119, a special averment to that effect has been held essential. *Smith* vs. *Lockwood*, 10 L. O., 232; 1 C. R. (N. S.), 319.

And, in every pleading, of whatever nature, every material fact necessary to sustain the right of the party pleading to recover, or to defeat a recovery, must be distinctly averred, and an issue tendered on such averment. A plaintiff must show, both his own right to recover, and also, the liability of the defendant; a defendant must either avoid the plaintiff's case, or show a counter-right to relief on his own part, on the face of his pleading. *Page* vs. *Boyd*, 11 How., 415; *Fuller* vs. *Lewis*, 13 How., 219; 3 Abb., 383; *Murphy* vs. *Merchant*, 14 How., 189; 6 Duer, 679; *Bloodgood* vs. *Bruen*, 4 Seld., 362; *Bristol* vs. *Rensselaer and Saratoga Railroad Company*, 9 Barb., 158; *House* vs. *Cooper*, 30 Barb., 157; 16 How., 292; *Edwards* vs. *Campbell*, 23 Barb., 423; *Van de Sande* vs. *Hall*, 13 How., 458; *Smith* vs. *Leland*, 2 Duer, 497; *Safford* vs. *Drew*, 3 Duer, 627; 12 L. O., 150; *Vrooman* vs. *Dunlap*, 30 Barb., 202; *Dewey* vs. *Hoag*, 15 Barb., 365; *Mechanics' Banking Association* vs. *Spring Valley Shot and Lead Company*, 13 How., 227; *Corsey* vs. *Mann*, 6 Duer, 679; 14 How., 163; 5 Abb., 91. *A fortiori* will the pleading be bad, if the averments of the party pleading tend to defeat his alleged title. *Palmer* vs. *Smedley*, 6 Abb., 205; affirmed, 28 Barb., 468; *Nelson* vs. *Eaton*, 7 Abb., 305; reversing *same case*, 15 How., 305; *Ely* vs. *Cook*, 2 Hilt., 406; 9 Abb., 366; *Gridley* vs. *Gridley*, 33 Barb., 250 (254).

Where an action is brought upon a special contract, the terms of such contract ought properly to appear, or, at least, its substance must be stated with sufficient certainty, and compliance with its conditions must be averred, or the pleading will be defective. *Adams* vs. *The Mayor of New York*, 4 Duer, 295; *Gihon* vs. *Levy*, 2 Duer, 176; *Fairbanks* vs. *Bloomfield*, 2 Duer, 349.

And when, from its nature, such contract must properly be a contract in writing, that fact should also be stated. *Thurman* vs. *Stevens*, 2 Duer, 609; *Le Roy* vs. *Shaw*, 2 Duer, 626. See, however, *Livingston* vs. *Smith*, 14 How., 490, denying this necessity in the first instance, but not impeaching its expediency.

Where the action or defence rests, in any manner, on the laws of another state or country, such laws must be specially averred and proved as facts. A general averment will be insufficient. *Throop* vs. *Hatch*, 3 Abb., 23; *Vanderwerken* vs. *The New York and New Haven Railroad Company*, 6 Abb., 239; *Myers* vs. *Machado*, 6 Duer, 678; 14 How., 149; 6 Abb., 198; *Connecticut Bank* vs. *Smith*, 9 Abb., 168; and generally, *Hawkins* vs. *Brown*, 30 Barb., 206. See also, as to the necessity of negativing a presumption as to the effect of such law, in order to the establishment of an affirmative right to sue, contrary to such presumption, and to the rules of the common law, *Tinkham* vs. *Borst*, 15 How., 204. See, as to presumptions in such cases generally, *Thorp* vs. *Hatch*, *supra*.

So also, where an objection to the constitutionality of a law of this state is not patent, the facts tending to show unconstitutionality must be distinctly averred. *The People* vs. *The Supervisors of Chenango*, 4 Seld., 317.

The consequences of an error of this nature are thus pointed out by the Court of Appeals, in *Emery* vs. *Pease*, 20 N. Y., 62 (64): "We are required, and we are always inclined to give a liberal and benign construction to pleadings under the present system; but if a party, either ignorantly or wilfully, will omit the very fact upon which his case depends, and will content himself with averring evidence inconclusive in its nature, he must take the consequences of his error, if objection be made at the proper time."

Where, however, a pleading states a case which will be good in any aspect, it will be supported on demurrer. Where, therefore, a complaint merely alleged joint ownership of goods, by persons who were stated by the defendant to be partners, an objection to it was overruled. *Loper* vs. *Welch*, 3 Duer, 644.

The same principles of averment which apply to a complaint or answer generally considered, apply equally to each separate statement of a cause of action or ground of defence therein stated. Each such statement must be full and complete in itself, and must contain all necessary constituents. See, as to such statements in a complaint, *Landau* vs. *Levy*, 1 Abb., 376; *Clark* vs. *Farley*, 3 Duer, 645. As to a defence, *Xenia Branch Bank* vs. *Lee*, 7 Abb., 372; 2 Bosw., 694.

A complaint will be sufficient, under the Code, if facts are stated in it which warrant the judgment of the court, though the grounds of that judgment may not be those originally contemplated by the pleader. *Wright* vs. *Hooker*, 6 Seld., 51.

It follows with equal clearness, from the principle above stated, that if, when the whole of the case of the party pleading is stated, the facts therein stated fall short of constituting a cause of action or ground

of defence, the pleading will, of course, be fatally defective, and practically useless. It will be impeachable, either by demurrer in the first instance, or by objection on the ground of insufficiency at the hearing, and, in aggravated cases, by motion to set aside.

To enter into any detailed consideration of this branch of the subject in the present section would, of course, be premature. A few cases of general aspect may, however, be advantageously adverted to.

If any portion of an entire contract be void for illegality, it will be void *in toto;* the court will not undertake to sift the claim, and it cannot be made the subject of a suit. *Rose* vs. *Truax*, 21 Barb., 361.

The general principle is thus laid down in *Smith* vs. *Lockwood*, 13 Barb., 209; 10 L. O., 232; 1 C. R. (N. S.), 319: "The court must see by the facts set forth in the complaint, that the plaintiffs have sustained, or are threatened with some legal injury. The objection is fatal to the complaint, as it now stands." See likewise *Field* vs. *Holbrook*, 6 Duer, 597; 14 How., 103; *Raynor* vs. *Clark*, 7 Barb., 581; 3 C. R., 230.

See also as to insufficiency of a complaint for breach of promise of marriage, *Buzzard* vs. *Knapp*, 12 How., 504.

As to the invalidity of insufficient defences, see *The Farmers' Bank of Saratoga County* vs. *Merchant*, 13 How., 10; *Van Valen* vs. *Lapham*, 5 Duer, 689; 13 How., 240; *Welch* vs. *Hazelton*, 14 How., 97; *Heebner* vs. *Townsend*, 8 Abb., 234; *Bank of Waterville* vs. *Beltser*, 13 How., 270; *Snaderbeck* vs. *Wertler*, 8 Abb., 37. As to the waiver of a statutory objection, by an omission to plead it, see *Haight* vs. *Child*, 34 Barb., 186.

(*g.*) Principle of "secundum allegata."

The necessity for a complete averment of all material facts being made, upon every pleading, whether on the part of a plaintiff or of a defendant, is further demonstrated, if demonstration were necessary, by a mere reference to the familiar principle that no evidence can, on the trial of a cause, be adduced by either party, unless in support or in disproof of some issue regularly tendered by and joined upon the pleadings. The decree or judgment must be *secundum allegata et probata*, and, to make proof available, it must be based upon allegation.

The following are selected as some of the principal *dicta* and decisions by which this old established principle has been recently reasserted. N. B. Those in 2d Comstock are strictly under the old practice, but are equally applicable to the new.

As to a complaint, thus: "Particular care must be taken to put in issue in the bill, whatever is intended to be proved by the complainant in the cause, otherwise he will not be permitted to give it in evidence,

for the court pronounces the decree *secundum allegata et probata*. The reason of this rule is, that the adverse party may be apprized against what suggestions he is to prepare his defence." *Ferguson* vs. *Ferguson*, 2 Comst., 360 (361).

The same rule is also again repeated in the same terms (being characterized as "well settled"), in *Kelsey* vs. *Western*, 2 Comst., 500 (506).

The same case then proceeds thus upon the subject of answer:

"This rule is equally applicable to a defendant who makes a defence by answer. It requires him, besides answering the plaintiff's case as made by the bill, to state to the court in his answer, all the circumstances of which he intends to avail himself by way of defence, for he is bound by his answer to apprize the plaintiff, in an unambiguous manner, of the nature of the case he intends to set up; and he cannot avail himself of any matter in defence which is not stated in his answer, even though it should appear in his evidence."

After remarking that the provisions in sections 169, 170, and 171 of the Code, only apply to cases where the pleading sets up some particular matter, but fails to present such matter, as proved in some particular, so that there is strictly a variance between the pleading and the evidence, the decision proceeds: "But when, as in this case, there is a total want of allegation in the pleading of the subject-matter as a ground of action, or of defence, the want of such allegation is not cured by the Code, so as to allow of a decree to be founded upon the proof without allegation."

The same principle is as clearly, though less fully laid down in *Brazill* vs. *Isham*, 2 Kern., 9 (17); affirming *same case*, 1 E. D. Smith, 437. See also *McKyring* vs. *Bull*, 16 N. Y., 297 (304, 307), above cited. It is laid down clearly though curtly, thus: "Facts proved, but not pleaded, are not available to the party proving them," in the head-note to *Field* vs. *The Mayor of New York*, 2 Seld., 179. See also *Bailey* vs. *Ryder*, 6 Seld., 263; *Laraway* vs. *Perkins*, 6 Seld., 371; *McCurdy* vs. *Brown*, 1 Duer, 101; *Oakley* vs. *Morton*, 1 Kern., 25.

The same rule is laid down as to the necessity of matters of special damage being not merely proved, but pleaded in terms, in *Vanderslice* vs. *Newton*, 4 Comst., 130, and *Low* vs. *Archer*, 2 Kern., 277 (282). See, too, *Molony* vs. *Dows*, 15 How., 261 (265).

See also the following decisions in the courts below:

As against plaintiff's denying the introduction of evidence, on matters not duly or sufficiently alleged or put in issue by the complaint: "The rule is explicit and absolute, that the plaintiff must recover according to the case made by his bill, or not at all, *secundum allegata*," as well as "*probata*." *Thomas* vs. *Austin*, 4 Barb., 265 (273). See also *Bristol* vs. *The Rensselaer and Saratoga Railroad Company*, 9 Barb., 158;

Salters vs. *Genin*, 3 Bosw., 250; *Cottrell* vs. *Conklin*, 4 Duer, 45; *Adams* vs. *The Mayor of New York*, 4 Duer, 295 (306); *Livingston* vs. *Tanner*, 12 Barb., 481; *Currie* vs. *Cowles*, 6 Bosw., 452; *Spear* vs. *Downing*, 34 Barb., 522; 22 How., 30; 12 Abb., 437.

As against defendants, under similar defects of substantive allegations in the answer: *Brazill* vs. *Isham*, above cited; *Gihon* vs. *Levy*, 2 Duer, 176; *Graham* vs. *Harrower*, 18 How., 144; *New York Central Insurance Company* vs. *National Protection Insurance Company*, 20 Barb., 468 (473). (N. B.—Not affected as regards this principle by the reversal, 4 Kern., 85.) *Harbeck* vs. *Craft*, 4 Duer, 122 (128); *Pepper* vs. *Haight*, 20 Barb., 429; *Gasper* vs. *Adams*, 28 Barb., 441; *Pier* vs. *Finch*, 29 Barb., 170; *Ford* vs. *Sampson*, 30 Barb., 183; 17 How., 447; 8 Abb., 332; *Catlin* vs. *Hansen*, 1 Duer, 309; *Coan* vs. *Osgood*, 15 Barb., 583; *Keteltas* vs. *Maybee*, 1 C. R. (N. S.), 363; *Newell* vs. *Salmons*, 22 Barb., 647; *Dillaye* vs. *Parks*, 31 Barb., 132; *Diefendorf* vs. *Gage*, 7 Barb., 18; *Devendorf* vs. *Beardsley*, 23 Barb., 656; *Jacobs* vs. *Remsen*, 12 Abb., 390; 35 Barb., 384; *Williams* vs. *Birch*, 6 Bosw., 674; *Ogden* vs. *Raymond*, 5 Bosw., 16; *Scott* vs. *Johnson*, 5 Bosw., 213; *Kissam* vs. *Roberts*, 6 Bosw., 154; *Buckman* vs. *Brett*, 22 How., 233 (235); 13 Abb., 119; *Hendricks* vs. *Decker*, 35 Barb., 298; 35 Barb., 596.

The above series of decisions on the subject of defensive pleading, show the entire abolition of the ancient practice of introducing special matter in evidence, on notice given, under a plea of the general issue. Under the new system this is wholly inadmissible; and facts of this nature must be specifically averred. See *Brazill* vs. *Isham*, above cited. See also *Catlin* vs. *Gunter*, 1 Duer, 253 (265); 11 L. O., 201. N. B.—The reversal, 1 Kern., 368; 10 How., 315, does not affect this point.

As to the paramount expediency of framing the allegations of fact in a pleading, with a distinct view to the relief proposed to be sought, see *Briggs* vs. *Vanderbilt*, 19 Barb., 222, and *Yertore* vs. *Wiswall*, 16 How., 8 (10).

As to the risk incurred by either party, by looseness of allegation, in respect to the consequent admissibility of adverse evidence, see *Brown* vs. *Colie*, 1 E. D. Smith, 265.

Although public statutes need no special reference to them, on pleading facts which bring the case within their operation, and although this rule holds good as to statutes of local, as well as to those of general application, and to ordinances expressly founded on such statutes, this is not the case with reference to ordinary municipal ordinances. Such ordinances are not public acts, to the extent that they can be noticed, without being specially pleaded. *The People* vs. *The Mayor of New York*, 7 How., 81.

§ 123. *Mode of Averment.*

(*a.*) General Considerations.

The considerations applicable to this branch of the subject, flow, in a great measure, from the principles above laid down.

The statement of facts in a pleading must be adapted to the nature of the relief sought in the action.

It must be a statement of the constitutive facts of the case, and not merely of the evidence proving, or tending to prove those facts.

It must state facts only, and not substitute for them bare conclusions of law, or arguments, or inferences.

It must state the whole of the case sought to be proved, so as to lay ground for all evidence sought to be introduced.

And the case so stated must be sufficient, either as a cause of action or ground of defence.

On these points it will not be necessary to make any recapitulation. There are, however, several minor considerations, affecting rather the mode of statement than the essentials of the matter to be stated, which it is proposed to deal with in the present section.

The essential principle of every affirmative averment, whether on the part of a plaintiff or of a defendant, is that all essential facts should appear upon its face.

(*b.*) Narrative.

Although, as a general rule, it will be expedient to frame such averments with a special view to the peculiar relief sought, still there may be cases in which a simple narrative of the facts may be expedient or even necessary. See *Thompson* vs. *Minford*, 11 How., 273.

(*c.*) Statement of Conclusions.

Nor is it necessary, where facts sufficient to establish the case of the party pleading are averred, to draw, upon the face of the pleading itself, the conclusions of law arising from those facts, upon which he seeks to recover or defend. Such allegations are usual, but they are not, in strictness, necessary. The legal conclusion follows the fact established. *Vide Sheldon* vs. *Hoy*, 11 How., 11 (16); *Fowler* vs. *The New York Indemnity Insurance Company*, 23 Barb., 143; *Ives* vs. *Humphrey*, 1 E. D. Smith, 196. See *Eno* vs. *Woodworth*, 4 Comst., 249 (253); 1 C. R. (N. S.), 262. And the same is the case, even when the plaintiff has mistaken his remedy, or prayed for a judgment to which he is not entitled, if the case which he has stated entitles him to any, either legal or equitable. *Emery* vs. *Pease*, 20 N. Y., 62 (64).

(*d.*) Statements to be Positive.

The averments in a pleading, whether on behalf of a plaintiff or defendant, should be made positively, wherever the nature of the case admits. It has been held that this should be so, even when such averments are actually on information and belief, the mode of verification being, of itself, sufficient to effect the necessary reservation by the party verifying. *Vide Truscott* vs. *Dole*, 7 How., 221; *Milliken* vs. *Carey*, 5 How., 272; 3 C. R., 250; *Dollner* vs. *Gibson*, 3 C. R., 153; 9 L. O., 77; *Ricketts* vs. *Green*, 6 Abb., 82. See also *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362 (374). See likewise as to denials, *Thorn* vs. *New York Central Mills*, 10 How., 19; *Hackett* vs. *Richards*, 11 L. O., 315; but see also qualification of the latter case, at general term, 3 E. D. Smith, 13.

There can be no doubt but that, wherever possible, this should be done. The principle as to its absolute necessity seems, however, to be carried somewhat too far in the above decisions. In others it has been held that, when the truth requires it, averments made on information and belief, or even on belief only, will be sufficient, as averments of the fact thus stated. *Radway* vs. *Mather*, 5 Sandf., 654; *Fry* vs. *Bennett*, 1 C. R. (N. S.), 238 (249); *Howell* vs. *Fraser*, 6 How., 221; 1 C. R. (N. S.), 270; *Borrowe* vs. *Millbank*, 5 Abb., 28; 6 Duer, 680.

A statement, either by way of mere implication or inference, will, though unanswered, be insufficient, standing alone, to warrant a recovery, or the exclusion of evidence in disproof. To have either effect, it must be direct and positive. *Oechs* vs. *Cook*, 3 Duer, 161. See also *Brown* vs. *Harmon*, 21 Barb., 508.

As to the statement of facts in an inferential, instead of in a direct and positive manner, rendering a pleading demurrable, see *Rodi* vs. *President, &c., Rutger's Fire Insurance Company*, 6 Bosw., 23.

(*e.*) Hypothetical and Alternative Pleading

As a general rule, allegations of this nature are inadmissible. Facts, when pleaded, must be pleaded directly to the point, and neither hypothetically or alternatively. As regards the statement of a cause of action, this rule may be taken as universal. See *Saltus* vs. *Genin*, 17 How., 390; 8 Abb., 254; 3 Bosw., 639. See also, as to a hypothetical prayer, *Lamoreux* vs. *The Atlantic Mutual Insurance Company*, 3 Duer, 680.

As regards defensive pleading, its universal operation cannot be conceded. Its general applicability is, it is true, laid down and asserted in numerous recent decisions. See *Boyce* vs. *Brown*, 3 How., 391; 7 Barb., 80; *McMurray* vs. *Gifford*, 5 How., 14; *Lewis* vs. *Kendall*, 6 How., 59; 1 C. R. (N. S.), 402; *Sayles* vs. *Wooden*, 6 How., 84; 1 C.

R. (N. S.), 409; *Porter* vs. *McCreedy*, 1 C. R. (N. S.), 88; *Arthur* vs. *Brooks*, 14 Barb., 533; *Buddington* vs. *Davis*, 6 How., 401; *Wies* vs. *Fanning*, 9 How., 543; *Hamilton* vs. *Hough*, 13 How., 14; *Dovan* vs. *Dinsmore*, 33 Barb., 36; 20 How., 503. See also, as to a reply, *Lewis* vs. *Acker*, 11 How., 163.

Even as regards slander, however, the subject matter of the majority of the cases cited in the last sentence, its universal applicability is denied, and a defence, by way of justification, in connection with a denial of the charge, was allowed by a majority of the general term of the first district, in *Butler* vs. *Wentworth*, 17 Barb., 649; 9 How., 282, such defences being separately stated.

The general rule is, also, further controverted, and the principle laid down that a separate hypothetical defence may be predicated, in connection with a denial of the plaintiff's case, upon any facts alleged in the complaint, not presumptively within the knowledge of the defendant, in *Brown* vs. *Ryckman*, 12 How., 313; and *Ketchum* vs. *Zerega*, 1 E. D. Smith, 553. In the latter of these cases, the subject is very fully discussed, and numerous instances are given, in which pleading substantially hypothetical was allowed, even under the strict rules of the former practice. See Opinion, pp. 560, 561.

The learned judge adds: "It is clear to my mind that the defendant cannot be required, as a condition of averring new matter, to make an admission of the facts alleged, which shall preclude him from denying them on the trial. Such was not the rule before the Code, and such is not the rule now. It is only for the purposes of the issue formed upon the new matter, that the defendant must admit, or rather that he is, by setting up the new matter, deemed to admit, the truth of the allegations avoided thereby.

"This is the whole of the rule, and the defendant was not required, even for this purpose, to admit the allegations in terms."

This view seems more consonant to the spirit of the Code, especially to that of section 150, which expressly empowers a defendant to set forth, by answer, "as many defences and counter-claims as he may have," the only absolute condition being that they should be separately stated.

An alternative mode of statement of a single defence does not fall within the spirit of the last observation, and is clearly bad. *Corbin* vs. *St. George*, 2 Abb., 465.

(*f.*) Inconsistency

The rule, as to inconsistency of statement, is substantially the same. In a complaint it may be taken as universally inadmissible. See *Lattin* vs. *McCarty*, 17 How., 239; 8 Abb., 225; *Smith* vs. *Hallock*,

8 How., 73; *Budd* vs. *Bingham*, 18 Barb., 494; *Sweet* vs. *Ingerson*, 12 How., 331. See also, more fully, in a subsequent chapter, under the head of *Joinder*. As regards an answer, however, inconsistency, in point of form, seems no bar to the assertion of any number of defences, provided only they comply with the conditions of section 150, and are separately stated. Inconsistency, in substance, may, however, render the defence bad. See, hereafter, book VIII., chapter IV., section 176, and cases there cited.

(*g.*) CERTAINTY.

Whatever the nature of the pleading, it is equally essential that its allegations should be definite and certain, so as to give the court adequate *data* on which to ground a judgment, whether affirmative or negative in its nature. *Tallman* vs. *Green*, 3 Sandf., 437; *Gihon* vs. *Levy*, 2 Duer, 176; *Fairbanks* vs. *Bloomfield*, 2 Duer, 349; *Clark* vs. *Farley*, 3 Duer, 645; *Cheesebrough* vs. *New York and Erie Railroad Company*, 13 How., 557; 26 Barb., 9. See also *Wiggins* vs. *Gans*, 3 Sandf., 738; 1 C. R. (N. S.), 117; *Anon.*, 3 How., 406; *Hoxie* vs. *Cushman*, 7 L. O., 149.

But, as regards the allegation of time, when not bearing upon the essence of the controversy, the old rule that absolute correctness is not essential, is not varied. *Vide Brown* vs. *Harmon*, 21 Barb., 508; also *Andrews* vs. *Chadbourne*, 19 Barb., 147.

(*h.*) FACTS ACCORDING TO LEGAL EFFECT.

So far as is practicable, facts should always be averred according to their legal effect. *Gasper* vs. *Adams*, 28 Barb., 441; *Boyce* vs. *Brown*, above cited; *Pattison* vs. *Taylor*, 8 Barb., 250; 1 C. R. (N. S.), 174; *Dollner* vs. *Gibson*, 3 C. R., 153; 9 L. O., 77; *Stewart* vs. *Travis*, 10 How., 148 (153); *Ives* vs. *Humphreys*, 1 E. D. Smith, 196; *Bennett* vs. *Judson*, 21 N. Y., 238.

The stringency of the rule is, however, considerably overstated in several of the foregoing decisions, nor does it seem to be positively binding, in that class of cases, where, by adopting this mode of statement, the real truth will not appear in terms. In such a case it is admissible to state the facts as they occurred, leaving the court to determine their effect. See *St. John* vs. *Griffith*, 1 Abb., 39.

(*i.*) LOOSENESS AND SUPERFLUITY.

Looseness in averment entails upon the pleader the risk of giving a wider latitude for the introduction of adverse evidence. *Vide Brown* vs. *Colie*, 1 E. D. Smith, 265.

Superfluity may be equally detrimental, and may totally change the

aspect of the case, either by the waiver of objections, or the introduction of otherwise inadmissible proof. *Belknap* vs. *Seeley*, 2 Duer, 570 (579); *Calkins* vs. *Isbell*, 20 N. Y., 147 (152); *People* vs. *The Ravenswood, &c., Turnpike and Bridge Company*, 20 Barb., 518.

(*j.*) Anticipation.

It will be also wholly unnecessary, and, in many cases, inadmissible, for the pleader to anticipate in his pleading, supposed defences or grounds of reply to a supposed defence, which may or may not be raised by the adverse party. All that he is required strictly to do is to allege his own case, and nothing more, leaving it for his adversary to set up such matters, or not, as he may choose. *Vide Wolfe* vs. *Howes*, 20 N. Y., 197; *Hunt* vs. *Hudson River Fire Insurance Company*, 2 Duer, 481; *Butler* vs. *Mason*, 16 How., 546; 5 Abb., 40; *Sands* vs. *St. John*, 23 How., 140; *Fowler* vs. *The New York Indemnity Insurance Company*, 23 Barb., 143 (150); *Pattison* vs. *Taylor*, 8 Barb., 250; 1 C. R. (N. S.), 174.

See, however, this rule somewhat qualified, and averments of this nature refused to be stricken out, in *Bracket* vs. *Wilkinson*, 13 How., 102. See also, generally, *Williams* vs. *The Insurance Company of North America*, 9 How., 365 (373).

In an action for an injury, it is not necessary for the plaintiff to deny negligence or carelessness on his part, on the face of his complaint. *Wolfe* vs. *Supervisors of Richmond*, 19 How., 370; 11 Abb., 270.

(*k.*) Adaptation to Case, whether Legal or Equitable.

At the outset of the new practice, considerable conflict of opinion arose, some members of the judiciary inclining to the general adoption of the strict rules of common-law pleading; others to a more extended application of the former mode of averment in equity.

The continued existence of the former essential distinctions between suits of a strictly legal or a strictly equitable nature, having been at length firmly established, as shown in previous portions of this chapter, the dependent discussion as to the principles of averment, in actions falling under one or the other of these classes, has died away with the original controversy.

It may now be considered as completely settled, according to the principle enounced at the outset, in *Shaw* vs. *Jayne*, 4 How., 119; 2 C. R., 69, that it is competent for, and also the duty of, the pleader, "to adapt the form of his statement to the class, either legal or equitable, to which the action belongs."

In *Knowles* vs. *Gee*, 4 How., 317, it was admitted that "the legislature, by adopting the forms of chancery pleadings, had given unequiv-

ocal indication of a preference for those forms," and that, in consolidating two distinct systems of jurisprudence, "it became indispensable to borrow something from each." See also *Linden* vs. *Hepburn*, 3 Sandf., 668; 5 How., 188; 3 C. R., 65; 9 L. O., 80; and *Burget* vs. *Bissel*, 5 How., 192; 3 C. R., 215, in which this principle is further laid down, that, in cases where there was any doubt whether the action or defence was of an equitable nature, any averments adapted to the latter contingency ought to be allowed to stand.

In *The Rochester City Bank* vs. *Suydam*, 5 How., 216, the principle, as to the proper averments in equitable cases, was thus enounced:

"The kind of relief given by a court of equity imperatively required a different mode of stating the case from that adopted in the common-law courts.

"The decree in chancery, with all its varied provisions, its conditions and limitations, could not be ingrafted upon the record of a common-law action. The two were incompatible. From the one was carefully excluded every fact, not essential to enable the court to determine for which party to give judgment; the other required a consideration of all the circumstances, bearing upon the nature of the judgment, and going to modify or vary its provisions."

The learned judge then summed up his argument as follows: "So long as jurisdiction in equity and law are kept distinct, and courts of justice are permitted to adapt the relief thus afforded to the facts and circumstances in one class of cases, while they are confined to a simple judgment for or against the plaintiff in all others, so long must different rules be applied to pleadings at law or in equity.

"To do this is not inconsistent with the provisions of the Code, which does not attempt to abolish the distinction between law and equity, even if the legislature had the power to do so under the constitution. See Constitution, art. VI., §§ 3 and 5.

"My conclusion, therefore, is, that the statement of facts in a complaint should be in conformity with the nature of the action. If the case, and the relief sought, be of an equitable nature, then the rules of chancery pleading are to be applied; otherwise, those of the common law."

In *Wooden* vs. *Waffle*, 6 How., 145; 1 C. R. (N. S.), 392, the distinction between the necessary allegations in common-law and equity pleadings is thus drawn: "The allegations in a pleading at law consist of a chain of facts, all tending to establish some definite legal right. An equity pleading, on the contrary, frequently, if not generally, consists of an accumulation of facts and circumstances, without logical dependency, but the accumulated weight of which is claimed to be sufficient to raise or defeat an equity. If a single link be destroyed in

the former, the whole conclusion falls; but, if you abstract a fact from the latter, you have not of necessity broken the chain, but only diminished the weight of the whole." After drawing a similar distinction between what are really material issues, in legal and equitable actions, and defining the latter as "an issue upon a fact which has some bearing upon the equity, and ought to be established," but not a mere matter of evidence; and stating as one of the reasons why chancery pleading was made more in detail, that its purpose was "to put the court in possession of all the facts going to show both the plaintiff's right to relief, and what that relief should be;" the learned judge proceeds to lay down that this reason "is in no way affected by any provision of the Code. Equity jurisdiction is maintained. It is exercised upon the same principles and to the same extent as heretofore. The mode of trial is the same. The relief is adapted to the circumstances of the case. Every reason, therefore, which ever existed for a full statement of the case, exists now."

In *Howard* vs. *Tiffany*, 3 Sandf., 695; 1 C. R. (N. S.), 99, it is also laid down that, where a portion of the relief sought is of an equitable nature, it will be often indispensable to set forth facts, which need not be stated in respect of the other relief, "and, as much at large as was formerly done in a well-drawn bill in chancery;" and also, that the "facts constituting a cause of action, include not merely the facts upon which the plaintiff's right to relief is founded," but also "all such facts as are necessary to found the particular relief demanded, and to enable the court to give the proper judgment in the action."

In *Minor* vs. *Terry*, 6 How., 208; 1 C. R. (N. S.), 384, similar principles are sustained, in relation to pleading under the Code, generally considered; and it is laid down that, since the abolition of forms, every action is analogous to an action on the case, under the old practice, in which the pleader was accustomed to set forth the facts of his case particularly, and at large. See also *Thompson* vs. *Minford*, 11 How., 273. See likewise *Coit* vs. *Coit*, 6 How., 53; *Fay* vs. *Grimsteed*, 10 Barb., 321. The highly restricted views on the subject of averments in cases of an equitable or general nature, as taken in *Milliken* vs. *Cary*, 5 How., 272; 3 C. R., 250; *Dollner* vs. *Gibson*, 3 C. R., 153; 9 L. O., 77; *Pattison* vs. *Taylor*, 8 Barb., 250; 1 C. R. (N. S.), 174, and other similar decisions may now be considered as overruled. *Dollner* vs. *Gibson* seems, in fact, to have been reversed.

The general result of the mutual exchange of principles referred to in *Knowles* vs. *Gee*, *supra*, may be thus shortly stated:

In common-law pleading, under the Code, the following principles of averment are borrowed from the former equity system.

The system of different counts tending to the same relief is abolished.

So also is the system of fictitious allegations.

So also that of alleging a conclusion of law as the foundation of the cause of action.

The pleading must, on the contrary, aver the facts of the case, as they exist.

The equity system has borrowed from that of the common law the following:

The old system of averments by way of pretence and charge, and the statement of legal propositions, is swept away. *Vide Clark* vs. *Harwood*, and *Gould* vs. *Williams*, *supra*.

So also is that of interrogations and allegations with a view to discovery. Code, § 389.

In common-law actions, the allegations must be confined to facts tending to show the right to a recovery, and to those only. In suits at equity this is, of course, equally necessary; but a wider latitude is given, and any facts tending to show the measure of relief to be granted, are also, not merely admissible, but necessary, with a view to the due administration of that relief.

(*l.*) Old Forms, how far Available.

And, with a view to the due framing of averments of either nature, having regard to the distinctions above drawn, the old forms, though generally abolished, may still partially be adopted, and adopted with advantage.

First. With regard to common law:

It is laid down in *Zabriskie* vs. *Smith*, 3 Kern., 322 (330), that, under the present system of pleading, "a complaint should contain the substance of a declaration under the former system." See also *Howard* vs. *Tiffany*, 3 Sandf., 695; 1 C. R. (N. S.), 99.

In *Buddington* vs. *Davis*, 6 How., 401 (402), the converse is laid down: "What is now a good answer, would before have constituted a good plea in bar."

In the following cases, the mode of statement of a cause of action, substantially in the same manner as was theretofore in use under the old practice, is approved:

For false imprisonment. *Shaw* vs. *Jayne*, 4 How., 119; 2 C. R., 69.

For breach of promise of marriage. *Leopold* vs. *Poppenheimer*, 1 C. R., 39.

For assault and battery. *Root* vs. *Foster*, 9 How., 37.

In an action against a common carrier, but employing the first of the old counts only. *Stockbridge Iron Company* vs. *Mellen*, 5 How., 439.

In an action of replevin in the *detinet*. *Hunter* vs. *Hudson River Iron and Machine Company*, 20 Barb., 493.

In an action for a statutory penalty. *The People* vs. *Bennett*, 5 Abb., 384; affirmed, 6 Abb., 343; *The People* vs. *Muller*, 6 Abb., 344, note; overruling *Morehouse* vs. *Crilley*, 8 How., 431.

Or in one brought to recover back money lost at play, contrary to the provisions of the statute against betting and gaming. *Betts* vs. *Bache*, 14 Abb., 297; affirming *same case*, 23 How., 197; 14 Abb., 297.

Even a complaint in the form of the old *indebitatus* count will be good under the Code, the facts necessary to ground a recovery being stated on its face. *Allen* vs. *Patterson*, 3 Seld., 476; *Cudlipp* vs. *Whipple*, 4 Duer, 610; 1 Abb., 106; *Adams* vs. *Holley*, 12 How., 326; *Stewart* vs. *Travis*, 10 How., 148. See also *Hall* vs. *Southmayd*, 15 Barb., 32. It may be remarked, however, that this line of cases are in their nature permissive, and not directory. An inversion of this order, and a substantive statement of the facts showing indebtedness in the first instance, then alleging that indebtedness as the result, seems to be better pleading. *Vide Eno* vs. *Woodworth*, 4 Comst., 249 (253); 1 C. R. (N. S.), 262.

But the common counts, under the old practice, will not be admissible, if employed in the aggregate, without selection, according to the true state of the case. Nor, where deficient in certainty, or allegation of the specific facts on which indebtedness was predicated, will they be available. *Vide Blanchard* vs. *Strait*, 8 How., 83 (86); *Woods* vs. *Anthony*, 9 How., 78.

The substance of the former statutory declaration in ejectment, so far as the truth was thereby stated, but not in so far as the statement was fictitious, may, and should also be employed as the model for a complaint under the Code. A detailed allegation of the plaintiff's title will, in fact, be improper. *Vide Ensign* vs. *Sherman*, 14 How., 439. See also *same case* below, 13 How., 35; *Sanders* vs. *Levy*, 16 How., 308; *Walter* vs. *Lockwood*, 23 Barb., 228; 4 Abb., 307; *Warner* vs. *Nelligar*, 12 How., 402; *The People* vs. *The Mayor of New York*, 8 Abb., 7 (19). By these decisions, *Lawrence* vs. *Wright*, 2 Duer, 673, is so far overruled.

And a plea of the statute of limitations, according to the old established form, was sustained in *Bell* vs. *Yates*, 33 Barb., 627.

Second. With regard to equity cases:

The stating part of a well-drawn bill in chancery, will form an eligible model for the statement of facts in a similar complaint under the Code. See *Howard* vs. *Tiffany*, above cited; *Fay* vs. *Grimsteed*, 10 Barb., 321; *Hunt* vs. *Hudson River Fire Insurance Company*, 2 Duer, 481 (488).

(*m.*) General Observations as to Averment.

Before preparing a pleading of whatever nature, every known circumstance of the case should be first maturely weighed, especially as regards its probable bearing on the general result of the suit. No more dangerous error can be committed, than to defer a complete investigation in this respect until the case approaches a hearing.

Whilst, in so doing, the probable defence or probable reply to that pleading should be present to the mind of the pleader, whilst framing his original statements; still, on the other hand, the insertion of anticipatory or conjectural allegations should always, as far as possible, be avoided, both as affording evidence of a sense of weakness, and also as calculated to suggest the taking of objections that might otherwise have escaped notice. The grand object in all pleadings, should be to state exactly enough to maintain the party's own case, and to furnish a ground for the introduction of the evidence by which it is proposed to be established; to state every thing necessary for these purposes, and to state not one word, not one syllable more. Every unnecessary allegation, however apparently trivial, gives, *pro tanto*, an advantage to the adversary. In every case, too, whilst alleging the necessary facts, care must be taken to allege them, or rather to allege the conclusion founded upon them, in such general terms, as to afford ground for the introduction of every species of evidence whatever, either direct or collateral, which may possibly bear upon the issue to be tried. The judicious employment of terms, and even the substitution of one word for another, of almost the same general import, may often accomplish this, and may perhaps lead to the most important ultimate results.

(*n.*) Averments, under a Statutory Provision.

Whenever the cause of action or ground of defence is grounded upon any statutory provision, the exact wording of the statute ought in all cases to be strictly followed. *Schroeppel* vs. *Corning*, 2 Comst., 132; *Hunt* vs. *Dutcher*, 13 How., 538; *Foot* vs. *Harris*, 2 Abb., 454.

A general averment of the passage of a statute will be sufficient, without the details necessary to show it has actually gone into operation. *Wolfe* vs. *Supervisors of Richmond*, 19 How., 370; 11 Abb., 270.

See also, as to a declaration for a statutory penalty, *The People* vs. *Bennett*, 5 Abb., 384; affirmed, 6 Abb., 343; overruling *Morehouse* vs. *Crilley*, 8 How., 431. See likewise, as to plea of the statute of limitations, *Ford* vs. *Babcock*, 2 Sandf., 518 (523); *Cole* vs. *Jessup*, 6 Seld., 96; 10 How., 515 (524); *Bell* vs. *Yates*, 33 Barb., 627. And where an exception forms part of the enacting clause, instead of being added in a

proviso, its existence should be negatived. *First Baptist Church* vs. *Utica and Schenectady Railroad Company*, 6 Barb., 313 (319).

Where, however, the allegations in a pleading clearly bring the case within the purview of a public statute, the court will take judicial notice, and a reference to it in terms will not be indispensable. *O'Maley* vs. *Reese*, 6 Barb., 658; *Brown* vs. *Harmon*, 21 Barb., 508; *Goelet* vs. *Cowdrey*, 1 Duer, 132; *Shaw* vs. *Tobias*, 3 Comst., 188.

City ordinances must be averred as facts. *People* vs. *Mayor of New York*, 7 How., 81. But a statute under which they are made, though of local application, is of a public nature, and need not be specially pleaded. *Beman* vs. *Tugnot*, 5 Sandf., 153.

As to the presumption with respect to foreign laws, and the construction of the common law in another state, see *Wright* vs. *Delafield*, 23 Barb., 498.

In pleading a statutory proceeding, such as attachment, jurisdiction in the officer is all that need be averred, and not even that, when issued by a court of general jurisdiction. *Cruyt* vs. *Phillips*, 16 How., 120; 7 Abb., 205.

(*o.*) AVERMENTS BY OR AGAINST INCORPORATIONS.

The following provision is made upon this subject at 2 R. S., 459, section 13, part III., chapter VIII., title IV.:

> In actions by or against any corporation created by or under any law of this state, it shall not be necessary to recite the act or acts of incorporation, or the proceedings by which such corporation was created, or to set forth the substance thereof; but the same may be pleaded, by reciting the title of the act and the date of its passage.

Under section 14, a misnomer of any corporation must be pleaded in abatement, or it will be waived.

And by section 3, p. 458: In suits brought by a domestic incorporation, its existence need not be proved on the trial, "unless the defendant shall have pleaded in abatement or in bar, that the plaintiffs are not a corporation."

These provisions are amongst those specially saved by section 471 of the Code, and are therefore now subsisting.

It will be observed that, with the exception of the clause as to misnomer, they are applicable to domestic incorporations only, and not to foreign.

Some difficulty has arisen as to the construction of these provisions, as regards the former.

In *Johnson, President, &c.*, vs. *Kemp*, 11 How., 186, it was held that a bank, created under the general banking law, when suing,

ought to comply with the terms of the above section, and "recite the title of the Act and the date of its passage." See also *Bank of Havana* vs. *Wickham*, 7 Abb., 134; 16 How., 97; also p. 288, as to a similar necessity on the part of an individual banker, assuming a corporate name.

In those cases it was held that the objection might be taken by special demurrer, on the ground of want of capacity to sue. See also *Bank of Lowville* vs. *Edwards*, 11 How., 216.

In the majority of the decided cases, however, section 13 has, as it were, been completely overshadowed by the previous provision in section 3, that, unless the objection be taken by plea in abatement or in bar, the incorporation need not be proved upon the trial.

It has especially been held that the objection cannot be taken by demurrer at all, where the plaintiff sues by an appropriate corporate name. It will be intended under such circumstances, for all the purposes of the suit, to be a corporation, unless the contrary be averred by plea, and there is no defect appearing on the face of the complaint. *Union Mutual Insurance Company* vs. *Osgood*, 1 Duer, 707; 12 L. O., 185; *Shoe and Leather Bank* vs. *Brown*, 18 How., 308; 9 Abb., 218. The same rule is laid down, where the same objection of want of legal capacity to sue had been taken by statement to that effect in the answer, but without any direct plea that the plaintiffs were not a corporation. *Metropolitan Bank* vs. *Lord*, 1 Abb., 185; 4 Duer, 630; *Bank of Waterville* vs. *Beltser*, 13 How., 270; *Lafayette Insurance Company of Brooklyn* vs. *Rogers*, 30 Barb., 491. Nor can the objection be raised under a general denial. *Kennedy* vs. *Colton*, 28 Barb., 59; *Bank of Genesee* vs. *Patchin Bank*, 3 Kern., 309 (314).

The above cited cases of *Shoe and Leather Bank* vs. *Brown*, *Bank of Waterville* vs. *Belzer*, and *Kennedy* vs. *Colton*, go, however, much further, and hold generally, that a corporation suing need not make any averment of its incorporation at all, beyond what is contained in its corporate name. See also *Stoddard* vs. *The Onondaga Annual Conference*, 12 Barb., 573. See likewise as against a defendant, *Accome* vs. *The American Mineral Company*, 11 How., 24.

These views are based upon a series of old common-law decisions, to the effect that the name itself argues a corporation.

It seems practically to ignore the direct provision in section 13, prescribing a specific form of pleading for the purpose of that averment. The authority of this line of decisions seems, however, to be doubted in *The Connecticut Bank* vs. *Smith*, 9 Abb., 168.

The Bank of Genesee vs. *The Patchin Bank*, 3 Kern., 309 (314), does not go to the full length as claimed in *The Shoe and Leather Bank* vs. *Brown*. In the title of that case, the designation of the

plaintiffs, although not stating the formal particulars required by section 13, was full and specific, and substantially averred under what law the plaintiffs were incorporated. All that was actually decided was that the defendant, who had merely interposed a general denial, had not pleaded in such a manner as to oblige the plaintiff to prove its corporate existence. Section 3 was alone referred to, and section 13 does not seem to have come up for consideration at all.

It cannot be denied, that the above decisions create some doubt, and a great deal of difficulty, as to the precise effect and extent of the provision at 2 R. S., 459, section 13. The easiest way of avoiding that difficulty and removing all pretext for that doubt, would be a formal compliance with that section in all cases. The particulars it requires to be given are unquestionably proper, even if not strictly necessary, and the form it prescribes short and easy. The pleading will, beyond doubt, be a proper, and, it may well be said, a better pleading, if so framed, and will then be open to no species of objection, either as to form or substance.

In averring the existence of a corporation, in the form prescribed by the statute, it is sufficient to specify the original act of incorporation, with a mere general reference to subsequent amendatory acts, and to the public statutes. *The Sun Mutual Insurance Company* vs. *Dwight*, 1 Hilt., 50.

In *The Seneca Nation of Indians* vs. *Tyler*, 14 How., 109, it was held that the plaintiffs, though in effect created a corporation, need not make any special averments as to their right to sue.

A plaintiff suing a domestic corporation by its corporate name, admits its existence as such, and cannot, by the same pleading, go on to allege that it has not become duly organized. *The People* vs. *Ravenswood, &c., Turnpike and Bridge Company*, 20 Barb., 518.

In a suit by a foreign corporation, the plaintiffs should make an express allegation of their corporate capacity, unless the defendants are estopped by having specially dealt with them as such; and the mere calling themselves a corporation in the title, will not suffice. The fact of their corporate existence, in such a case, is properly put in issue by a general denial. Section 3 (2 R. S., 488), does not apply in such case, nor is any special plea necessary. *Waterville Manufacturing Company* vs. *Bryan*, 14 Barb., 182. See also cases as to associations, below cited. And in a suit by or against such a body, the other prerequisites to bringing the case within the power conferred by section 427, must necessarily be averred and proved. See *Cumberland Coal and Iron Company* vs. *Hoffmann Steam Coal Company*, 20 How., 62.

In such a case, however, it is not necessary for them to state their

act of incorporation at large, or even by reference, and that, especially, when that incorporation has taken place under a general or even a particular law of the foreign state, printed in an authorized volume of its statutes, and which may be the subject of judicial cognizance (see Code, section 426). *Connecticut Bank* vs. *Smith*, *supra*; *Holyoke Bank* vs. *Haskins*, 4 Sandf., 675.

Unincorporated but legal associations stand, as to averment, subject to the same general rules as foreign corporations. The existence of the association, and such facts as are necessary to give it legality as such, should be averred, but may be so in general terms. These facts may be put in issue by a general denial, a special plea not being necessary. *Tiffany* vs. *Williams*, 10 Abb., 204; *Tibbetts* vs. *Blood*, 21 Barb., 650. See also, *Waterville Manufacturing Company* vs. *Bryan*, *supra*.

In cases where a corporation is the defendant, the complaint must show its corporate character, by allegation beyond mere designation in the title, or demurrer will lie. *Mechanics' Banking Association* vs. *The Spring Valley Shot and Lead Company*, 13 How., 227.

A mere general allegation, without the specific particulars required by section 13 (2 R. S., 459), has been held sufficient, as against a defendant. *Accome* vs. *The American Mineral Company*, 11 How., 24. See also *Stoddard* vs. *The Onondaga Annual Conference*, 12 Barb., 573. In the latter case it was held that a special plea of *nul tiel* corporation was not necessary, in the case of a corporation sued as such, but denying its corporate existence. The statutory necessity for that form of plea, under section 3 (2 R. S., 458), only applies to cases where a corporation is plaintiff. Nor need the replication to such a plea allege the details of the alleged incorporation, or any thing beyond the general fact.

As to the necessity of a positive allegation of the title of a plaintiff to sue, in respect of the assets of a dissolved foreign corporation, and the necessity of negativing all counter implications, see *Tinkham* vs. *Borst*, 15 How., 204.

§ 124. *Averments by Implication.*

(*a.*) By Special Provision.

Under sections 161, 162, and 163, averments of this nature are authorized in three several classes of allegation. 1. In pleading a judgment or determination of a court or officer. 2. In pleading the performance of a condition precedent. 3. In pleading a private statute, or a right derived therefrom. In the two former, an allegation that the judgment or determination was duly given or made, or the conditions duly performed, will be sufficient to put in issue all the facts which tend to such conclusion. In the third, a mere reference to the

statute by its title and day of passage, renders its contents a matter of judicial notice.

The analogous provisions in the latter portion of section 162, authorizing a more simple mode of averment in the case of a written instrument for payment of money only, belong more especially to the subject of complaint; and those in 164 and 165, on the subject of libel and slander, refer exclusively—the former to the complaint—the latter, to the answer in such cases. Section 166 relates to answer only. They will accordingly be considered in their place, in subsequent chapters of the present work. For similar reasons, the consideration of section 158 is deferred to a later stage.

To obtain the benefit of sections 161, 162, and 163, the pleader must strictly pursue the form thereby prescribed. If he departs from the rule as laid down by the statute, and makes his averment in another form, he does so at his peril, and will then be held to a statement of all the different facts necessary to conduce to the conclusion. So held as to a judgment. *Hunt* vs. *Dutcher*, 13 How., 538. As to a proceeding before a magistrate. *Ayres* vs. *Covill*, 18 Barb., 260. Generally, *Hatch* vs. *Peet*, 23 Barb., 575 (580); *Graham* vs. *Machado*, 6 Duer, 514.

But, if the spirit of the provision be followed, the exact wording need not be strictly pursued. *Rowland* vs. *Phalen*, 1 Bosw., 43.

In *Hollister* vs. *Hollister*, 10 How., 532 (539), it is stated as conceded that section 161 does not apply to foreign judgments, and it would therefore seem to follow that a general averment of jurisdiction in a foreign tribunal will not be sufficient, but that all necessary details must be averred, as heretofore.

This rule, however, does not apply to the jurisdiction of the United States courts, which, being general in its nature, is intended, without being specially proved. *Bement* vs. *Wisner*, 1 C. R. (N. S.), 143.

"An allegation that a policy was duly assigned," was held sufficient in *Fowler* vs. *The New York Indemnity Insurance Company*, 23 Barb., 143. See also, as to assignment of an undertaking, *Morange* vs. *Mudge*, 6 Abb., 243.

A bare allegation of assignment of a cause of action, will, also, in all cases, be sufficient, without any statement of detail, as to its mode, or consideration, or otherwise. All that is material is the change of interest; all else is matter of evidence. *Horner* vs. *Wood*, 15 Barb., 371; *Martin* vs. *Kanouse*, 2 Abb., 390.

In like manner, an allegation that execution was "duly issued," is sufficient, without showing the steps in the action on which its regularity depends. *French* vs. *Willett*, 10 Abb., 99; 4 Bosw., 649.

A statement that a receiver was duly appointed, was held to tender a sufficient issue, in *Cheney* vs. *Fisk*, 22 How., 236. So, also, as to an

allegation that an insolvent's discharge was duly made and granted. *Livingston* vs. *Oaksmith*, 13 Abb., 183. So likewise, as to the appointment of a party to an office, and its incidents. *Platt* vs. *Stout*, 14 Abb., 178.

A statement that a meeting was "duly" convened, implies all that is necessary to its regularity. *The People* vs. *Walker*, 23 Barb., 304; 2 Abb., 421. So also, as to an averment that a party was legally elected, *The People* vs. *Ryder*, 2 Kern., 433.

In *Gay* vs. *Paine*, 5 How., 107; 3 C. R., 162, it is held that, to charge an indorser, it is not necessary to set forth any details as to presentation or payment, but that it will be sufficient to allege that the note was "duly" presented and payment "duly" demanded. In *Woodbury* vs. *Sackrider*, 2 Abb., 402, it is, also, laid down that an averment, that a bill was "duly demanded at maturity, and thereupon duly protested for non-payment, and notice thereof duly given to the indorsers," was sufficient to introduce evidence to charge all parties. In *Alder* vs. *Bloomingdale*, 1 Duer, 601; 10 L. O., 363, the principle is acknowledged, and the decisions followed in *Adams* vs. *Sherrill*, 14 How., 297; and also, in *Ferner* vs. *Williams*, 14 Abb., 215.

In *Graham* vs. *Machado*, 6 Duer, 514, these conclusions are denied, and it is held that the operation of the section is to be confined exclusively to conditions, apparent upon the face of a contract itself. See also, dissenting opinion in *Ferner* vs. *Williams*, and similar inclination in *Adams* vs. *Sherrill*, above cited.

This rule seems, however, to be far too strict, and the doctrine of the other decisions preferable. The Court of Appeals have, on the contrary, considered that the provisions of the section have a more peculiar applicability to bills and notes, and other promises for the payment of money, without other stipulation. *Prindle* vs. *Carruthers*, 15 N. Y., 425 (439); 10 How., 33. They seem also expressly to disapprove the attempt of the Superior Court to limit the operation of the section (p. 428). And, in the same case, the general effect of such an allegation, and of what is put in issue by it, and by a general denial of it, is laid down (p. 429).

A complete issue on all material facts is clearly tendered and joined by such a form of pleading, and, independent of the fact of *Prindle* vs. *Carruthers*, and of the previous decisions above cited, there seems no substantial reason why, in the averment of performance of this nature, one class of contracts should be placed on a different footing from another.

A far more liberal principle of interpretation of the section, in its general aspect, is laid down by the Superior Court itself, in *Rowland* vs. *Phalen*, 1 Bosw., 43, with reference to the general spirit of the Code, as

evidenced by section 159, and also the general rule excluding a strict construction, laid down in section 437. It is there held that the word "party" in the section is to be taken as meaning the person or persons by whom the condition is to be performed, and is not restricted to a technical party to the suit. "The impropriety of being critical to a degree which would exclude the operation of the section from large classes of cases, in all respects within its spirit or intent;" or of adhering to "a purely strict and technical interpretation of its words, when no beneficial purpose renders it necessary;" and of giving to a word a meaning which it does not necessarily require, "in order to restrict the application of the section to as few cases as possible, and leave the inconvenience the section was designed to remedy to exist in as many cases as possible," is strongly enforced in the opinion, page 58 (59).

Of course, under the principles before laid down, an averment of the performance of a condition, will be wholly insufficient for the introduction of evidence in excuse of that performance. *Vide Graham* vs. *Machado*, *supra*.

Nor will an allegation that a party was "duly" authorized to sue be of any avail. It falls in no respect within the provision of the section, and is a mere conclusion of law. *Myers* vs. *Machado*, 6 Duer, 678; 14 How., 149; 6 Abb., 198.

A resort to the facilities provided by the section in question is, in all cases, purely optional and never obligatory. *Mayor of New York* vs. *Doody*, 4 Abb., 127.

(*b.*) By General Operation.

The general rule on this subject may be stated thus: "What is necessarily understood or implied in a pleading, forms part of it, as much as if it was expressed." *Partridge* vs. *Badger*, 25 Barb., 146 (170).

This rule was always applicable, and is still more so under the liberal intendment to be given in the construction of pleadings under section 159.

The following may be stated as a few, amongst many cases in which it has been so applied.

The word "due" has been held sufficient to express the fact that money sought to be recovered had become payable. *Allen* vs. *Patterson*, 3 Seld., 476.

But the operation of that word does not extend to a debt, not payable at the present time, and cannot be held to comprise one payable in future. *Leggett* vs. *Bank of Sing Sing*, 25 Barb., 326.

A promise need not be pleaded, where facts are stated, from which the law will imply it. *Farron* vs. *Sherwood*, 17 N. Y., 227 (230); *Allen* vs. *Patterson*, *supra*.

In *Brown* vs. *Richardson*, 20 N. Y., 472, it is laid down that a mere averment of lawful ownership of a non-negotiable note, was sufficient to warrant the introduction of evidence to prove an assignment. In *Holstein* vs. *Rice*, 15 How., 1, it was held in like manner, that the intermediate steps by which a note, alleged to be indorsed over, came into the possession of the plaintiff, need not be alleged, but may be proved, under such an averment.

Allegations of the making of an instrument, or the indorsement of a note, both import delivery. *Prindle* vs. *Carruthers*, 15 N. Y., 425 (426); *Peets* vs. *Pratt*, 6 Barb., 662; *Bank of Lowville* vs. *Edwards*, 11 How., 216.

The words "value received," on the face of an instrument, likewise import consideration. *Prindle* vs. *Carruthers*, *supra*; *Benson* vs. *Couchman*, 1 C. R., 119.

An averment of acceptance, in like manner, implies previous presentation. *Graham* vs. *Machado*, 6 Duer, 514 (516). And likewise, that such acceptance was in writing, *Bank of Lowville* vs. *Edwards*, *supra*.

And the rule has been laid down, that a specific averment of the making of a contract, implies the fact that such contract was a legal contract, and therefore that it was made in writing, when that condition is necessary to its validity. *Livingston* vs. *Smith*, 14 How., 490; *Stern* vs. *Drinker*, 2 E. D. Smith, 401; *Washburn* vs. *Franklin*, 7 Abb., 8; *Horner* vs. *Wood*, 15 Barb., 371. These cases seem to overrule *Thurman* vs. *Stevens*, 2 Duer, 609, and *Le Roy* vs. *Shaw*, 2 Duer, 626.

Where a written instrument is stated *in extenso*, the recitals in it have been held to have the effect of an averment of the facts recited. *Slack* vs. *Heath*, 4 E. D. Smith, 95; 1 Abb., 331.

Allegations of acceptance of a bill of exchange, or of indorsement of a note by a corporation, have been held to imply that the proper authority requisite for the validity of these acts had been duly obtained. *Partridge* vs. *Badger*, 25 Barb., 146 (170, 171); *The Mechanics' Banking Association* vs. *The Spring Valley Shot and Lead Company*, 25 Barb., 419.

Although a mere *descriptio personæ* in the title is wholly insufficient to show the right of the plaintiff to sue in an official or representative character, still, when coupled with averments in the body of the pleading necessarily implying that he sues as such, the whole may be considered as tendering a sufficient issue. *Root* vs. *Price*, 22 How., 372. See also *Gould* vs. *Glass*, 19 Barb., 179; and *Smith* vs. *Levins*, 4 Seld., 472, there referred to.

See likewise, as to the sufficiency of similar allegations to show that the plaintiff sues in a representative character, *Scranton* vs. *Farmers'*

and Mechanics' Bank of Rochester, 33 Barb., 527. See, however, contrary view as taken in *Forrest* vs. *Mayor of New York*, 13 Abb., 350.

A bare plea of payment has been held to be sufficient for the introduction of evidence, tending to show the previous discharge of a mortgage sought to be foreclosed. *Pattison* vs. *Taylor*, 8 Barb., 250; 1 C. R. (N. S.), 174.

An allegation of possession has been held to import lawful title. *Sheldon* vs. *Hoy*, 11 How., 11 (16). See also cases, before cited, as to the generality of statement admissible in ejectment. Allegations of sale and delivery have also been held to imply a request and agreement. *Accome* vs. *The American Mineral Company*, 11 How., 24. And, in an action for use and occupation, it is not necessary to aver the circumstances as to the origin of the defendant's tenancy. A contract between the parties is clearly implied. *Waters* vs. *Clark*, 22 How., 104.

As to the extended import of an allegation of conversion, see *Decker* vs. *Matthews*, 2 Kern., 313 (321).

In *Zabriskie* vs. *Smith*, 3 Kern., 322 (330), the principle as to implication by reasonable intendment, is thus broadly laid down: "It is sufficient that the requisite allegation can be fairly gathered from all the averments in the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language."

As to averments by implication, under a general allegation, in suits by or against corporations, see last subdivision of last section, and the decisions there cited.

The liberality evinced upon this subject must not, however, be allowed to conduce to looseness of pleading. To be available as a substitute for direct averment, the implication relied on must be *necessary*. Where it falls, in any manner, short of this cardinal criterion, to rely on it will be most unsafe, and a direct and positive averment in terms, the only expedient course.

(*c.*) Construction of Pleadings.

The case of *Zabriskie* vs. *Smith*, last cited, gives a fair sample of the liberal principles upon which a pleading will henceforth be construed, under the spirit, and especially under the actual provision for that object, effected by section 159, as above cited.

Even under the former practice, the rule that the allegations of a pleading were to be construed most strictly against the pleader, was subject to considerable qualification: "For the language of the pleading is to have a reasonable intendment and construction, and, when a matter is capable of different meanings, that shall be taken which will support the declaration, &c., and not the other, which will defeat it." And, under the Code, not merely is the court authorized, but required,

to put such a construction, where admissible. *Allen* vs. *Patterson*, 3 Seld., 476 (480); see also *Woodbury* vs. *Sackrider*, 2 Abb., 402 (405); likewise *Peel* vs. *Elliot*, 28 Barb., 200; 16 How., 485; 7 Abb., 433, to the effect that a mere error of definition or superfluity of statement in a complaint, will not avail to deprive the plaintiff of his general rights in the action.

The rule in question is not, however, wholly done away with, where the defect in allegation is not merely formal, but goes to matter of substance. In *Cruger* vs. *The Hudson River Railroad Company*, 2 Kern., 190 (201), it is thus stated: "We are not to assume, in favor of the defendants, any thing which they have not averred, for the law does not presume that a party's pleadings are less strong than the facts of the case will warrant."

The principle that the liberal mode of construction authorized by section 159 must not be stretched too far, and that, although its application is admissible on questions of form, it is not so with regard to the fundamental requisites of a cause of action, is also distinctly laid down in *Spear* vs. *Downing*, 34 Barb., 522; 22 How., 30; 12 Abb., 437. See also as to an answer, *Bates* vs. *Rosekrans*, 23 How., 98.

Where a pleading is ambiguous in a material matter, it has been held that the presumption should be against the party whose pleading it is. *Beach* vs. *The Bay State Steamboat Company*, 18 How., 335; 30 Barb., 483. See also the rule directly stated, and strictly applied, in *Rider* vs. *Whitlock*, 12 How., 208 (212). Nor will any presumption be indulged in favor of a party, unless consistent with his allegations. *Andrews* vs. *Chadbourne*, 19 Barb., 147.

When the adverse party neglects to impeach a pleading for ambiguity, by motion on the ground of uncertainty, and goes to trial on that pleading, as it is, it has been held that the rule will be substantially reversed, and the pleading taken most strongly against him, in *Wall* vs. *The Buffalo Water Works Company*, 18 N. Y., 119.

CHAPTER II.

GENERAL VIEW, FORMAL REQUISITES.

§ 125. *Preparation.*

(*a.*) Numbering Folios, &c.

In the preparation and service of pleadings, the same general rules must be observed as with respect to other papers.

They must be fairly and legibly written.

They must be in the English language, except ordinary technical words, and without abbreviations, except such as are in common use.

When exceeding two folios in length, the folios must be marked in the margin, and each copy must correspond.

Each copy must be indorsed with the title of the cause.

And the attorney who indorses or subscribes them, must add his place of business on each copy served.

See these subjects heretofore fully considered, and rules 5 and 10, and also 2 R. S., 275, section 9, all bearing upon the point, heretofore cited, in Book 4, sections 66 and 67. As there remarked; the courts view an objection of this kind with little favor, and the party who makes it must see to his own proceedings being technically correct. The objection too must be taken at once, and the defective paper returned, or it will be waived: see rule 10, and various decisions there cited.

On the other hand, the requisition is simple and easily complied with, and a literal compliance will always be best.

(*b.*) Numbering Causes of Action, &c.

This condition bears solely on the subject of pleading, and is imposed by rule 19 (86), before cited.

This rule provides that "in all cases of more than one distinct cause of action, defence, counter-claim or reply; the same shall not only be separately stated, but plainly numbered."

An omission to do this is clearly an irregularity. *Vide Blanchard* vs. *Strait*, 8 How., 83; *Corbin* vs. *St. George*, 2 Abb., 465.

In the event of such omission, and of a motion on that ground, the court will order a compliance with the rule. *Vide Forsyth* vs. *Edmiston*, 11 How., 408.

The defect is, however, a mere defect in form, and not in substance, and cannot be reached by demurrer, but only by motion. It is so closely and inseparably connected with the more essential necessity of the separation of the statements themselves required to be so numbered, that the further consideration of the subject, and of the remedies of the adverse party, will for the present be unnecessary. See hereafter, in the chapter on complaint, under the head of *Joinder of Causes of Action*, and also in that relating to defects in pleading, under that of *Motion for Uncertainty.*

§ 126. *Subscription and Verification.*

(*a.*) Subscription.

As prescribed by section 156, every pleading must be subscribed by the party or his attorney. This is indispensable. In practice the

attorney almost invariably subscribes, even when the party verifies. The latter may, however, do so, if he chooses, and, where he appears in person, of course he must.

In *Hubbell* vs. *Livingston*, 1 C. R., 63, the signature to the affidavit of verification was held to be a sufficient subscription to the pleading. See likewise the analogous cases of *Post* vs. *Coleman*, 9 How., 64, and *Purdy* vs. *Upton*, 10 How., 494, as to signature to a confession of judgment. It is, however, far better in practice to leave no room for any question on the subject, and to subscribe, both at the end of the pleading, and before the verification.

In *Farmers' Loan and Trust Company* vs. *Dickson*, 17 How., 477; 9 Abb., 61, it was held that a printed subscription of the attorneys to a complaint was insufficient, and that, to the original at least, that signature must be written. In the *Mutual Life Insurance Company* vs. *Ross*, 10 Abb., 260, note, the exact contrary is maintained as to a summons. And the objection is one of that nature which will not be favored by the court. See *Ehle* vs. *Haller*, 10 Abb., 287; 6 Bosw., 661.

(*b.*) VERIFICATION, WHEN, AND WHEN NOT, IMPERATIVE.

It rests, since 1849, in the option of the plaintiff, whether the pleadings throughout the suit shall or shall not be verified. He possesses the power of compelling his adversary to do so, by verifying his own in the first instance. A similar option is, at a later period, given to the defendant, who, by verifying his answer, may, in like manner, compel the plaintiff to swear to his reply, if one be necessary. *Vide Levi* vs. *Jakeways*, 4 How., 126; 2 C. R., 69; reported also as *Lin* vs. *Jaquays*, 2 C. R., 29. From this observation demurrers must, of course, be excepted, as, from their very nature, they need no verification. See section 156, above cited.

When any pleading in a suit is once verified, "every subsequent pleading, except a demurrer, must be verified also." Same section. The term "subsequent pleading" has given rise to some discussion. It has been held that a bare verification of an originally unverified complaint, after answer put in, is of no effect as an impeachment of that answer. *White* vs. *Bennett*, 7 How., 59. Nor, in fact, does the addition of a verification alone, without amendments of the complaint in substance, constitute it a subsequent pleading, or require any further answer at all. The verification is no part of the pleading. See *George* vs. *McAvoy*, 6 How., 200; 1 C. R. (N. S.), 318.

In *Hempstead* vs. *Hempstead*, 7 How., 8, it is held that the term "subsequent pleading" is to be construed as subsequent in the order of pleading, not subsequent in time, and applies only to pleadings in answer to the pleading verified, or those which follow in such order.

It was held, therefore, that the defendant was not justified in disregarding, but was, on the contrary, bound to answer an unverified amended complaint, served after a verified answer.

N. B.—Whether this decision was not carried a little too far, and whether the plaintiff in that case, who had, as appears by the report, verified his original complaint, had not thereby set the rule in motion, as well against himself as against the defendant, seems somewhat questionable.

As a general rule it will be highly inexpedient, if not imprudent, for a plaintiff to omit to verify his complaint in the first instance. Such omission will completely deprive him of the benefit of binding down the defendant to the assertion of a true, as well as of a sufficient ground of defence, and it will leave the latter at full liberty to make any allegation he may choose, and thus throw upon his adversary the duty of proving facts, which, in a verified pleading, it would be impossible for him to deny. See *George* vs. *McAvoy*, 1 C. R. (N. S.), 318; 6 How., 200. See also *White* vs. *Bennett*, 7 How., 59, *supra*. Under the Code of 1848, verification was imperative in all cases. See above. See also *Swift* vs. *Hosmer*, 1 C. R., 26; 6 L. O., 317.

The effect of verification is confined to the pleading itself. It does not extend so far as to dispense with the affidavit required by statute, to exclude a notarial certificate of protest as evidence. *Lansing* vs. *Coley*, 13 Abb., 272.

(*c.*) Mode of Verification.

The verification takes place by means of an affidavit annexed to the complaint. That affidavit must be sworn in the ordinary manner, before any officer duly authorized to administer oaths. The question as to these officers and their powers, has been already fully considered in book I., chapter VII., section 27, to which, therefore, the reader is referred. It will suffice to say here, that the ordinary course is to swear to such affidavit before a commissioner of deeds, or notary public.

A pleading must not, however, be verified before the attorney of the party. If so, it will be a nullity, and may be set aside on motion, if made in due time. *Gilmore* vs. *Hempstead*, 4 How., 153; *Anon.*, 4 How., 290.

(*d.*) Mechanics' Lien.

The notice to create a lien of this description must now be verified, in the same manner as a pleading. *Vide* Laws of 1855, ch. 404, § 7.

That precisely the same conditions will be required in this case, and that the *jurat*, to be regular, must be in the same form as that prescribed in the case of a pleading, is laid down in *Conklin* vs. *Wood*, 3

E. D. Smith, 662. The provisions of the act of 1855 are not, however, retrospective, so as to impose the same condition upon previous proceedings. *Foley* vs. *Gough*, 4 E. D. Smith, 724.

(*e.*) PRIVILEGE TO OMIT VERIFICATION.

Under section 157, a party may omit to verify, when an admission of the truth of the allegation might subject him to prosecution for a felony. This provision, as above shown, dates from 1851. Since 1854, he is equally privileged in those cases in which he would be privileged from answering as a witness, to the truth of any matter denied by him. See statute of 1854, above cited. This last privilege was, in effect, conceded by the Code of 1848, but taken away in 1849.

In the intermediate period, however, the courts had taken upon themselves to allow similar relief to a party claiming it, and the amendments, fixing the law as it now stands, were probably the consequence of these decisions. See *Clapper* vs. *Fitzpatrick*, 3 How., 314; 1 C. R., 69; under Code of 1848; *Hill* vs. *Muller*, 2 Sandf., 684; 8 L. O., 90, and *White* vs. *Cummings*, 3 Sandf., 716; 1 C. R. (N. S.), 107, under that of 1849.

That the old principle, "*nemo tenetur se ipsum prodere*," is still in force, and that the rule is not confined by the terms of the amendment of 1851, but extends to all cases, where the answer would tend to convict the defendant of any crime, whether strictly or not a felony, is maintained in *Thomas* vs. *Harrop*, 7 How., 57.

In *Springsted* vs. *Robinson*, 8 How., 41, this principle was extended to the case of a party, who, in lieu of verifying his answer, made an affidavit that an admission of the truth of its allegations might subject him to a prosecution for felony; and an answer, put in without verification, but accompanied by that affidavit, was held to be sufficient.

These cases were both prior to the further statute of 1854, which has now placed the question beyond a doubt.

As to the former privilege of a witness thus extended to a party pleading, see *Henry* vs. *Salina Bank*, 1 Comst., 83 (86); *In re Van Tine* vs. *Nims*, 12 How., 507. See also generally as to discovery, *Bailey* vs. *Dean*, 5 Barb., 297.

As to the privilege of a defendant to omit to verify, where the complaint alleges matter as to which he would be privileged from testifying, and the extent to which he will be protected in that right, see *Moloney* vs. *Dows*, 2 Hilt., 247.

The following distinction is drawn in *Scovell* vs. *New*, 12 How., 319. The defendant, if entitled to the privilege, may deny the allegation, and omit to verify his answer. In this case, a regular issue is joined. But if, instead of this, he, by his pleading, declines to answer the allegation

at all, on the ground that his answer might subject him to a prosecution, he admits it for the purposes of the action.

A mere liability to a civil action does not extend this privilege to a defendant, where he personally is not subject to any penalty or forfeiture. So held as to a stakeholder of a wager, if not appearing by the pleadings that he was either a winner or a loser, so as to bring him within the statute as to gaming. *Lynch* vs. *Todd*, 13 How., 546.

A party thus privileged, may serve his answer without any accompanying affidavit, where the fact of his privilege appears on the face of the complaint. *Wheeler* vs. *Dixon*, 14 How., 151. N. B. This does not conflict with *Springsted* vs. *Robinson*, as, in that case, this was not sufficiently apparent.

The privilege was extended to a defendant in an action for libel, and an entire omission held good, though the privilege only extended to part of the allegations, in *Blaisdell* vs. *Raymond*, 5 Abb., 144; affirmed, 6 Abb., 148.

Wolcott vs. *Winston*, 8 Abb., 422, is less extended in its construction, and lays down that a mere charge of fraud in the complaint, even although it might be construed into a criminal misdemeanor, did not entitle the defendants to omit verification. The ground taken is, that they would incur no risk, as their pleading could not, in a criminal prosecution, be used against them; but this view seems to be founded on a misconception of the statute of 1854, which a comparison of the statute itself with the decision will show.

In *Olney* vs. *Olney*, 7 Abb., 350, it was held that the act of 1854 does not extend to pleadings in a divorce on the ground of adultery. It is then held that the privilege conferred by that statute, does not extend to cases where the party will not by law be permitted, but only to those where he would be privileged by law to omit answering, for his own protection. In *Sweet* vs. *Sweet*, 15 How., 169, the contrary view is held on this question. See also *Smith* vs. *Smith*, 15 How., 165. The recent amendment of section 399 seems to bring a new element into the question. In *Sweet* vs. *Sweet*, however, this further ground is taken, *i. e.*, that by special provision of the Revised Statutes, 2 R. S., 144, section 39, the defendant, in such cases, is to be permitted to answer without oath or affirmation; and, also, that the penalties and forfeitures imposed upon the guilty party by 2 R. S., 145, 146, sections 46 to 49 inclusive, bring the case within the general rule of exemption of a witness, and, therefore, set the statute in motion: this view seems, on the whole, to be preferable.

(*f.*) Form of Verification by Party.

The form of verification is distinctly specified by section 157, and should, in all cases, be followed without alteration. It is substantially the same as that previously adopted by the Court of Chancery, except that the additional statement, that the party has read, or heard read, the pleading, is now unnecessary.

The present section dates from 1851, and is so framed as to admit of slight verbal variations, provided the substance of the provision be complied with. The Code of 1849 was more strict, and it was then considered doubtful whether a *jurat*, varying in any, even the slightest respect, from the prescribed wording, was valid. *Vide Van Horne* vs. *Montgomery*, 5 How., 238; *Davis* vs. *Potter*, 4 How., 155; 2 C. R., 99.

The rule is less technical now, the words "to the effect" unquestionably enlarging the powers of the party in this respect. There is, in reality, however, no substantial reason why the exact wording of the section should not be exactly used in all cases, and such will certainly be the easiest as well as the most consistent practice. *Vide Tibballs* vs. *Selfridge*, 12 How., 64. Duly interpreted, the form gives the fullest latitude to the conscience of the verifying party, as full as, in fact, he can reasonably require. See construction of the section, as given in *Truscott* vs. *Dole*, 7 How., 221; *Hackett* vs. *Richards*, 11 L. O., 315; 3 E. D. Smith, 13; *Thorn* vs. *The New York Central Mills*, 10 How., 19; *Levy* vs. *Ely*, 15 How., 395; 6 Abb., 89; *Ricketts* vs. *Green*, 6 Abb., 82; and *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362 (374).

The following are cases of variation from the form:

A mere statement that the pleading is true, without adding that it is true to the knowledge of the party, will be bad, whether standing alone, or accompanied with the exception as to information and belief. *Williams* vs. *Riel*, 5 Duer, 601; 11 How., 374. See also, *Tibballs* vs. *Selfridge*, 12 How., 64, as to verification by an attorney. These cases seem, unquestionably, to overrule *Southworth* vs. *Curtis*, 6 How., 271; 1 C. R. (N. S.), 412.

An affidavit that the pleading was true to the knowledge of the verifier, without stating further, was held good in *Kinkaid* vs. *Kipp*, 1 Duer, 692; 11 L. O., 313. But this statement cannot be qualified in any manner. One that the complaint was substantially true, of the party's own knowledge, was held bad in *Waggoner* vs. *Brown*, 8 How., 212. Any qualification, too, which makes the verification applicable only to part of the statement, will make it wholly irregular. See as to a mechanic's lien, *Conklin* vs. *Wood*, 3 E. D. Smith, 662.

The doctrine that, where the statements in the pleading are wholly

made on information and belief, or where the facts pleaded are none of them within the knowledge of the party, the pleading may be verified on information and belief, or belief only, as laid down in *Harnes* vs. *Tripp*, 4 Abb., 232; and *Finnerty* vs. *Barker*, 7 L. O., 316, seems too dangerous to be extensively followed in practice, as there seems really no substantial reason why the ordinary form should not be followed, instead of going to pains to provide a substitute. *Vide Tibballs* vs. *Selfridge*, *supra*.

By the express terms of the section, the pleading may be verified by only one of several parties united in interest, and pleading together, and, so verified, will be sufficient without the concurrence of the others.

To bring this rule into operation, however, the union of such interests must be complete. If they are in any manner severed, or severable, the contrary principle will prevail, and, in such cases, every party to the pleading must concur in the verification, or it will be bad, *pro tanto*, and be no pleading at all, as regards the interest of the party so omitting.

So held as regards the joint answer of maker and indorser, or indorsers. *Andrews* vs. *Storms*, 5 Sandf., 609; *Alfred* vs. *Watkins*, 1 C. R. (N. S.), 343; *Hall* vs. *Ball*, 14 How., 305. As regards several creditors, uniting in a joint complaint. *Gray* vs. *Kendall*, 5 Bosw., 666; 10 Abb., 66. As regards husband and wife, in a suit relating to the wife's separate property. *Youngs* vs. *Seely*, 12 How., 395; *Harlay* vs. *Ritter*, 18 How., 147; *Reed* vs. *Butler*, 2 Hilt., 589.

The managing agent of a corporation, on whom the summons has been served under section 132, verifies as an officer of the company, and not as a mere agent. His verification is therefore the verification of the party itself, and he may use the ordinary form. *Glaubensklee* vs. *The Hamburgh and American Steam Packet Company*, 9 Abb., 104.

The same conclusion would seem to follow in the case of a relator, verifying in an action brought by the state or its officer, though as yet no decision has been made upon the subject. When verified by the attorney of such relator, the ordinary rule would seem to apply. *Vide The People* vs. *Allen*, 14 How., 334.

(*g.*) Verification by Attorney or Agent.

This mode of verification is only allowable under some one or more of the following conditions:

1. When the party who should verify is not within the county where the attorney resides.

2. When such party is, for any other reason, not capable of making the affidavit.

3. When the action or defence is founded upon an instrument for the

payment of money only, and such instrument is in the possession of the agent or attorney.

4. When all the material allegations of the pleading are within the personal knowledge of the agent or attorney.

The case of an attorney residing in one county, and doing business in another, seems to have been left unprovided for. The section clearly points only to the county of residence. It would be unsafe practice, however, to take his verification, when the party was in fact within the county in which he does business. The spirit of the section clearly is, that, when the party can verify without inconvenience, he ought to do so, unless where the knowledge of the agent or attorney is really equal to his own.

In those cases where the attorney or agent is competent to verify, he must, in order to the regularity of that verification, state two things expressly upon its face.

1. His knowledge, or the grounds of his belief, upon the subject.

2. The reasons why it is not made by the party.

The exact form of verification in these cases has given rise to considerable discussion.

When the affidavit is made by the agent or attorney from his own personal knowledge, it is unnecessary to state upon it any other reason why it is not made by the party, or that such party is absent. *Gourney* vs. *Werseeland*, 3 Duer, 613.

The same principle would seem to hold good, when the attorney or agent verifies on a written instrument for the payment of money only. Upon this point, however, a further discussion has arisen.

In *Smith* vs. *Rosenthal*, 11 How., 442, it was held that, in such case, it was sufficient for the attorney merely to state the fact that such instrument was in his possession, without any additional statement of his knowledge, or of the grounds of his belief as to the truth of the allegations in the pleading.

This conclusion is however denied, and the broad principle laid down that in all cases where the pleading is not verified by the party, the attorney or agent must state his knowledge and the grounds of his belief, whatever the circumstances be under which he verifies, in the following decisions, which must be regarded as settling the question. *Stannard* vs. *Mattice*, 7 How., 4; *Treadwell* vs. *Fassett*, 10 How., 184; *Hubbard* vs. *The National Protection Insurance Company*, 11 How., 149; *Bank of State of Maine* vs. *Buel*, 14 How., 311; *The People* vs. *Allen*, 14 How., 334; *Boston Locomotive Works* vs. *Wright*, 15 How., 253; *Meads* vs. *Gleason*, 13 How., 309.

In *Meyers* vs. *Gerritts*, 13 Abb., 106, the agent omitted to state, in terms, the fact of his agency, the verification being otherwise sufficient,

and showing his possession of the notes sued on. It was held that the fact of agency was sufficiently implied, and the pleading was sustained.

Where the attorney or agent verifies from personal knowledge, or from possession of the instrument, verification either by him or by the party is optional, without regard to the residence of the latter. *Smith* vs. *Rosenthal*, 11 How., 442; *Stannard* vs. *Mattice*, 7 How., 4; *Treadwell* vs. *Fassett*, 10 How., 184; *The People* vs. *Allen*, 14 How., 334; *Boston Locomotive Works* vs. *Wright*, 15 How., 253; *Lefevre* vs. *Latson*, 5 Sandf., 650; 10 L. O., 246, and, if he assigns either reason, it will be sufficient. *Mason* vs. *Brown*, 6 How., 481.

In this class of cases, the general rule requiring the party to verify whenever conveniently feasible, may be considered as relaxed; in all others, however, sufficient reason for verification by the attorney or agent instead of by the party, must be shown, and one or other of the excuses allowed by the section, *i. e.*, absence or inability of the party to verify, must be alleged on the face of the affidavit. *Vide Boston Locomotive Works* vs. *Wright*; *Lefevre* vs. *Latson*; *Stannard* vs. *Mattice*, *supra*; *Roscoe* vs. *Maison*, 7 How., 121; *Fitch* vs. *Bigelow*, 5 How., 237; 3 C. R., 216; *Webb* vs. *Clark*, 2 Sandf., 647; 2 C. R., 16, and numerous other decisions. And, even in those cases where the general rule is relaxed as above, the attorney must allege why the affidavit is not made by the party, though he need give no other reason than that of his own full knowledge, or of possession of the instrument. *Vide Meads* vs. *Gleason*, 13 How., 309; *Gourney* vs. *Werseeland*, *supra*.

The compliance with that part of the section which requires the attorney or agent to set forth his knowledge and the grounds of his belief, must be full and literal, and nothing short of such a compliance should be accepted. *Vide Tibbals* vs. *Selfridge*, 12 How., 64.

The general principle is thus laid down in *Treadwell* vs. *Fassett*, 10 How., 184: "In every case where the verification is so made, as far as the agent or attorney speaks of his own knowledge, he must state what knowledge he has; and when he speaks of his belief, he must state the grounds of such belief." See also *Hubbard* vs. *The National Protection Insurance Company*, 11 How., 149; and *Meads* vs. *Gleason*, 13 How., 309. He should also give the sources of the information on which his belief is founded. *The People* vs. *Allen*, 14 How., 334. And, he must not merely state partial grounds, but grounds sufficient to cover all essential parts of the adverse pleading. *Bank of State of Maine* vs. *Buel*, 14 How., 311. And, where an agent or attorney verifies from his own knowledge, he must state, in addition to the above requisites, his character as agent, and the nature of his agency, so as to show that such knowledge grew out of or pertained to his business or

trust. *Boston Locomotive Works* vs. *Wright*, 15 How., 253. He ought also to make the proper distinction, between matters which he knows, and matters of which he is only informed. *Vide Wilkin* vs. *Gilman*, 13 How., 225.

Objections of this nature being, however, technical in their nature, the courts will be disposed to a liberal construction, and, if possible, allow the verification to stand. See last case. And, in *Bank of State of Maine* vs. *Buel*, 14 How., 311, where the verifications of complaint and answer were both irregular, both were allowed to stand.

In *Hunt* vs. *Meacham*, 6 How., 400, it was at first held that, although the defendants were absent from the State, the verification of the attorney, stating his knowledge to be solely derived from the statements of his clients, was insufficient, because the statements were not derived from his own personal knowledge, or from an instrument in his possession.

This doctrine is, however, too restricted, and has not been sustained. That established is, that in all cases of absence or inability of the party, the attorney or agent may verify, complying otherwise with the provisions of the section. See *Stannard* vs. *Mattice; Roscoe* vs. *Maison; Lefevre* vs. *Latson*, and the other decisions above cited, *passim*. By *Lefevre* vs. *Latson*, *Hunt* vs. *Meacham* is overruled in terms, and is also referred to in *Stannard* vs. *Mattice*.

In *Dixwell* vs. *Wordsworth*, 2 C. R., 1, a verification, by an attorney, to the effect that the party was absent from the county, and that "from the information furnished this deponent by said defendant, and from his representations (which are the grounds of this deponent's knowledge and belief in the matter), he believes the foregoing answer to be true," was sustained by the court.

In *Hill* vs. *Thacter*, 3 How., 407; 2 C. R., 3, it seems to have been considered that the guardian of an infant might properly verify the complaint, in an action brought in his name.

When a pleading is verified by the attorney or agent, it is not necessary it should be done by the one who knows most about the matter. The attorney may verify, though his information be derived from the agent. *Drevert* vs. *Appsert*, 2 Abb., 165.

As to the verification of the managing agent of a corporation, on whom process has been served under section 132, being taken as that of the party, and not of the agent, see *Glaubensklee* vs. *The Hamburgh and American Steam Packet Company*, 9 Abb., 104, before cited.

The provisions, enabling the verification of a pleading by the attorney or agent, seem practically to abolish, and certainly to render unnecessary, the former practice of taking the oath to a pleading by special commission from the court. At the same time, it can scarcely be

said that this procedure may not still be considered admissible, if ever thought expedient.

(*h.*) Points as to Form.

Defects in a verification, or an omission to verify, seem to be clearly amendable, by leave of the court on proper cause shown. *Vide Bragg* vs. *Beckford*, 4 How., 21; *Watt* vs. *Rogers*, 2 Abb., 261 (265). But not so without leave, or by way of mere amendment as of course. *Vide George* vs. *McAvoy*, *supra.*

The omission of the party's signature to the affidavit of verification, will render the pleading altogether defective. *Laimbeer* vs. *Allen*, 2 Sandf., 648; 2 C. R., 15.

So, also, the omission of the statement of venue, where that affidavit is taken before a commissioner of deeds, *Lane* vs. *Morse*, 6 How., 394; or an omission of the signature of the officer who takes it.

On service of the copy of a pleading, a correct copy of the affidavit of verification must be added. Any omission in this respect, especially an omission of the name of the party, or of the officer before whom such pleading is sworn, will entitle the opposite party to treat the service as a nullity. *Graham* vs. *McCoun*, 5 How., 353; 1 C. R. (N. S.), 43; *Williams* vs. *Riel*, 5 Duer, 601; 11 How., 374; *Hughes* vs. *Wood*, 5 Duer, 603, note.

§ 127. *Course of Adverse Party.*

The present section must be understood as exclusively confined to cases of defect in an adversary's pleading, when served, in mere matter of form, or as regards the verification only. Those which go either wholly or partially to the substance of the pleading, require another course of proceeding, which will be considered hereafter. See *Bergman* vs. *Howell*, 3 Abb., 329; *Strout* vs. *Curran*, 7 How., 36.

The party, in these cases, may either proceed with a view to obtain a correction of the defect complained of, or, in the case of a clearly deficient verification, may even disregard it.

(*a.*) Return of Defective Pleading.

In the former case, he is bound at once to return the paper served, with a statement of the defects complained of. If the objection be a noncompliance with rule 20, prescribing legibility, marking of folios, &c., he is bound to return the paper, accompanied by such a statement, within twenty-four hours after its receipt. If not the objection will be waived. The rule does not apply in terms to the case of a defective verification, and, therefore, the limitation as to time is not so strictly

imperative, but the spirit of it has been and will, doubtless, be equally enforced.

The adoption of this principle was, in fact, long antecedent to the making of the rule itself, which, so far, only dates from the revision of 1858. That under these circumstances, what amounts in substance to an immediate return of the pleading complained of, with a statement of the defects, has always been held to be necessary; and that the party, if he retain such pleading more than a reasonable time, will be held to have waived the irregularity, is evidenced by the following series of decisions: *Laimbeer* vs. *Allen*, 2 Sandf., 648; 2 C. R., 15; *Knickerbacker* vs. *Loucks*, 3 How., 64; *Levi* vs. *Jakeways*, 4 How., 126; 2 C. R., 69; *McGown* vs. *Leavenworth*, 2 E. D. Smith, 24; 3 C. R., 151; *White* vs. *Cummings*, 3 Sandf., 716; 1 C. R., (N. S.), 107; *Williams* vs. *Sholto*, 4 Sandf., 641; *Sawyer* vs. *Schoonmaker*, 8 How., 198; *Broadway Bank* vs. *Danforth*, 7 How., 264; *Rogers* vs. *Rathbun*, 8 How., 466; *Hollister* vs. *Livingston*, 9 How., 140; *Strauss* vs. *Parker*, 9 How., 342; *Chatham Bank* vs. *Van Vechten*, 5 Duer, 628; *Corbin* vs. *St. George*, 2 Abb., 465; *Ehle* vs. *Huller*, 10 Abb., 287; 6 Bosw., 661. See also, as to defective notice of trial, *New York Central Insurance Company* vs. *Kelsey*, 13 How., 535.

It has also been held equally incumbent on a plaintiff, to return an answer, defective as regards its verification, before proceeding against the defendant by default, on the ground of its nullity. *Strout* vs. *Curran*, 7 How., 36. See also *Wilkin* vs. *Gilman*, 13 How., 225; *Phillips* vs. *Prescott*, 9 How., 430. See, however, *per contra*, *Farrand* vs. *Herbeson*, 3 Duer, 655.

A party returning a paper as irregular, is bound to state his objections, not in a mere general manner, but specifically, and so as to point out the exact objection complained of. *Broadway Bank* vs. *Danforth*, and *Sawyer* vs. *Schoonmaker*, above cited. See also *President of Chemung Canal Bank* vs. *Judson*, 10 How., 133.

A verbal statement of such objection, by such party, to the person who serves the defective pleading, and a return of it by him, will, however, be sufficient; and if, after that, it is again sent back to the office of the objecting attorney, it will not be necessary for him to return it a second time. See *Jacobs* vs. *Marshall*, 6 Duer, 689.

A mistaken specification, on return of a pleading, will not, however, preclude the adverse party from taking advantage of another defect not specified, where such defect is of a nature to be fatal in itself, and incapable of being remedied. *Vide Phillips* vs. *Prescott*, 9 How., 430.

Where a pleading is partly perfect and partly imperfect, it need not be actually returned, but immediate notice of the imperfection must be given to the adverse party. So held in the case of a verification by one

only, of a joint answer of parties severally liable. *Hall* vs. *Ball*, 14 How., 305.

The provision as to the return of a pleading for defective verification is, of course, only applicable to the case of answer or reply. This defect in a complaint, merely relieves the defendant from the necessity of answering under oath. *Quinn* vs. *Tilton*, 2 Duer, 648.

As to the return of papers to the party, where no attorney's name appears upon them, see *Taylor* vs. *Mayor of New York*, 11 Abb., 255.

(*b.*) Disregard of Pleading.

In the earlier cases it was held that a pleading defectively verified could not be treated as a nullity, and that the proper course was to move to set it aside for irregularity; and, also, that such motion must be made, the very first opportunity after the service, or the irregularity would be held to have been waived. *Vide Gilmore* vs. *Hempstead*, 4 How., 153; *Laimbeer* vs. *Allen*, and *Graham* vs. *McCoun*, above cited; *Webb* vs. *Clark*, 2 Sandf., 647; 2 C. R., 16.

This view, however, has since been overruled, and the rule may now be considered as settled, that a pleading, not duly verified, is, in effect, a nullity (*vide Swift* vs. *Hosmer*, 6 L. O., 317; 1 C. R., 26), and may be treated as such by the adverse party. If the complaint be thus defective, the defendant's remedy is to answer without oath. If the answer be defective, the plaintiff may disregard it, and enter up judgment by default. If a reply be defective, the answer may either be taken as admitted upon the trial, or possibly a motion may be made under section 154. *Vide Fitch* vs. *Bigelow*, 5 How., 237; 3 C. R., 216; *Quin* vs. *Tilton*, 2 Duer, 648; *White* vs. *Bennett*, 7 How., 59; *Strauss* vs. *Parker*, 9 How., 342; *Lane* vs. *Morse*, 6 How., 394; *Waggoner* vs. *Brown*, 8 How., 212; *Treadwell* vs. *Fassett*, 10 How., 184; *Hubbard* vs. *The National Protection Insurance Company*, 11 How., 149 (152); *Williams* vs. *Riel*, 5 Duer, 601; 11 How., 374; *Hughes* vs. *Wood*, 5 Duer, 603, note; *The People* vs. *Allen*, 13 How., 334, as to the right of a defendant to omit verification in such cases. As to the plaintiff's power to disregard, and enter up judgment for want of a properly verified answer (though of course he exercises such right at his peril), *vide Strout* vs. *Curran*, 7 How., 36; *Phillips* vs. *Prescott*, 9 How., 430. Or he may take an inquest under similar circumstances. *Farrand* vs. *Herbeson*, 3 Duer, 655. But, where the pleadings of both parties under such circumstances are irregular, both will be allowed to stand. *Vide Bank of State of Maine* vs. *Buell*, 14 How., 311. See also, as to the indisposition of the court to entertain motions under such circumstances, *Wilkin* vs. *Gilman*, 13 How., 225.

CHAPTER III.

AMENDMENT OR DISREGARD OF ERRORS IN SUBSTANCE.

General Observations.

Errors in pleading, of whatever nature, are, under specified conditions, capable of correction under the new system, at any time during the continuance of the controversy.

Such correction, or its equivalent, may be made on application of the moving party, and in any of the following modes:

1. By amendment, as of course.
2. By similar amendment, on special application to the court.
3. By amendment of immaterial defects, at or after the trial.
4. By disregard of immaterial objections at the trial.

The above four heads will form the subject of the present chapter, and will be considered in the order above prescribed. The correction of pleadings on adverse motion, will form the subject of that next succeeding.

§ 128. *Amendments as of Course.*

The power of a party in this respect is regulated by section 172, above cited.

Under that section, every pleading may be once amended by the party, as of course, without costs, and without prejudice to the proceedings then already had.

This may be done at any time within twenty days after it is served;

Or at any time before the period for answering it expires;

Or it can be so amended, at any time within twenty days after the service of the answer or demurrer thereto.

But this restriction is, in the latter case, imposed, that the amendment must not be made for the purpose of delay, in order to throw the adverse party over a circuit or term, for which the cause is or may be noticed. If this is made to appear to the court, the amendment may be stricken out, and terms imposed.

(*a.*) Right to Amend.

The only restriction upon the right of a party to avail himself of the facilities in question, is that imposed by the latter part of the pro-

vision, as above cited, in the case of amendments, made after a substantial joinder of issue, for the express and only purpose of delay. Otherwise that right is absolute, and incapable of being defeated or abridged by any act of the adverse party. *Washburn* vs. *Herrick*, 4 How., 15; 2 C. R., 2; *Dickerson* vs. *Beardsley*, 1 C. R., 37; 6 L. O., 389; *Clor* vs. *Mallory*, 1 C. R., 126; *Morgan* vs. *Leland*, 1 C. R., 123; *Currie* vs. *Baldwin*, 4 Sandf., 690; *Cooper* vs. *Jones*, 4 Sandf., 699; *Griffin* vs. *Cohen*, 8 How., 451; *Rogers* vs. *Rathbone*, 8 How., 466; *Thompson* vs. *Minford*, 11 How., 273; *Burrall* vs. *Moore*, 5 Duer, 654.

Where, after the decision of an adverse motion, the plaintiff, having leave to amend his summons and complaint, had elected not to amend the latter, it was held that, after the subsequent service of an answer, his right to amend as of course still subsisted. It could not be cut off by mere implication. *Ross* vs. *Dinsmore*, 20 How., 328; 12 Abb., 4.

Nor can such right be impaired by any act of the adverse party. The latter cannot make himself the judge, as to the competency or sufficiency of an amended pleading, or disregard it when duly served. His remedy, if it be defective in substance, is by motion. *Spencer* vs. *Tooker*, 21 How., 333; 12 Abb., 353. See also *McQueen* vs. *Babcock*, 22 How., 229 (233); 13 Abb., 262.

And, if the adverse party proceed, during the time allowed as above, he does so at his peril, and subject to his proceedings being defeasible, and any judgment he may take being liable to be set aside, in the event of a subsequent amendment in due course, and not for the purpose of delay. *Vide Washburn* vs. *Herrick; Dickerson* vs. *Bearsley; Morgan* vs. *Leland; Griffin* vs. *Cohen; Rogers* vs. *Rathbone;* and *Currie* vs. *Baldwin*, above cited.

But, although, in this respect, an amendment may be said to effect a qualified stay of proceedings, still, for general purposes, this is not the case. The cause may be at once noticed for trial by the plaintiff, on the first joinder of issue (*Plumb* vs. *Whipples*, 7 How., 411); and, if the defendant waive his right, either expressly or by service of a counter-notice, the former will be bound to proceed. *Cusson* vs. *Whalon*, 5 How., 302; 1 C. R. (N. S), 27. It has been also held that the plaintiff may at once move for a reference. *Enos* vs. *Thomas*, 4 How., 290.

But, in such cases, either party, whether plaintiff or defendant, acts at his peril. That of the former, is the contingency that, before he can bring the case to trial, the defendant may amend, and thus destroy the issue he had intended to try. On the other hand, the defendant takes the time allowed to him to amend, at the peril of all regular proceedings which may be taken against him, before he amends. Such proceedings, whatever they may be, are not to be *prejudiced* by the amendment. *Plumb* vs. *Whipples*, 7 How., 411.

The power of amendment as of course, can only be exercised once by either party. If a second alteration be required, it can only be done by leave of the court. *White* vs. *The Mayor of New York*, 14 How., 495; 5 Abb., 322; 6 Duer, 685. See also *Jeroliman* vs. *Cohen*, 1 Duer, 629.

Prior to the amendment of the section in 1859, the power to amend as of course was held to exist, in cases of responsive pleading, only with respect to the insertion of new matter, and that an answer consisting of denials only, was not amendable as of course. *Plumb* vs. *Whipples*, 7 How., 411; *Farrand* vs. *Herbeson*, 3 Duer, 655; *Lampson* vs. *McQueen*, 15 How., 345.

The amendment of 1859, by making any pleading amendable, at any time within twenty days after it is served, seems, however, now to remove this restriction. Prior to 1851, and between 1855 and 1857, an answer, being generally demurrable, was also held to be generally amendable. See *Townsend* vs. *Platt*, 3 Abb., 323.

An amended pleading supersedes, and takes, in all respects, the place of the original, which, from thenceforth, is to be considered as non-existent for any purpose in the case. *Seneca Bank* vs. *Garlinghouse*, 4 How., 174; *Kapp* vs. *Barthan*, 1 E. D. Smith, 622; *Fry* vs. *Bennett*, 3 Bosw., 200; *Burrall* vs. *Moore*, 5 Duer, 654 (656). See also *dictum* in *Dann* vs. *Baker*, 12 How., 521, and *Megrath* vs. *Van Wyck*, 2 Sandf., 641. And, when made or allowed, an amendment dates back to the commencement of the action. *Ward* vs. *Kalbfleisch*, 21 How., 283.

Pending a motion for judgment on the ground of defect, it has been held that the power in question is exercisable. *Burrall* vs. *Moore*, 5 Duer, 654; *Currie* vs. *Baldwin*, 4 Sandf., 690.

In these two cases, the motions were denied without costs. A stricter view is taken in *Williams* vs. *Wilkinson*, 5 How., 357; 1 C. R. (N. S)., 20, and *Hall* vs. *Huntley*, 1 C. R. (N. S.), 21, note, where it was held that the section does not apply to irregularities, and that, after motion on that ground, an amendment was inadmissible, except on terms, and payment of costs to the moving party. See also *Aymar* vs. *Chase*, *infra*.

After the decision on a motion to strike out a pleading, it can no longer be amended without special leave. *Aymar* vs. *Chase*, 1 C. R. (N. S.), 141. But, where the pleading has been put in in good faith, this leave will be granted, or a conditional order made. *Witherspoon* vs. *Van Dolar*, 15 How., 266; *Fales* vs. *Hicks*, 12 How., 153. These cases seem to overrule the *dictum* to the contrary, in *Sherman* vs. *The New York Central Mills*, 1 Abb., 190.

To be available, under the section in question, an amendment must be substantial, and not colorable, or of formalities outside of the substance of the pleading. *Vide Snyder* vs. *White*, 6 How., 321; *George* vs. *McAvoy*, 6 How., 200; 1 C. R. (N. S.), 318.

An amendment of the complaint, changing the substantial nature of the action, or involving a change of parties, so as, in effect, to necessitate an amendment of the summons also, cannot be made at all, as of course, and without special leave of the court. *Russell* vs. *Spear*, 5 How., 142; 3 C. R., 189; *Gray* vs. *Brown*, 15 How., 555.

But, where such is not the case, or where the amendment does not involve a misjoinder, any new cause or causes of action, claims for relief, or grounds of defence, may be added in this manner. *Mason* vs. *Whiteley*, 4 Duer, 611; 1 Abb., 85; *Thompson* vs. *Minford*, 11 How., 273; *Wyman* vs. *Remond*, 18 How., 272; *Troy and Boston Railroad Company* vs. *Tibbitts*, 11 How., 168 (170); *Getty* vs. *The Hudson River Railroad Company*, 6 How., 269; 10 L. O., 85; *Spencer* vs. *Tooker*, 21 How., 333; 12 Abb., 353; *McQueen* vs. *Babcock*, 22 How., 229; 13 Abb., 262. See also *Allaben* vs. *Wakeman*, 10 Abb., 162, an amendment on motion.

By these cases, *Hollister* vs. *Livingston*, 9 How., 140, and *Field* vs. *Morse*, 8 How., 47, may be considered as so far overruled.

It is also competent for a party to make, in this manner, any changes in the mode of statement of his case, or in the form of his action, not changing its essential nature, in the particulars above referred to. *Vide Hollister* vs. *Livingston*, and *Field* vs. *Morse*, *supra*. See also *Thompson* vs. *Minford*, 11 How., 273; *Dows* vs. *Green*, 3 How., 377; *Chapman* vs. *Webb*, 6 How., 390; 1 C. R. (N. S.), 388.

Supplemental matter, occurring after the commencement of the suit, cannot be introduced by way of amendment. *Hornfager* vs. *Hornfager*, 6 How., 13; 1 C. R. (N. S.), 180; *Beck* vs. *Stephani*, 9 How., 193 (195); *St. John* vs. *Croel*, 10 How., 253 (258); *McCullough* vs. *Colby*, 4 Bosw., 603. Nor, without special permission, can matter in answer to the original complaint be inserted in a supplemental answer. *Dann* vs. *Baker*, 12 How., 521. Nor, *per contra*, can matter known at the time of commencing the action, be introduced, by way of supplemental pleading, or otherwise than by amendment. *McMahon* vs. *Allen*, 3 Abb., 89; affirming, 12 How., 39, also 3 Abb., 92.

An order directing a complaint to be specially amended, does not restrict the plaintiff's general power to amend, as of course, if exercised in due time, and in a manner not inconsistent with the order. *Jeroliman* vs. *Cohen*, 1 Duer, 629.

An amendment of a merely technical nature, not altering the real issue between the parties, is without prejudice to the proceedings, and will not exclude the admission at the trial, of a deposition previously taken. *Vincent* vs. *Conklin*, 1 E. D. Smith, 203 (209).

The powers of amendment conferred by the Code are equally applica-

ble in partition, as well as in other cases. *Croghan* vs. *Livingston*, 17 N. Y., 218; 6 Abb., 350; affirming 25 Barb., 336.

A special power of amendment as of course, and exercisable at any time and without costs, is conferred by chapter 464 of 1847, section 7, in the case of a legal change of name, by a party, *pendente lite*. Analogous to this is the provision, by section 175 of the Code, for amendment, on discovery of the true name of a defendant, of which the plaintiff was ignorant at the outset.

An amendment, when made, has no collateral effect, beyond that of an acknowledgement of mispleader. It cannot be construed as a confession, that the party has wilfully or knowingly made a false statement in the pleading amended. *Elizabethport Manufacturing Company* vs. *Campbell*, 13 Abb., 86.

(*b.*) TIME OF AMENDMENT.

As will have been seen, the usual period of twenty days is allowed for amendment, either after the service of the pleading in the first instance, or after the service of the answer or demurrer thereto. The further liberty is given of doing so, at any time before the time for answering it expires.

This last mentioned provision seems clearly to secure to the pleader the right to amend his own pleading, at any time within the limits of an order for extension of time obtained by his adversary, in addition to the original twenty days after service.

It is equally clear that the words "service of an answer or demurrer" must also be held to include the service of a reply, which is, in fact, essentially an answer to a counter-claim, when put in. See *Seneca Bank* vs. *Garlinghouse*; *Enos* vs. *Thomas*; and *Cusson* vs. *Whalon*, before referred to.

In the former of these three cases, an amendment of the complaint was allowed, even after the service of a reply, on the subsequent service of an amended answer by the defendant.

It has been held that, in cases where service by mail is admissible, the time to amend is doubled, and runs for forty days instead of twenty. *Washburn* vs. *Herrick*, 4 How., 15; 2 C. R., 2; *Cusson* vs. *Whalon*, 5 How., 302; 1 C. R., (N. S.), 27. These cases stand uncontradicted, but whether they can be safely relied upon is very questionable. See, hereafter, under the head of *Time to Answer*.

Of course, by amending his complaint after answer, the plaintiff works a practical recommencement of the pleadings, *ab initio*, and cannot take judgment, with reference to the date of the original service. *Dickerson* vs. *Beardsley*; and *Seneca County Bank* vs. *Garlinghouse*, above cited.

(*c.*) Restrictions on Power.

The restrictions, imposed as above noticed, are solely upon amendments, made for the mere purpose of delay, after an actual joinder of issue.

Before that joinder, the right is absolute under any circumstances.

After that joinder it is equally so, unless two things be made to appear to the court.

1. That the amendment is made for the purpose of delay.

2. That, by that amendment, the objector will lose the benefit of a circuit, or term, for which the cause is or may be noticed.

Both these conditions must concur, to bring the restriction into operation. *Vide Thompson* vs. *Minford*, 11 How., 273 (275).

And the proper form of procedure, in such cases, is a motion to strike out the amendment, on which the court may impose such terms as may be just. See, as to similar practice, antecedent to the insertion of this provision, *Cooper* vs. *Jones*, 4 Sandf., 699.

If an answer is put in in good faith, and not for delay, the mere fact that the adverse party will thereby lose the benefit of a term, will not authorize it to be stricken out. *Griffin* vs. *Cohen*, 8 How., 451.

In the same case, the following is laid down as the proper course of practice, on the application authorized by the section:

"If the amended pleading shall be served during a circuit or term, the court can, upon a proper case being made, require the party amending to show cause, at a short day, why the amended pleading should not be stricken out (Code, section 402); or if, for any reason, this cannot be done before the adjournment of the circuit, application may be made at a special term; and, if the case is brought within the provision authorizing the court to strike out, it can be done, and such terms imposed upon the party thus attempting to avail himself of the statute of amendments in bad faith, as will prevent injury to the adverse party."

It was also held in that case, that the taking of an inquest was not a proper course under these circumstances, and one so taken was set aside. The same course was taken in *Rogers* vs. *Rathbone*, 8 How., 446. See also *Farrand* vs. *Herbeson*, 3 Duer, 655 (658). In *Allen* vs. *Compton*, 8 How., 251, the plaintiff evidently did not fully rely on an inquest so taken, but made a subsequent motion to strike out. The general rule is also admitted in *Vanderbilt* vs. *Bleecker*, 4 Abb., 289 (291).

In *Allen* vs. *Compton*, an inquest was taken, but, as above, evidently not relied upon. Where, however, the amendment is so grossly frivolous as to be obviously a fraud upon the law, the possibility of its being treated as a nullity is admitted, in *Rogers* vs. *Rathbone*, *supra*.

And this view was acted upon, and an inquest so taken sustained, in *Vanderbilt* vs. *Bleecker*, 4 Abb., 289.

An inquest was also sustained, as against a motion to set it aside for irregularity, as taken before the time for amendment had expired, on the ground that, if the defendant delays to amend, he delays at his peril. *Plumb* vs. *Whipples*, 7 How., 411.

That case, however, proceeded mainly upon the ground that the answer, consisting of mere denials, was not amendable at all, and that therefore the amendment itself was a nullity. That, in such case, an attempted amendment may be properly disregarded, and an inquest taken, without the necessity of a special motion, is maintained in *Farrand* vs. *Herbeson*, 3 Duer, 655.

Of course the extreme measure of striking out will be of comparative rarity; and the more usual remedy will look to the imposition of terms, more or less stringent, as the peculiar circumstances of each case may require.

§ 129. *Amendments on Special Motion.*

The power in this respect, conferred by section 173, as above cited, is of the most extensive nature, and is applicable to every proceeding in the suit. In its aspects as regards process, and some branches of interlocutory applications, it has been already partly considered. It will be so hereafter, in its other different phases not immediately connected with the subject of pleading, wherever the necessity occurs; the observations in the present chapter being strictly confined to that subject alone, without touching upon any other matters of proceeding.

The power is to the following effect:

The court may amend any pleading or proceeding—

By adding or striking out the name of any party;

By correcting a mistake in the name of a party;

By correcting a mistake in any other respect;

By inserting other allegations material to the case;

Or, when the amendment does not substantially change the claim or defence, by conforming the pleading or proceeding to the facts proved.

This last category must be looked upon as more peculiarly limited to amendments at or consequent upon the trial, for the purpose, not of laying a basis for ulterior proceedings, but rather for that of sustaining a verdict or judgment already rendered. It will accordingly be separately considered in the next section. The others are of more general application, and have rather in view the object of forming the basis for ulterior proceedings in the action itself, and will form the subject of this.

These powers may all of them be exercised, either before or after judgment.

But they must be exercised in furtherance of justice.

And, in their exercise, the court may and will impose such terms as may be proper.

(*a.*) AMENDMENT IN NAMES OF PARTIES.

The courts are disposed to show great liberality in applications for amendments of this description, whether applied for at or before the trial. In the former case, terms will of course be imposed. See *Dutcher* vs. *Slack*, 3 How., 322; 1 C. R., 113; *Vanderwerker* vs. *Vanderwerker*, 7 Barb., 221; *Brown* vs. *Babcock*, 3 How., 305; 1 C. R., 66; *Bemis* vs. *Bronson*, 1 C. R., 27: the two former being cases of adding the names of necessary plaintiffs, the two latter of striking out unnecessary defendants. In *Barnes* vs. *Perine*, 9 Barb., 202, affirmed generally, 2 Kern., 18, a mistake in the designation of the plaintiffs, was, in like manner, held not to be ground of nonsuit, but for amendment, at or after the trial. See too *De Peyster* vs. *Wheeler*, 1 Sandf., 719; 1 C. R., 93, as to disregard at the trial of a technical misnomer, with liberty for the parties to apply for a subsequent amendment, if thought prudent. See also *Travis* vs. *Tobias*, 8 How., 333.

But, as a general rule, such an amendment, unless the objection be of the most technical nature, should not be made *instanter* on the trial, but afterwards and on terms. *Travis* vs. *Tobias*, *supra*.

The name of a next friend was allowed to be inserted in a complaint by amendment, on its being decided that the suit in that case could not be brought by a wife in her own name alone. *Forrest* vs. *Forrest*, 3 C. R., 254. See also *Willis* vs. *Underhill*, 6 How., 396.

One plaintiff may be substituted for another by amendment, where the interest of the latter has passed entirely to the former, during the action; and this, even when the matter is actually, at the time of such application, in the course of hearing before a referee. *Davis* vs. *Schermerhorn*, 5 How., 440. See, as to similar substitution of a defendant, *Fuller* vs. *The Webster Fire Insurance Company*, 12 How., 293.

In *The People* vs. *Walker*, 23 Barb., 304; 2 Abb., 421, an omission to join the relator as party plaintiff, was permitted to be cured by amendment, without costs.

In *Turner* vs. *Hillerline*, 14 How., 231, the plaintiff was also allowed, pending the hearing before a referee, to strike out one of the defendants, upon terms, for ensuring the benefit of the past proceedings and costs to the defendant retained.

In *Gock* vs. *Keneda*, 29 Barb., 120, the striking out of a defendant, become superfluous by his own act, was likewise sanctioned.

In *Johnson* vs. *Snyder*, 8 How., 498, additional defendants were allowed to be introduced on terms. See likewise, *Mayhew* vs. *Robinson*, 10 How., 162 (168). Both these cases occurred on the hearing: in the former, the amendment, and payment of costs, were made a condition of not dismissing the suit; in the latter, the party was put to a substantive application (168, note).

The courts will not, however, carry the principle too far.

An amendment, involving an entire change of parties, plaintiff and defendant, so as to constitute, in fact, a new suit, was accordingly refused in *Wright* vs. *Storms*, 3 C. R., 138.

Where, too, an amendment of this nature, if granted, would have involved the making the complaint objectionable on the ground of misjoinder, it was refused. *Peck* vs. *Ward*, 3 Duer, 647.

And, when made, an amendment, involving an addition of parties, must, of course, be followed up by the necessary service, so as to bring them before the court; or, of necessity, it will be wholly unavailing. *Aikin* vs. *The Albany Northern Railroad Company*, 14 How., 337.

(*b.*) Correction of Mistake.

The courts are also liberally disposed, as regards the extension of facilities of this nature, and as a general rule, relief of this description will rarely be denied. The more frequent exercise of this branch of the power is that considered in the next section, by amendment, or disregard of formal objections at the trial; but the application of the remedy on special motion is not unfrequent.

Among the many instances in which amendments of this nature have been granted, may be cited the following:

The addition of the name of the county of venue. *Merrill* vs. *Grinnell*, 12 L. O., 286.

An amendment, for the purpose of averring slanderous words in their original language. *Debaix* vs. *Lehind*, 1 C. R. (N. S.), 235.

An amendment in the complaint, increasing the amount of the plaintiff's claim, originally understated. *Merchant* vs. *The New York Life Insurance Company*, 2 Sandf., 669; 2 C. R., 66–87. The like amendment, where the nature and effect of the plaintiff's claim had been generally misunderstood by his attorney. *Hare* vs. *White*, 3 How., 296; 1 C. R., 70.

The insertion of a count on special contract, in lieu of the common count, on two promissory notes. *Jackson* vs. *Sanders*, 1 C. R., 27.

The insertion of a material averment. *Executors of Keese* vs. *Fullerton*, 1 C. R., 52.

In *Raynor* vs. *Clark*, 7 Barb., 581; 3 C. R., 230, the plaintiff was allowed to amend his complaint, on the reversal of a judgment errone-

ously taken by him. In *Lettman* vs. *Ritz*, 3 Sandf., 734, an amendment of the complaint was allowed after the trial, the object of it being formal, and the defendant not complaining of surprise; but terms were imposed, and such will be the general, if not the universal rule, in cases of this description.

In *Comstock* vs. *White*, 31 Barb., 301, the demand for relief was ordered to be amended, in order to allow full justice to be done between the parties, in respect of the matters alleged, with liberty for the defendants to amend their answer, if the plaintiffs declined taking such action on their part. See likewise *Peck* vs. *Mallams*, 6 Seld., 509, where, on reversal of a judgment dismissing the complaint, leave was given to the plaintiff to bring in necessary parties, though the objection had not been raised upon the adverse pleading.

But upon the decision of a demurrer, the court refused to make any order allowing the plaintiff to amend his complaint. The application should, it is evident, have been made separately. *Lord* vs. *Vreeland*, 13 Abb., 195.

In *Balcom* vs. *Woodruff*, 7 Barb., 13, a plaintiff was allowed to amend his declaration, after he had been nonsuited, and to do so *nunc pro tunc*, as otherwise the statute would have run out; although the court expressly guarded against their decision being drawn into a precedent; and

In *Burnap* vs. *Halloran*, 1 C. R., 51, leave was granted to the plaintiff to amend, by adding a new count to his declaration, even after two trials had been had, resulting in the defendant's favor; it not appearing that the defendant had been misled, or that the plaintiff sought to introduce a new cause of action.

It would not be safe, however, to calculate, in other instances, upon the extent of liberality evinced in the two last decisions. That there is some limit to it, is evinced by the case of *Houghton* vs. *Skinner*, 5 How., 420, where, two trials having already been had, the court refused leave to amend, by pleading a former judgment against a co-defendant (the suit being one against joint contractors), the matter sought to be so pleaded having been known to the defendant, before issue was originally joined in the cause, so that it might have been pleaded in the first instance.

So in *Malcom* vs. *Baker*, 8 How., 301, leave to amend an answer, after an appeal from a judgment, affirmed at general term, was refused; though, on that affirmance, leave had been given to the defendants to make the application. It was held that the judgment must first be set aside, before such leave could be given, and that such a motion could not be entertained by the special term. Even if this could be done, it should not only appear that the party has been surprised or misled,

after the exercise of ordinary care and skill, but also, that the amendment asked for is clearly required, in order to promote the ends of justice, before such a stretch of the power of amendment can be consented to.

And in *Field* vs. *Hawxhurst*, 9 How., 47, it was also held that the extraordinary power of amendment after judgment should be sparingly exercised, and only in a case of necessity.

An amendment of this nature is admissible, even though it change the character of the action, the cause remaining the same. Thus, a claim for damages has been allowed to be changed, into one for replevin. *Dows* vs. *Green*, 3 How., 377; *Furniss* vs. *Brown*, 8 How., 59. Or a claim, originally sounding in tort, to be changed into one in contract, by striking out allegations of fraud. *Field* vs. *Morse*, 8 How., 47. Or the general theory of the case to be changed. *Troy* and *Boston Railroad Company* vs. *Tibbitts*, 11 How., 168; *Prindle* vs. *Aldrich*, 13 How., 466. In *Spalding* vs. *Spalding*, 3 How., 297; 1 C. R., 64, the general principle is admitted, though the particular relief there sought was denied, as incompatible with the provisions of the Code, as it then stood. A change from contract to tort is likewise held to be allowable. *Chapman* vs. *Webb*, 6 How., 390; 1 C. R. (N. S.) 388.

In *Allaben* vs. *Wakeman*, 10 Abb., 162, a new and distinct cause of action was allowed to be added, by amendment after trial, but upon strict terms, abandoning all prior advantages, and vacating an order of reference and the referee's report.

An amendment of this latter nature must, however, be asked in good faith, or it may be denied. Thus, where a plaintiff, who, by originally suing on contract, had obtained the benefit of an attachment and of service by publication, afterwards moved to amend, so as to found his action on tort, leave was refused. This, it was held, was not a mistake, and the court had no power. *Lane* vs. *Beam*, 19 Barb., 51; 1 Abb., 65.

The general power of the court to allow amendments of this description is asserted, but the particular amendment asked for denied in *Daguerre* vs. *Orser*, 3 Abb., 86, as not being in furtherance of justice.

An amendment or correction of an error in practice will not be allowed, for the purpose of obviating a jurisdictional defect *ab initio*, such as an omission to file complaint, on service by publication. *Kendall* vs. *Washburn*, 14 How., 380. Or an omission, as regards the signature of a petition for sequestration. *Bangs* vs. *McIntosh*, 23 Barb., 591 (601). See, as to a jurisdictional defect in a suit originally commenced in a justices' court, *Davis* vs. *Jones*, 4 How., 340; 3 C. R., 63. But see also, as to the possibility of waiver of this class of objections, *Wiggins* vs. *Tallmage*, 7 How., 404.

Where, during a trial before a referee, illegal or incompetent action has been had, the courts have refused to cure it by a subsequent amendment, *nunc pro tunc*. Thus, where a referee had proceeded to try the case, and had administered oaths to the witnesses, without any regular order of reference having been made or entered, the court refused to recognize the subsequent entry of an order, *nunc pro tunc*, in order to legalize the proceedings, and render an action for slander maintainable, in respect of an imputation of perjury at such irregular trial. *Bonner* vs. *McPhail*, 31 Barb., 106.

So likewise an order allowing a defendant to amend his answer, *nunc pro tunc*, in order to support the admission of evidence which, at the trial, the referee should have rejected as not within the issue, was reversed in *Johnson* vs. *McIntosh*, 31 Barb., 267.

As to the power of the court to grant leave to amend a pleading, decided, on motion, to be defective, see last section, and *Witherspoon* vs. *Van Dolar*, and *Fales* vs. *Hicks*, there cited. See, as to the granting of a conditional order, on a motion of this description, *Corbin* vs. *St. George*, 2 Abb., 465.

An amendment asked for, if wholly ineffectual for the purpose proposed, or otherwise objectionable, will be denied. *Stewart* vs. *Smithson*, 1 Hilt., 119; *Saltus* vs. *Genin*, 17 How., 390; 8 Abb., 254; 3 Bosw., 639.

See, as to permission being given to supply defects in the original allegation in a complaint, *McMahon* vs. *Allen*, 3 Abb., 89 (92).

An implied admission in a pleading was allowed to be corrected by amendment, in *Vanderbilt* vs. *The Accessory Transit Company*, 9 How., 352.

An amendment of this nature will not, as a general rule, be granted after trial, and in opposition to the decision of the judge on that occasion. A full and clear case must be shown, before the court will then interfere. *Travis* vs. *Barger*, 24 Barb., 614.

(*c.*) Insertion of Material Allegations.

This subject, so far as regards the insertion of allegations for the purpose of supplying a defect, has been substantially considered in the previous head.

It embraces, however, the power of inserting, by amendment, allegations pertinent to the case, but not necessary to it in its original aspect, in order to lay ground for different and independent relief. *Houghton* vs. *Latson*, 10 L. O., 32, refusing such an amendment, was decided under an antecedent condition of the Code.

Thus, in *Beardsley* vs. *Stover*, 7 How., 294, a defendant was allowed to insert an additional counter-claim in his answer.

But, in granting such an amendment, the court will secure to the defendant his right to answer or demur, as in other cases. See *Union Bank* vs. *Mott*, 19 How., 267; 11 Abb., 42; modifying *same case*, 19 How., 114; 10 Abb., 376.

The courts have frequently been disposed to refuse leave to amend, for the sole purpose of setting up what was considered an unconscientious defence; as, for instance, the statute of limitations. See *Davis* vs. *Garr*, 7 How., 311; *Sagory* vs. *New York and New Haven Railroad Company*, 21 How., 455; *Macquen* vs. *Babcock*, 22 How., 229; 13 Abb., 262.

See also, as to the retrospective effect of an amendment, in order to oust a plea of this nature, *Ward* vs. *Kalbfleisch*, 21 How., 283. The defence of usury has been sometimes placed upon the same footing. *Vide Bates* vs. *Voorhies*, 7 How., 234; *Catlin* vs. *Gunter*, 1 Duer, 253; 11 L. O., 201. This view has, however, been overruled. *Vide Catlin* vs. *Gunter*, reversed by the Court of Appeals, 1 Kern., 368; 10 How., 315, holding that usury, being a defence allowed by law, is entitled to be placed on the same footing as others, in this as in other respects. See also *Brown* vs. *Mitchell*, 12 How., 408; and *Grant* vs. *McCaughin*, 4 How., 216.

The introduction of supplemental matter, by way of amendment, is beyond the powers of the court. A supplemental pleading will be necessary. *Hornfager* vs. *Hornfager*, 6 How., 13; 1 C. R. (N. S.), 180; *St. John* vs. *Croel*, 10 How., 253 (258); *Beck* vs. *Stephani*, 9 How., 193 (195). See also *McMahon* vs. *Allen*, 12 How., 39 (44). See the same case as to the converse of the proposition, *i. e.*, that matter, antecedent to the commencement of the suit, cannot be made the subject of a supplemental pleading, but can only be introduced by amendment. *McMahon* vs. *Allen*, 12 How., 39; and affirmance, and subsequent decision, 3 Abb., 89 and 92. As to the general liberality of the court in granting amendments of the above nature, *vide Harrington* vs. *Slade*, 22 Barb., 161.

See, however, a stricter view taken, as to the impossibility of curing a radical defect in the action as originally commenced, by the insertion, in either form, of entirely supplemental matter, not then existent. *McCullough* vs. *Colby*, 4 Bosw., 603.

(*d.*) General Considerations.

The courts will not, however, be disposed to extend the above privileges to a party pleading, in cases where he has been guilty of unreasonable delay or gross *laches* in attempting their assertion. *Vide Davis* vs. *Garr*, 7 How., 311; *McMahon* vs. *Allen*, 12 How., 39; affirmed, 3

Abb., 89 (though the relief was subsequently granted, *vide* 3 Abb., 92); *Egert* vs. *Wicker*, 10 How., 193; *Saltus* vs. *Genin*, 17 How., 390; 8 Abb., 254; *Cocks* vs. *Radford*, 13 Abb., 207.

The power of a referee to grant amendments, under section 272, does not extend to the granting of those of the nature treated of in this section. It does not extend to amendments on independent motion, but is confined to amendments upon the trial, strictly considered, or to disregard of objections on that occasion. *Union Bank* vs. *Mott*, 18 How., 506; 10 Abb., 372 (374).

On the granting of an amendment of this description, the imposition of terms, more or less stringent, is the general, and almost the universal rule. It is, in fact, expressly contemplated by the section. In some few of the cases above cited, amendments have been granted without imposing them, but this has only occurred when the defect has been a mere technicality, and the objection on the adverse part overstrained or invidious. It will be needless to draw attention to each particular case, as all agree in the general principle, and, nevertheless, almost all disagree in minor details. The question is purely one in the discretion of the court, and such discretion will necessarily vary, according to the circumstances of each particular case.

A few general principles may, however, be laid down, as probable to be followed in individual applications.

The costs of the motion will almost invariably be imposed.

Where the amendment is made before the trial, costs, down to the time of amendment, will often be granted to the adverse party.

When made at or after the trial, payment of costs of the trial, and of any subsequent proceedings which the amendment tends to neutralize, will be generally imposed as a condition.

Where the issue is not substantially changed, it is often stipulated that any prior proceedings are to stand, and any evidence previously taken is to be admissible; or, in extreme cases, the proceedings of the moving party will be vacated, and the adverse party placed in his former position. And, where that amendment will necessitate a change of proceedings on the part of the adverse party, indemnification from the expenses of that change has occasionally been made a prerequisite. See the above cases, *passim*. See especially *Union Bank* vs. *Mott*, 19 How., 267, above cited.

The power to plead over, after the decision of a demurrer, as given by the latter part of section 172, although closely analogous to the above, is, nevertheless, a proceeding not of a general nature, but adapted only to a particular pleading, and to a particular stage of the action: as such it will be considered hereafter.

The subject of supplemental pleading, also, presenting a close analogy

to that of amendment, will likewise be reserved for a separate chapter, devoted to that especial subject.

In a suit against several defendants, a plaintiff, who amends in matter of substance, after default taken against one of them, waives that default in effect, and must serve a copy upon that defendant, so as to give him a renewed opportunity of defending, if so advised. *The People* vs. *Woods*, 2 Sandf., 652; 2 C. R., 18.

§ 130. *Service of Amended Pleading.*

Whatever the grounds or mode of amendment, a copy of the amended pleading must, in all cases, be served at once upon the adverse party. There can be no doubt but that this is the clear meaning of the provision in the section, though its peculiar wording, with reference to the immediate antecedent, is awkward.

In every case, therefore, in which a pleading is amended, a full and complete copy of it must be served upon the adverse party. An arrangement may, of course, be occasionally made to amend the copy previously served; but, when feasible, this is a matter of pure accommodation, and not of strict practice.

Such service is, above all, necessary, because it is only from the time of actual service of the amended pleading, that the time of the adverse party to answer or amend, as the case may require; or that of the party serving, to take an ultimate default, or analogous measures in default of service of an answer, or reply where requisite, will commence to run.

A fortiori, will the neglect to serve process on additional defendants, if brought in, render the amendment, as to them, a complete nullity. *Vide Aikin* vs. *The Albany Northern Railroad Company*, 14 How., 357, above cited.

And if, after taking judgment by default against one of several defendants, the plaintiff afterwards amends in matter of substance, he opens the default, in effect, and must serve his amendments upon all, the defaulted defendant inclusive. *People* vs. *Woods*, 2 Sandf., 652; 2 C. R., 18, *supra*.

And, as regards service, the same general rule obtains as to other papers. Where an attorney has appeared, service on the party instead of the attorney will, accordingly, be void. Section 146 of the Code is, in this respect, controlled by section 417. *Mercier* vs. *Pearlstone*, 7 Abb., 325.

Section 146, as above noticed, makes special provision for the taking of judgment by default, on amendment of the complaint after demurrer, but the same general principle is applicable to an amended complaint of whatever nature. According to the decisions above cited, it takes

the place of, and supersedes the original, and the same rules are applicable to it, as regards the necessity of an answer, and the time within which that answer, to be available, must be put in.

The above rules, as to service, apply, of course, to amendments directed at, or in consequence of occurrences upon the trial, as treated in the next section, when not made at the time. Actual amendment of the papers of the adverse party, will be peculiarly applicable to this class of cases, though, of course, it is competent to the party to refuse, if he chooses, that facility. In this case there seems no resource but to serve a fresh copy; or, where the amendments are short, a specification of them, in the nature of amendments to a case as after noticed.

§ 131. *Amendments on or after the Trial.*

The powers of the courts in this respect, as conferred by sections 169, 170, and 173, are most extensive.

Every variance between the pleading and the evidence, unless amounting to a total failure of proof, is, for the future, to be either disregarded or amended. See sections 169, 170, and 176. The question of a total failure of proof is considered in the succeeding section of this work.

If the adverse party be actually misled, by such variance, to his prejudice, in maintaining his action or defence upon the merits, the variance is to be deemed material, but not otherwise. See section 168.

To establish such distinction, such adverse party must allege, and must prove, to the satisfaction of the court, that he has been so misled, and in what respect.

The court may thereupon order the pleading to be amended, upon such terms as may be just (§ 168). Relief in these cases will ordinarily, though not always, be obtained by means of a substantive motion. See preceding section of this work.

But, where the variance is not established to be material, in the manner above provided, then the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. Section 169.

And, under section 173, the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding, by, among other things, "conforming the pleading or proceeding to the facts proved." See also general power to amend proceedings or supply omissions in them, at the close of section 174. But this last power can only be exercised "when the amendment does not change substantially the claim or defence."

The general power of amendment, under section 169, is, on the contrary, unrestricted.

It is proposed to consider these two powers and their incidents in the present section: the subject of disregard of objections, and of a fatal variance being reserved for the next.

By the Revised Statutes, title V., chapter VII. of part III., 2 R. S., 424 to 426, extensive powers of amendment, under similar circumstances, had already been given, and those powers appear to be still subsisting, in concurrence with those of the Code. See, to this effect, in *Brown* vs. *Babcock*, 1 C. R., 66; 3 How., 305. Those of the Code, however, are of wider scope, and may be considered as practically superseding the others.

The former practice of entering suggestions on the record, is also, in proper cases, still subsisting. *Vide* 2 R. S., 553, sections 17, 18, 19.

(*a.*) Amendments at the Trial.

The following may be cited as *dicta*, laying down the general principle in respect of the general conduct of a trial in this respect: "The Code has made important changes in the system of *nisi prius* trials. Under the new system, the judge at circuit possesses the same control over the pleadings formerly exercised by the Supreme Court, after verdict, and before judgment. The pleadings may now, on the trial, be conformed to the proof—immaterial allegations disregarded, immaterial evidence rejected, and such judgment may be directed as the facts and the law of the case require." *Corning* vs. *Corning*, 1 C. R. (N. S.), 351; affirmed, 2 Seld., 97.

With reference to amendments, made for the express purpose of conforming the pleading to the facts proved, it is laid down in *Fay* vs. *Grimsteed*, 10 Barb., 321, that a fatal variance must leave the case unproved in its entire scope and meaning. If left unproved in some particulars, it is a subject for amendment upon terms, if the adverse party has been misled by it, otherwise amendments may be made at the trial, and without any conditions whatever.

In *Wood* vs. *Wood*, 26 Barb., 356 (359), the rule is thus laid down very liberally: "Errors in pleadings must now be fatal to the action or defence, or they will be disregarded and cured by amendment in furtherance of justice, both before and after judgment. A plaintiff who expects to recover in an action, when there is a substantial defence to it, solely by reason of defects in the answer; or a defendant who thinks of succeeding in an action, upon errors in the complaint, without regard to the merits of his defence, may as well stay out of court as to come in, under the Code." After citing section 176, the learned judge (Balcom, J.) proceeds: "And, when the courts construe the allegations of pleadings liberally (as section 159 of the Code enjoins), with a view to substantial justice, parties who are in the right, on the merits of cases,

will succeed," &c. See similar views, stated in great detail, by the same judge, in *Dauchy* vs. *Tyler*, 15 How., 399 (403 to 405); and approved as authority in *Baker* vs. *Seeley*, 17 How., 297 (298). See likewise general statements of principle, in *Gates* vs. *Hudson River Railroad Company*, 6 How., 290; *Ayrault* vs. *Chamberlain*, 33 Barb., 229 (238); *McKensie* vs. *Farrell*, 4 Bosw., 192; *Frey* vs. *Johnson*, 22 How., 316 (327); *Root* vs. *Price*, 22 How., 372 (374); *Van Ness* vs. *Bush*, 22 How., 481; 14 Abb., 33.

An amendment made at the trial, for the purpose of conforming the pleading to the facts proved, was approved by the Court of Appeals in *Hall* vs. *Gould*, 3 Kern., 127, there being no pretence of a misleading, and all essential facts having been put in issue. See also *Van Duzer* vs. *Howe*, 21 N. Y., 531; *New York Ice Company* vs. *North Western Insurance Company of Oswego*, 23 N. Y., 357; 21 How., 296; 12 Abb., 414.

The following cases will evidence the application of the rule under different circumstances:

A mistake in the proper denomination of the plaintiffs has been allowed to be corrected at the trial. *Vide Barnes* vs. *Perine*, 9 Barb., 202.

Amendments have been so allowed, by striking out the names of joint defendants improperly joined, or against whom there was a failure of proof, terms being, however, generally imposed. *Bemis* vs. *Bronson*, 1 C. R., 27; *Turner* vs. *Hillerline*, 14 How., 231; *Marks* vs. *Bard*, 1 Abb., 63; *Bonesteel* vs. *Vanderbilt*, 21 Barb., 26.

But, at the same time, a power of this description should be cautiously exercised, and on proper terms, and only when it is not likely to endanger the rights of any of the defendants. *Vide Fullerton* vs. *Taylor*, 6 How., 259; 1 C. R. (N. S.), 411; *Downing* vs. *Mann*, 3 E. D. Smith, 36; 9 How., 204. See also, as to striking out the name of a plaintiff, *Travis* vs. *Tobias*, 8 How., 333.

The omission of the name of the relator was allowed to be supplied in *The People* vs. *Walker*, 23 Barb., 304; 2 Abb., 421.

It is not, however, in the power of the court, to grant an amendment of this description, effecting an entire change of parties. *Vide Davis* vs. *The Mayor of New York*, 4 Kern., 506 (527), overruling contrary views as to the power to insert the name of the attorney-general, in addition to that of private parties seeking an injunction in restraint of a public corporation, as entertained by the Superior Court. *Vide* 3 Duer, 119.

An omission to state the time at which a promissory note was payable was allowed to be supplied by amendment, and the variance disregarded, in *Chapman* vs. *Carolin*, 3 Bosw., 456.

An amendment of this nature in partition was sustained, in *Gordon* vs. *Sterling*, 13 How., 405.

In *Barth* vs. *Walther*, 4 Duer, 228, an amendment was granted, changing the amount of plaintiff's claim to conform to the proof; and in *Miller* vs. *Garling*, 12 How., 203, the plaintiff was admitted to insert averments to found a claim for special damages, flowing out of his original claim in replevin, the defendant not being able to show that he was misled to his prejudice.

An additional charge in assault and battery was allowed to be inserted in *Hagins* vs. *De Hart*, 12 How., 322.

It was held proper, if necessary, to amend a complaint for nuisance, so as to charge such nuisance to be continuing, in *Beckwith* vs. *Griswold*, 29 Barb., 291.

In *The Clyde and Rose Plank Road Company* vs. *Baker*, 12 How., 371; affirmed 22 Barb., 323, it was held improper for the judge at circuit to refuse an offer of the plaintiffs to produce and annex to the pleadings, in a suit transferred to the Supreme Court, title being in question, the original proceedings before the justice, in answer to an objection taken as to his having acquired jurisdiction.

The general principles above stated as to amendments are admitted collaterally in *Bacon* vs. *Comstock*, 11 How., 197; and *Dunning* vs. *Thomas*, 11 How., 281. An amendment is the proper course when the defect complained of involves an insufficient statement of facts. *Vanderpool* vs. *Tarbox*, 7 L. O., 150.

In *Jackson* vs. *Sanders*, 1 C. R., 27, permission was given to amend upon the trial, by substituting for a count upon two promissory notes, a count upon a special contract, under which such notes had been deposited, as a temporary security for an unfulfilled arrangement. The plaintiff, however, there refused to come to the terms imposed, and was nonsuited accordingly.

In the *Cayuga County Bank* vs. *Warden*, 2 Seld., 19, an amendment, by striking out parts of the declaration, allowed by the judge upon the trial, without costs, was sustained by the Court of Appeals, as authorized by the Code, and resting in the discretion of the court.

Where the complaint, in slander, had omitted to allege the words complained of, to have been spoken "in the presence or hearing of some person," the court, at the trial, allowed the complaint to be amended in that respect, without costs, the defendant not having been thereby misled or injured. *Wood* vs. *Gilchrist*, 1 C. R., 117.

A party will not, however, be allowed to retract, by amendment on the trial, an admission made by him in the previous pleadings, unless upon very clear proof that he has been misled or deceived, or has acted under evident mistake. *Miller* vs. *Moore*, 1 E. D. Smith, 739; *Wood-*

burn vs. *Chamberlin*, 17 Barb., 446 (450). Still less will he be allowed to do so, by retracting such admission and substituting a technical defence. *Robbins* vs. *Richardson*, 2 Bosw., 248.

The power of the court in this respect extends only to the pleadings, and does not warrant the granting of extraneous relief, such as the entry of an independent order for discontinuance, *nunc pro tunc*, at the time of trial, in order to overrule a defence, upon which issue had been taken and tried. *Bedell* vs. *Powell*, 13 Barb., 183.

The proper time to apply for an amendment of this description is at the trial itself, when the whole subject is fresh in the mind of the court. An application, delayed till a subsequent period, will be less favorably entertained, and, if so delayed, then it must be sustained by affirmative proof that the defence is true, and can be established. *Travis* vs. *Barger*, 24 Barb., 614.

Prior to the amendment of 1859, a referee had no powers of this description. Whenever, therefore, an amendment of this nature was necessary during a trial before him, an application to the court was requisite. See an order of this kind granted in *Turner* vs. *Hillerline*, 14 How., 231. See also, as to its power in this respect, and as to the propriety of adjourning the trial in order to such an application, *Mayhew* vs. *Robinson*, 10 How., 162 (167).

Since the amendment of 1859, powers of this respect are given to a referee. His powers are, however, strictly restricted to amendments of immaterial variances or for conformity, at the actual trial. They do not extend to the making of such as are properly entertainable by the court on motion, or to those involving a change of the cause of action or defence. *Union Bank* vs. *Mott*, 18 How., 506; 10 Abb., 372. An amendment of this latter description must be applied for by means of a substantive motion to the court, when terms may be imposed, for the continuance of the proceedings before the referee, or otherwise, as may be just. *Union Bank* vs. *Mott*, 19 How., 114; 10 Abb., 372 (376); *Woodruff* vs. *Husson*, 32 Barb., 557. See, however, contrary view taken, and his general powers of amendment asserted, in *Van Ness* vs. *Bush*, 22 How., 481; 14 Abb., 33.

Where, on the hearing before a referee, full justice has not been done between the parties, as regards the admissibility of evidence reserved for consideration, and the line of defence requires alteration, the proper time for a motion for that purpose will be immediately upon the coming of the report. If delayed till after judgment, the general term cannot entertain the application. *Browne* vs. *Colie*, 1 E. D. Smith, 265.

A motion for leave to introduce supplemental matter cannot properly be made at the trial, but must be brought forward in the usual manner on notice. *Garner* vs. *Hannah*, 6 Duer, 262 (275).

Where an amendment proposed tends substantially to change the cause of action or defence, it will be equally improper to grant it during as after the trial, under which circumstances it is expressly prohibited by section 173. The applicant should be put to his motion, in order to the imposition of proper terms. *Vide Robbins* vs. *Richardson*, 2 Bosw., 248 (257); *Egert* vs. *Wicker*, 10 How., 193; *Catlin* vs. *Hansen*, 1 Duer, 309; *Grosvenor* vs. *The Atlantic Fire Insurance Company of Brooklyn*, 1 Bosw., 469 (479); *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362 (377); *Fagen* vs. *Davison*, 2 Duer, 153; *Hunt* vs. *Hudson River Fire Insurance Company*, 2 Duer, 481; *Watson* vs. *Bailey*, 2 Duer, 509. See also *Beardsley* vs. *Stover*, 7 How., 294; *Marquat* vs. *Marquat*, 7 How., 417; *Coan* vs. *Osgood*, 15 Barb., 583; *Catlin* vs. *Hansen*, 1 Duer, 309. Nor can such an amendment be granted, for the purpose of making the complaint conform to the verdict of a jury, for larger damages than those claimed by the plaintiff, unless upon the condition of payment of costs, and granting a new trial. *Corning* vs. *Corning*, 2 Seld., 97; 1 C. R. (N. S.), 351. Liberty was given, however, to the plaintiff in that case, to remit the excess of damages, in which case the verdict was to stand.

The granting or refusing of an amendment of this description rests, as a general rule, in the discretion of the court. *Gould* vs. *Rumsey*, 21 How., 97; *Kissam* vs. *Roberts*, 6 Bosw., 154. And in *Smalley* vs. *Doughty*, 6 Bosw., 66, leave was refused to amend at the trial, by setting up the defence of usury, then raised for the first time, and not previously pleaded. So also an amendment may be denied, for the purpose of setting up matter known to the plaintiff from the outset, but not pleaded in due time. *Bulen* vs. *Burdell*, 11 Abb., 381.

A refusal to allow an amendment, if based on the ground of power, will, however, be error, and reviewable on appeal. *Russell* vs. *Conn*, 20 N. Y., 81.

Where, by amendment during the trial, the court allows the plaintiff to insert a further and separate cause of action, the defendant has a right to claim that the amendments be served upon him in the usual manner, and that his legal right to answer or demur to them as in other cases, be secured to him, and he should be allowed, at least, a trial fee and his disbursements. *Union Bank* vs. *Mott*, 19 How., 267; modifying order in *same case*, 19 How., 114; 10 Abb., 376.

And, where one party is allowed to amend, liberty to make counter amendments, if necessary, should be secured to the other. See *Stoddard* vs. *Rotton*, 5 Bosw., 378.

If an amendment to the answer be allowed at the trial, the plaintiff cannot raise the objection of insufficiency, by demurrer. He should raise the point by motion at the time, or, if surprised, apply for a post-

ponement, and for leave to reply, if necessary. *Therasson* vs. *Peterson*, 22 How., 98.

Amendments at the trial can, for the most part, be made or considered as having been made on the spot. In some cases, however, it may be necessary to apply for a postponement for that purpose, and, even when a defect has been disregarded, it may sometimes be prudent to make the proper amendment subsequently, on special application, with a view to ulterior proceedings. *Vide Depeyster* vs. *Wheeler*, 1 Sandf., 719; 1 C. R., 93.

(*b.*) Amendments after Trial.

Amendments of the above description have also not unfrequently been granted at this stage of the cause.

In *Snell* vs. *Snell*, 3 Abb., 426, where some of the counts in the complaint were defective, but others good, an amendment, applying the verdict to the latter, was held to be proper. In *Fry* vs. *Bennett*, 9 Abb., 45, one of several causes of action was, in like manner, permitted to be abandoned, and an order to that effect inserted in the judgment-roll, on terms.

In *Smith* vs. *Floyd*, 18 Barb., 522, it was considered proper to allow the plaintiff leave to file a reply, necessary to the proper joinder of an issue, to which the evidence given had been applicable, "*nunc pro tunc*."

Where the whole of the case was before the court, and every item in an account had been substantially contested, an amendment of the complaint was allowed, so as to cover an amount found by the referee. *Davis* vs. *Smith*, 14 How., 187. See, however, *Bowman* vs. *Earle*, *infra*, to the contrary effect.

As a general rule, however, and it may be said in all cases where they are of an unliquidated nature, the amount of damages claimed, cannot be altered after the trial, by amendment to conform. It can only be granted on condition of payment of costs, and granting a new trial; and if the order do not impose such terms, it should be vacated. *Corning* vs. *Corning*, 2 Seld., 97; affirming *same case*, 1 C. R. (N. S.), 351. In *Bowman* vs. *Earle*, 3 Duer, 691, the same rule was applied to an order for amendment, increasing the amount of the plaintiff's claim, above that stated in his complaint and bill of particulars.

In *Lettman* vs. *Ritz*, 3 Sandf., 734, relief of this nature was granted, and the plaintiff was allowed to amend his complaint after verdict, the defect being, that the words complained of, in slander, had not been averred in the original language. This leave was, however, only given on terms, that he should reduce the amount of his verdict to a reasonable sum.

An order allowing an amendment, after trial by a referee, by adding

a new cause of action, should only be granted on condition of the plaintiff's abandoning the report and order of reference, with costs to abide the event, and serving an amended complaint, with its usual incidents. *Allaben* vs. *Wakeman*, 10 Abb., 162. See also, as to the proper terms in a similar case, *Union Bank* vs. *Mott*, 19 How., 267; 11 Abb., 42.

An amendment to conform the pleadings to the proofs, is only proper for the purpose of sustaining the judgment which has been given, and not for that of impeaching or impairing its validity. *Englis* vs. *Furniss*, 3 Abb., 82; *Hull* vs. *Birch*, 6 Bosw., 674. If ever granted, it should only be conditionally, and on strict terms. *Gasper* vs. *Adams*, 24 Barb., 287.

Where it would clearly have been the duty of the court below to have ordered an amendment to conform, or to correct a mere formality, a full trial having been had; the general term have not unfrequently, on appeal, made such an order, or treated it as having been made. *Vide Sluyter* vs. *Smith*, 2 Bosw., 673; *Bowdoin* vs. *Coleman*, 6 Duer, 182; 3 Abb., 431; *Union India Rubber Company* vs. *Tomlinson*, 1 E. D. Smith, 364; *Cushingham* vs. *Phillips*, 1 E. D. Smith, 416; *Clark* vs. *Dales*, 20 Barb., 42 (67); *Harrower* vs. *Heath*, 19 Barb., 331; *Bate* vs. *Graham*, 1 Kern., 237. See also *Catlin* vs. *Gunter*, 1 Kern., 368 (375); 10 How., 315, and *Smith* vs. *Floyd*, 18 Barb., 522.

In *Gould* vs. *Glass*, however, 19 Barb., 179 (186), it was doubted whether such an amendment was admissible, in a case originally commenced in a justice's court. See, however, a more liberal view in *The Clyde and Rose Plank Road Company* vs. *Baker*, 12 How., 371; affirmed, 22 Barb., 323.

The powers of the court of granting amendments to conform, are, however, strictly limited by the terms of section 173. They are only admissible, when the amendment proposed does not change substantially the claim or defence; when it does, an amendment cannot be granted in this form, after the trial, nor will it be proper during the trial itself. *Robbins* vs. *Richardson*, 2 Bosw., 248 (257); *Grosvenor* vs. *The Atlantic Fire Insurance Company of Brooklyn*, 1 Bosw., 469 (479); *Andrews* vs. *Bond*, 16 Barb., 633; *Engliss* vs. *Furniss*, 3 Abb., 82; *Daguerre* vs. *Orser*, 3 Abb., 86; *Brown* vs. *Colie*, 1 E. D. Smith, 265; *Ketchum* vs. *Zerega*, 1 E. D. Smith, 553 (562); *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362 (377); *Egert* vs. *Wicker*, 10 How., 193; *Fagen* vs. *Davison*, 2 Duer, 153.

But after, or in connection with the granting of a new trial, this restriction no longer applies, and it is then in the power of the court to grant any amendment, which may tend to the promotion of substantial justice between the parties. *Troy and Boston Railroad Company* vs. *Tibbits*, 11 How., 168; *Depew* vs. *Keyser*, 3 Duer, 335 (341). Of course

any proper terms may, and generally should, be imposed on such an occasion. *Vide McGrane* vs. *Mayor of New York*, 19 How., 144.

Undue delay, amounting to *laches*, or the fact that to grant the application will not be in furtherance of justice, will be a bar to any motion of the above description. *Egert* vs. *Wicker*, 10 How., 193; *Malcolm* vs. *Baker*, 8 How., 301; *Andrews* vs. *Bond*, 16 Barb., 633; *Ketchum* vs. *Zerega*, 1 E. D. Smith, 553 (562); *Ford* vs. *David*, 1 Bosw., 569 (596); *Saltus* vs. *Genin*, 3 Bosw., 639; 17 How., 390; 8 Abb., 254, affirmed, 10 Abb., 478.

The above powers of amendment only reach the correction of ordinary defects. They do not extend to the curing of a failure to acquire jurisdiction. An order to allow a complaint to be filed after judgment, *nunc pro tunc*, in order to sustain service by publication, was accordingly decided to be invalid, in *Kendall* vs. *Washburn*, 14 How., 380. Nor do those powers extend to the amendment of a substantial defect, in the entry of judgment upon confession. *Allen* vs. *Smillie*, 12 How., 156; 1 Abb., 354.

Where one party has been allowed to amend, the court will be disposed to grant the same privilege to the other, though otherwise it might not have been permitted. *Hoxie* vs. *Cushman*, 7 L. O., 149.

Unless in those cases where the party has shown a clear case of unquestionable right, the decision of a judge allowing or refusing an amendment, either upon or after the trial, is a matter that rests entirely in discretion, and will not be reviewed on exception or appeal. *Roth* vs. *Schloss*, 6 Barb., 308; *Brown* vs. *McCune*, 5 Sandf., 224; *Phincle* vs. *Vaughan*, 12 Barb., 215; *Robbins* vs. *Richardson*, 2 Bosw., 248 (256); *Ford* vs. *David*, 1 Bosw., 569 (596). *Woodburn* vs. *Chamberlin*, 17 Barb., 446 (450); *St. John* vs. *Northrup*, 23 Barb., 25 (29); *Hunt* vs. *Hudson River Insurance Company*, 2 Duer, 481 (489); *Watson* vs. *Bailey*, 2 Duer, 509; *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362; *Garner* vs. *Hannah*, 6 Duer, 262 (275).

Although however, as a general rule, such allowance is discretionary, the refusal to exercise that discretion, on the ground of want of power, where that power exists, is error in law, and may be reviewed as such. *Russell* vs. *Conn*, 20 N. Y., 81. So also the undue exercise of the power may be reviewed. *Union Bank* vs. *Mott*, 19 How., 267.

§ 132. *Variances, when and when not Disregarded.*

It remains, before quitting the subject of amendment of pleadings, to notice those cases where a defect, which in strictness might necessitate an amendment, will nevertheless be disregarded on the trial; and also those, on the other hand, where such a defect, allowed to remain un-

corrected until that juncture, will be held fatal to the ulterior prosecution of the action.

The former class fall especially under section 176, providing that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party.

The latter is expressly provided for by section 171, providing that where the allegation of the cause of action or ground of defence to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the two previous sections, but of failure of proof.

(*a.*) Disregard of Variance.

Many of the questions and decisions bearing upon the present subdivision have, in effect, been anticipated in the last section of this work. The same considerations are applicable to both, and the difference in their application is a question rather of degree than of principle.

Neither course is applicable, where the variance is material, the test of materiality being that imposed by section 169. Where the party cannot bring himself within that test, and show that he has been actually misled to his prejudice upon the merits, one or the other will be applied. Where the objection is so ultra technical as to trench upon the frivolous, disregard will be the proper, where it has somewhat more of substance in it, amendment will constitute the more usual course; but the precise limits of distinction rest entirely in the discretion of the court.

In *Fox* vs. *Hunt*, 8 How., 12, it is laid down to be the correct practice on the circuit, to lay out of the case all irrelevant allegations, or immaterial issues, and to hold the parties to trial, on such as are left.

In *De Peyster* vs. *Wheeler*, 1 Sandf., 719; 1 C. R., 93, it was held that variances, not affecting the merits, which do not surprise the adverse party, and on which he ought not, in good faith, to have relied, will be disregarded on arguments at bar, without directing any amendment. If, however, the prevailing party deem an amendment prudent, he may apply for leave, by motion, after the argument, when the court will allow it, on such terms as may be just. It was further held, that, upon the trial of the cause, the court may, in their discretion, either order amendments in like manner, or may disregard the variance.

Where, however, the defect is one involving an insufficient statement of facts, the court will not disregard the objection, but will direct an amendment. *Vanderpoel* vs. *Tarbox*, 7 L. O., 150.

This provision of the Code is in no manner applicable to objections

taken by way of demurrer, but only to those cases in which issue has been joined on the merits. *Vide Vandenburgh* vs. *Van Valkenburgh*, 8 Barb., 217. In considering the latter, less strictness is required, than where the objection has been taken at the outset, and an opportunity allowed to amend. *Vide St. John* vs. *Northrup*, 23 Barb., 25 (30). See also *White* vs. *Spencer*, 4 Kern., 247. And the same rule holds good with respect to allegations deficient in certainty, the proper remedy as to which is a motion on that ground. *Seely* vs. *Engell*, 3 Kern., 542.

Before the supplemental measure of 1849, this section was held inapplicable to proceedings commenced before the Code. *Vide Diefendorf* vs. *Elwood*, 3 How., 285; 1 C. R., 42; *Denniston* vs. *Mudge*, 4 Barb., 243. Since that measure, however, and *a fortiori* since the amendment, in 1851, of section 459 of the Code, this is no longer the case, and these provisions are clearly retrospective. *Vandenburgh* vs. *Van Valkenburgh*, *supra*; *Milbank* vs *Dennistoun*, 1 Bosw., 246 (280); *Pearsoll* vs. *Fraser*, 14 Barb., 564.

The following decisions will show in what manner the rule has been ordinarily applied in practice.

In *Chapman* vs. *Carolin*, 3 Bosw., 456, an omission to state the time when a note was payable was allowed to be supplied, and the following general principles stated:

"When there is a variance between some of the allegations of a complaint only, and the proof, and nothing more appears, the court has no power to order a nonsuit, on the mere ground that such a variance, whatever it may be, is material. The only test of its materiality, is proof to be furnished by the defendant, that the variance has actually misled him to his prejudice, in maintaining his defence upon the merits. Where such proof is not furnished, the variance must be disregarded, and the pleadings may be amended to conform to the facts proved." See to the same effect *Cotheal* vs. *Tallmadge*, 1 E. D. Smith, 573; *Millbank* vs *Dennistoun*, 1 Bosw., 246 (280); *Barrich* vs. *Austin*, 21 Barb., 241 (243), and others of the decisions below cited. In one of them, *Catlin* vs. *Gunter*, 1 Kern., 368 (374); 10 How., 315, after referring to the sections of the Code in terms, the court continues: "These provisions introduce a principle unknown to the former practice, namely, that of determining this class of questions, not by the incoherence of the two statements upon their face, and hence inferring their effect upon the state of preparation of the party, but by proof *aliunde*, as to whether the party was misled to his prejudice by the incorrect statement. In this case the plaintiff did not offer any proof of the character suggested, nor did he even allege that he had been misled He put himself upon the old rule, &c." "If, then, the discrepancy was a vari-

ance, as defined by these provisions, it should have been regarded as immaterial."

In this latter case, the variance complained of was a difference between the actual proof, and the allegations of an usurious agreement set up in the answer. A new trial was granted, on the ground that it should have been disregarded. See also *Duel* vs. *Spence*, 1 Abb., 237. *Catlin* vs. *Gunter*, reverses the same case, 1 Duer, 253; 11 L. O., 201 (see also *Fay* vs *Grimsteed*, 10 Barb., 321), in which the old strictness of rule was held with respect to the defence of usury, and an amendment denied.

In *Pearsoll* vs. *Fraser*, 14 Barb., 564, the court considered it proper to disregard, even upon demurrer, defects in form, in the statement laying ground for enforcement of the defendant's responsibility, under an agreement there stated.

In *Harmony* vs. *Bingham*, 1 Duer, 209; affirmed, 2 Kern., 99, similar defects in mere form, were held to have been duly disregarded by the referee, as variances by which the defendant could not have been misled.

See also similar disregard of purely technical errors in *Wooster* vs. *Chamberlin*, 28 Barb., 602; *White* vs. *Spencer*, 4 Kern., 247; *Seeley* vs. *Engell*, 3 Kern., 542; *Cotheal* vs. *Talmadge*, 1 E. D. Smith, 573; *Beach* vs. *Tooker*, 10 How., 297; *Wright* vs. *Hooker*, 6 Seld., 51; *Cornell* vs. *Masten*, 35 Barb., 157.

A variance between allegation of delivery of goods to defendant, and proof of delivery to a third person to defendant's credit, was, after a full trial, disregarded on appeal, in *Briggs* vs. *Evans*, 1 E. D. Smith, 192. See also *Rogers* vs. *Verona*, 1 Bosw., 417.

So also was a variance, between a pleading alleging a sale of stock deposited, on a specific day, and non-accounting for the proceeds, and proof that such specific stock had been twice subsequently sold, and reinvested, but the proceeds of such last sale not accounted for. *Hall* vs. *Morrison*, 3 Bosw., 520.

So as to variance between an allegation of money loaned, and proof of money paid to the use of the defendant. *Parsons* vs. *Suydam*, 3 E. D. Smith, 276.

Or an averment of notice of non-payment of a check, and proof of facts excusing notice. *Purchase* vs. *Mattison*, 6 Duer, 587.

Or an averment of chattels being in the possession of the mortgagor on a specific date, and proof of possession being changed by deliveries to the mortgagee on that same day, there being a reasonable interpretation, *i. e.*, that of the possession of the mortgagor being subordinate, capable of reconciling the supposed discrepancy, and which ought, accordingly, to have been adopted at the trial. *Willis* vs. *Orser*, 6 Duer, 322.

Or a general averment, seeking to charge defendants as common carriers, and proof at the trial, of a special liability under a specific undertaking. *Richards* vs. *Westcott*, 1 Bosw., 589.

So, in like manner, a variance was disregarded between an averment that goods were the property of the plaintiff, and proof of his having a special property in them, by storage in his name, and at his risk, as consignee. *Gorum* vs. *Carey*, 1 Abb., 285.

So between an allegation of sole, and proof of joint liability, where no plea in abatement had been put in. *Carter* vs. *Hope*, 10 Barb., 180.

Or between an allegation of the removal of a force pump, mentioned in an application for insurance, and proof tendered of its non-existence. *McComber* vs. *The Granite Insurance Company*, 15 N. Y., 495.

An objection to proof of the docketing of a judgment, as not comprised within the terms of an allegation that it had been recovered, and was a lien upon property in question, was held to have been properly overruled in *Cady* vs. *Allen*, 22 Barb., 388.

A trifling misdescription of real property was disregarded in ejectment, in *St. John* vs. *Northrup*, 23 Barb., 25; *Russell* vs. *Conn*, 20 N. Y., 81. So also, in a case in which the question was collateral. *Underhill* vs. *The New York and Harlem Railroad Company*, 21 Barb., 489 (497).

So as to misdescription of a promissory note, alleged to be payable three months, and proved, on trial, as payable four months after date. *Trowbridge* vs. *Didier*, 4 Duer, 448. See likewise *Chapman* vs. *Carolin*, 3 Bosw., 456, before cited.

So, likewise, a variance between the pleading and the proof, as to the place at which goods were delivered to common carriers, or an omission to state, on the face of the former, restrictions forming part of the actual contract between the parties. *Newstadt* vs. *Adams*, 5 Duer, 43.

In an action for commissions, variances between an allegation of sale for a specific amount, and proof that that amount was larger, and also between an allegation of a special agreement for compensation, and proof of a *quantum meruit*, the special agreement not being proved, were, in like manner, disregarded in *Morgan* vs. *Mason*, 4 E. D. Smith, 636.

A variance between the contract as alleged, and as proved, was, in like manner, disregarded in *The Union India Rubber Company* vs. *Tomlinson*, 1 E. D. Smith, 364. So, likewise, as to an omission to allege part of a contract, and proof of it in the entire. *Cobb* vs. *West*, 4 Duer 38.

Proof of an agreement to insure, was held admissible under an allegation of actual insurance, in *First Baptist Church in Brooklyn* vs. *Brooklyn Fire Insurance Company*, 18 Barb., 69 (79).

A variance between an allegation of an absolute promise, and proof

of a conditional one fulfilled, was, in like manner, held as one that should be disregarded, in *Hart* vs. *Hudson*, 6 Duer, 294.

A variance between the allegation and proof of the date of giving notice to an insurance company, was held immaterial in *Hovey* vs. *The American Mutual Insurance Company*, 2 Duer, 554. See likewise *Belknap* vs. *Seeley*, 2 Duer, 570 (582); affirmed, 4 Kern., 143.

A variance, in some respects, between the allegation and the proof of fraudulent representations, was held to have been properly disregarded in *Zabriskie* vs. *Smith*, 3 Kern., 322. See generally, as to a trifling variance, between representations as alleged, and as proved, *Hawkins* vs. *Appleby*, 2 Sandf., 421.

A misnomer in the pleading may, in like manner, be held immaterial. See, as to a case of a suit by an individual banker, in a name importing a corporate character, *Bank of Havana* vs. *Magee*, 20 N. Y., 355. And as to the omission of one of the Christian names of a defendant, *Wolcott* vs. *Meech*, 22 Barb., 321. See however *Farnham* vs. *Hildreth*, 32 Barb., 277, holding that an essential misnomer, by statement of a wholly erroneous Christian name, is fatal, and that, where the defendant has not appeared, the objection may be taken at any time.

A variance as to the time of uttering a slander, was held wholly immaterial in *Potter* vs. *Thompson*, 22 Barb., 87.

A mere defect in the setting up of a sufficient defence was held to be immaterial in *Richards* vs. *Allen*, 3 E. D. Smith, 399 (408). See also *dictum* in *Kelsey* vs. *Western*, 2 Comst., 500 (507), there referred to, and cited below, in the next subdivision of this section.

Although allegations in the complaint may be defective, yet, if the deficiency be supplied by the pleadings or proofs of the defendant, the objection will be immaterial. *Bate* vs. *Graham*, 1 Kern., 237; *Belknap* vs. *Sealey*, 2 Duer, 570 (579); affirmed, 4 Kern., 143.

A defect of statement of essential facts in the complaint was held no ground for an appeal, where, after denial of a motion for a nonsuit, those facts were actually proved upon the trial. *Lounsbury* vs. *Purdy*, 18 N. Y., 515.

Proof of a contract made by two only, instead of by three defendants, as alleged, was admitted, and the third defendant discharged, in *Bonesteel* vs. *Vanderbilt*, 21 Barb., 26.

That the defendant applying is not affected by it, is a conclusive answer to an application, on the ground of variance. *Gordon* vs. *Sterling*, 13 How., 405 (408).

A want of statement of the venue in the complaint, was held to be disregardable on motion, in *Davison* vs. *Powell*, 13 How., 287.

In *Marquat* vs. *Marquat*, 2 Kern., 336, a failure to prove the case

as alleged, against the wife, joined as a party with her husband, was held no bar to a recovery being awarded, against the latter alone. By this decision, the stricter view taken by the majority of the court below, 7 How., 417, is overruled, and the decision reversed. See also *Brumskill* vs. *James*, 1 Kern., 294.

It was held in *Diblee* vs. *Mason*, 1 C. R., 37; 6 L. O., 363, that these provisions apply to pleadings only, and not to process, and that a mistake in the latter cannot be disregarded at the hearing, though the court may have power to direct an amendment, on motion.

See generally, as to disregard of defects of this nature on appeal, *Bennett* vs. *Judson*, 21 N. Y., 238; *Lounsbury* vs. *Purdy*, 18 N. Y., 515, above cited; *Pratt* vs. *Hudson River Railroad Company*, 21 N. Y., 305; *Clark* vs. *Dales*, 20 Barb., 42; *Cady* vs. *Allen*, 22 Barb., 308.

See also, as to disregard of variance between the plaintiff's proof and his bill of particulars, *Seaman* vs. *Low*, 4 Bosw., 337.

(*b.*) Variance, when Fatal.

It remains to consider those cases in which, under section 171, a variance between the proof and the allegation will not be disregarded.

The test, in these cases, is that imposed by the section itself. Whenever "the allegation of the cause of action or defence, to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the two last sections, but a failure of proof."

The rule is thus broadly stated by Jewett, J., in *Kelsey* vs. *Western*, 2 Comst., 500 (507): "When the pleading sets up a particular matter as the ground of action or of defence, and fails to present it as proved in some particular, so that there is strictly a variance between the pleading and the evidence, sections 169, 170, 171 of the Code, apply and provide for the case. But when, as in this case, there is a total want of any allegation in the pleading, of the subject-matter as a ground of action or of defence, the want of such allegation is not cured by the Code, so as to allow of a decree to be founded upon the proof without allegation."

Being of a strictly technical nature, this rule will not be indiscriminately or severely enforced, but only when the defects complained of are in themselves of an incurable nature. *Vide St. John* vs. *Northrup*, 23 Barb., 25 (30).

An objection of this, or the like description, will, therefore, be waived, unless taken at the trial. It will then be cured by verdict or judgment, and cannot be raised, under a general exception to the decision of the court. *Belknap* vs. *Seeley*, 4 Kern., 143; *Lounsbury* vs. *Purdy*, 18 N. Y., 515; *Phillips* vs. *Gorham*, 17 N. Y., 270 (275);

Clark vs. *Dales*, 20 Barb., 42 (65); *Elton* vs. *Markham*, 20 Barb., 343 (348); *Hunter* vs. *Hudson River Iron Machine Company*, 20 Barb., 493 (502); *Brown* vs. *Harmon*, 21 Barb., 508; *Dolsen* vs. *Arnold*, 10 How., 528 (530).

A fortiori, will it be waived by an express construction agreed to be given to the pleadings, and a voluntary submission of the question on that occasion. *Ogden* vs. *Coddington*, 2 E. D. Smith, 317.

And, when an amendment of the pleading, by which the variance will be cured, is admissible, it will be error in the judge not to grant it. *Russell* vs. *Conn*, 20 N. Y., 81.

In the following cases, however, the rule has been strictly applied:

Where a promissory note sued upon, appeared by the evidence to have been altered, by the addition of the signature of the payee as maker. *Chappell* vs. *Spencer*, 23 Barb., 584.

An omission to require the joinder of the purchaser of lands, sought to be reached by a creditor's bill, and the taking of a legal judgment for damages, in a suit of that nature, were both held fatal errors, and a new trial granted in *Sage* vs. *Mosher*, 28 Barb., 287.

Although the variance be of an amendable nature, yet, if the parties mispleading fail to ask for an amendment upon the trial, and allow the case to go up on appeal, a judgment that they have failed to substantiate their case will be sustained. *Gasper* vs. *Adams*, 28 Barb., 441. See also, as to continued *laches* of this description, *Egert* vs. *Wicker*, 10 How., 193.

An omission to aver a special statutory liability on the part of a railroad company, was held to debar a plaintiff from resorting to that ground of recovery, on the failure of his case against them, on their general liability as common carriers. *Hempstead* vs. *The New York Central Railroad Company*, 28 Barb., 485.

Where an agreement to submit to two arbitrators, and their umpire, was alleged, and the proof showed an agreement to submit to three arbitrators, the variance was held fatal, and that the complaint should have been dismissed. *Lyon* vs. *Blossom*, 4 Duer, 318.

Where the plaintiff sued the defendant in tort for the conversion of a draft, or of its proceeds, and the evidence showed a lawful receipt by the latter, it was held that the variance was fatal, and that a judgment *ex contractu* for the sum received could not be granted. *Walter* vs. *Bennett*, 16 N. Y., 250.

Where the plaintiff sued for a wrongful conversion, and the proof showed a mere breach of duty on the part of the defendant, the variance was held to be fatal. *Moore* vs. *McKibbin*, 33 Barb., 246.

Where all the material facts alleged by the plaintiff as the ground of his claim were denied and disproved, he was held not entitled to any judgment, though facts appeared upon the trial, constituting another,

but wholly inconsistent cause of action. *Salters* vs. *Genin*, 3 Bosw., 250; 7 Abb., 193. See also *Stearns* vs. *Tappin*, 5 Duer, 294 (303); and *Egert* vs. *Wicker*, 10 How., 193.

Where, too, the defence relied on at the trial, differed in its entire scope and meaning from that set up in the answer, the objection was held to be fatal, and that the court had no power to amend or disregard. *Texier* vs. *Gouin*, 5 Duer, 389; *Catlin* vs. *Hansen*, 1 Duer, 309. See also *Robbins* vs. *Richardson*, 2 Bosw., 248 (257).

Where the complaint averred a joint insurance and joint loss, and the proof showed a joint loss, but a several insurance, by one joint owner only, the variance was held to be fatal. *Burgher* vs. *Columbian Insurance Company of Philadelphia*, 17 Barb., 274.

Where accord and satisfaction were pleaded, but the proof failed to show the latter, it was held that, on the merits, the plaintiff could not recover. *Dolsen* vs. *Arnold*, 10 How., 528. The immediate question of variance was, however, not raised, the parties having tried and argued the case upon the merits (p. 530).

Where the complaint averred a sale and delivery to the defendant, but the proof showed a purchase by and a delivery to a third person for his own use, without any proof of a ratification by the defendant, the variance was held fatal. *Smith* vs. *Leland*, 2 Duer, 497. But not so, where the purchase was made by the defendant himself, though the goods were delivered to another. *Rogers* vs. *Verona*, 1 Bosw., 417.

In *Coan* vs. *Osgood*, 15 Barb., 583, where the defendants set up title in a third person, and license from him, as a justification in trespass, it was held that they could not change their ground at the trial, and show title in one of themselves.

In *Mann* vs. *Morewood*, 5 Sandf., 557, evidence of the alleged satisfaction of a debt by the delivery of stock, was held not to be receivable, in support of a simple allegation of over-payment, without specifying any particulars, and the complaint was dismissed accordingly.

In *Whittaker* vs. *Merrill*, 30 Barb., 389, where assignees sued for a conversion of property, subsequent to their assignment, proof of a previous conversion, under an attachment against the assignor, was held to be inadmissible, and the variance to be fatal, though a right of action for such conversion might pass under the assignment.

The doctrine held in *Diefendorf* vs. *Gage*, 7 Barb., 18, that, under an answer averring that property in question in the cause "was very poor, and of little value," proof could not be received, that such property was "worth nothing and of no value," seems overstrained.

An essential misnomer was held to be a fatal defect, and the objection one that could be raised at any time, in *Farnham* vs. *Hildreth*, 32 Barb., 277, above cited.

CHAPTER IV.

CORRECTION ON ADVERSE MOTION.

§ 133. *General Observations.*

To complete the consideration of the subject of pleadings, in a general as distinguished from a specific and individual point of view, it remains to advert, in the last place, to those remedies, by which the adverse party may obtain and enforce their correction, either by the excision of superfluous, or the more definite insertion of deficient statements.

Both are provided for by section 160.

The former as follows:

"If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby."

The latter, in this manner:

"And when the allegations in a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment."

These remedies affect, as will be seen, all pleadings indiscriminately, and the present is therefore the proper period for their treatment. The closely analogous proceedings by which sham and irrelevant answers and defences may be stricken out, on motion, or judgment moved for on a frivolous demurrer, answer, or reply (*vide* §§ 152–247) apply to responsive pleading only, and, as such, will be hereafter considered.

The analogy, too, is more apparent than real. This latter class of proceedings are essentially akin in their nature to demurrer. They go directly to the substance, not to the mode of statement; and, in impeaching a pleading, or a separate ground of defence stated in that pleading, they impeach it, not in part, but as a whole. The remedy sought is not its correction, but its total rejection; and, in those cases where the whole pleading is impeached, the judgment consequent on that rejection. Those under the section now under consideration are, on the contrary, essentially partial in their nature. They are directed strictly and solely, to deficiencies or superfluities in the pleader's mode of statement, not in the substance of the case stated. The moment too that the objection of irrelevancy applies wholly instead of partially to a responsive pleading, or to a separate defence stated in that pleading,

section 160 loses its operation. The defect becomes one of substance, and not of statement, and must be otherwise reached, either by demurrer or motion under section 152. That of insufficiency also is wholly beyond its reach. That defect can only be impeached by demurrer, or, in gross cases of responsive pleading, by a motion on the ground of frivolousness, under section 247.

(*a.*) WHEN MOTION ADMISSIBLE, AND WHEN NOT.

The general rules above stated, though clear in principle, and seemingly obvious in their application, have given rise to considerable discussion, in the course of their establishment and the definition of their limits.

One of the great points on which that discussion has turned, has been the question as to whether demurrer or motion is the more proper course of impeaching a pleading, drawn in disregard of the conditions imposed by sections 167 and 150; that different causes of action united in the same complaint, on the one hand, or different counter-claims or defences set forth in an answer, on the other, must, as to each, be "separately stated."

It has been held that a neglect of this description on the part of the pleader, affords grounds for demurrer, under subdivision 5 of section 144, "That several causes of action have been improperly united," and that this mode of procedure is not merely admissible but proper in such case. *Vide Getty* vs. *The Hudson River Railroad Company*, 8 How., 177; *Van Namee* vs. *Peoble*, 9 How., 198; *Strauss* vs. *Parker*, 9 How., 342; *Pike* vs. *Van Wormer*, 5 How., 171; *Durkee* vs. *The Saratoga and Washington Railroad Company*, 4 How., 246. See likewise, *Waller* vs. *Raskan*, 12 How., 28 (31); *Accome* vs. *The American Mineral Company*, 11 How., 24; *Winterson* vs. *Eighth Avenue Railroad Company*, 2 Hilt., 389.

This view is, however, abundantly overruled, and the contrary, *i. e.*, that a defect of this nature can only be reached by motion, established. Demurrer for misjoinder is only applicable, where the causes of action sought to be joined, differ in character and substance, not to a case of mere confusion of statement. *Vide Dorman* vs. *Kellam*, 14 How., 184; 4 Abb., 202; *Moore* vs. *Smith*, 10 How., 361; *Lattlin* vs. *McCarty*, 17 How., 239; 8 Abb., 225; *Gooding* vs. *McAllister*, 9 How., 123; *Robinson* vs. *Judd*, 9 How., 378; *Peckham* vs. *Smith*, 9 How., 436; *Woodbury* vs. *Sackrider*, 2 Abb., 402; *Hess* vs. *Buffalo and Niagara Falls Railroad Company*, 29 Barb., 391; *Badger* vs. *Benedict*, 1 Hilt., 414; 4 Abb., 176; *Harsen* vs. *Bayaud*, 5 Duer, 656; *Lippincott* vs. *Goodwin*, 8 How., 242.

The proper form of motion in such case would appear to be, that the

party guilty of mispleader be compelled to elect on which cause of action or ground of defence he will proceed, and that the rest of his pleading be stricken out as redundant. *Benedict* vs. *Seymour*, 6 How., 298; *Waller* vs. *Raskan*, 12 How., 28; *Welles* vs. *Webster*, 9 How., 251; *Gooding* vs. *McAllister*, 9 How., 123; *Robinson* vs. *Judd*, 9 How., 378 (382); *Dorman* vs. *Kellum*, 14 How., 184; 4 Abb., 202. See also *Hess* vs. *Buffalo and Niagara Falls Railroad Company*, 29 Barb., 301. A motion to make the pleading more definite and certain may also, in such case, be admissible. *Vide Harsen* vs. *Bayand*, 5 Duer, 656; *Wood* vs. *Anthony*, 9 How., 78. Or even a motion to set aside the complaint altogether. *Vide Robinson* vs. *Judd*, *supra*, and *House* vs. *Cooper*, 30 Barb., 157; 16 How., 292.

The objection, on the other hand, of the undue division of a single cause of action into numerous counts, is equally unattainable by demurrer. *Vide Hillman* vs. *Hillman*, 14 How., 456. So likewise as to an alleged omission in statement, not affecting the substance of the plaintiff's rights. *Vide Welles* vs. *Webster*, 9 How., 251.

Election between inconsistent causes of action is, in like manner, only enforceable by motion. *Young* vs. *Edwards*, 11 How., 201; *Smith* vs. *Hallock*, 8 How., 73. Departure from the complaint in a reply is also only available by motion, and not by demurrer. *White* vs. *Joy*, 3 Kern., 83 (90). Nor will demurrer lie, in respect of any superfluity of allegation, or for immaterial matter. A motion under the section now under consideration, is the only proper course. *Vide Smith* vs. *Greenin*, 2 Sandf., 702; *Watson* vs. *Husson*, 1 Duer, 242; *Meyer* vs. *Van Collem*, 28 Barb., 230; 7 Abb., 222; *Esmond* vs. *Van Benschoten*, 5 How., 44; *Fry* vs. *Bennett*, 5 Sandf., 54; 9 L. O., 330; 1 C. R. (N. S.), 238; *Bank of British North America* vs. *Suydam*, 6 How., 379; 1 C. R. (N. S.), 325; *Gray* vs. *Nellis*, 6 How., 290. See likewise, as to matter in an answer, pleaded by way of counter-claim, but inadmissible as such, *Putnam* vs. *De Forest*, 8 How., 146; *Quin* vs. *Chambers*, 1 Duer, 673; 11 L. O., 155. The objection on the ground of uncertainty or indefiniteness of statement, is in the same manner only remediable by motion. It cannot be reached by demurrer. *Vide Smith* vs. *Greenin*, and *Fry* vs. *Bennett*, above cited. See also, *Howell* vs. *Fraser*, 6 How., 221; 1 C. R. (N. S.), 270; *Seeley* vs. *Engell*, 3 Kern., 542; *The People* vs. *Ryder*, 2 Kern., 433 (440); *Welles* vs. *Webster*, 9 How., 251 (253); *Martin* vs. *Kanouse*, 2 Abb., 327; 11 How., 567; *Bement* vs. *Wisner*, 1 C. R. (N. S.), 143; *Richards* vs. *Edick*, 17 Barb., 260; *Atwell* vs. *Leroy*, 15 How., 227; 4 Abb., 438; *Harsen* vs. *Bayaud*, 5 Duer, 656; *Spies* vs. *The Accessory Transit Company*, 5 Duer, 662; *Graham* vs. *Camman*, 5 Duer, 697; 13 How., 360; *Merwin* vs. *Hamilton*, 6 Duer, 244; *Prindle* vs. *Carruthers*, 15 N. Y., 425; *Wall* vs. *The Buffalo*

Water Works Company, 18 N. Y., 119; *Séré* vs. *Coit*, 5 Abb., 481; *Cheesebrough* vs. *New York and Erie Railroad Company*, 26 Barb., 9; 13 How., 557; *Cheney* vs. *Fisk*, 22 How., 236; *Lund* vs. *Seamen's Savings Bank*, 23 How., 258.

Nor can the objection of redundancy be reached otherwise than by motion. *Roeder* vs. *Ormsby*, 22 How., 270; 13 Abb., 334.

The converse of the above proposition holds, however, equally good, and in all cases where the pleading itself, or any separate statement of cause of action or ground of defence therein, is irrelevant as a whole, and not in part only, the proper mode of raising the question is by demurrer, and not by motion under this section. *White* vs. *Kidd*, 4 How., 68; *Fabbricotti* vs. *Launitz*, 3 Sandf., 743; 1 C. R. (N. S.), 121; *Benedict* vs. *Dake*, 6 How., 352; *Nichols* vs. *Jones*, 6 How., 355. In an unreported case of *Belden* vs. *Knowlton*, in the Superior Court, the same course was taken, and allegations, refused to be stricken out upon motion, were afterwards held bad upon demurrer. See likewise *Harlow* vs. *Hamilton*, 6 How., 475; *Budd* vs. *Bingham*, 18 Barb., 494; *Blake* vs. *Eldred*, 18 How., 240; and *Gould* vs. *Horner*, 1 C. R. (N. S.), 356; 12 Barb., 601. See likewise, as to a reply framed on the principle of the old common counts, *Stewart* vs. *Travis*, 10 How., 148. The same rule was applied to a motion on the ground of frivolousness, *Vide Scovill* vs. *Howell*, 2 C. R., 48.

It will be found generally stated in *Anon.*, 2 Sandf., 682; *Corlies* vs. *Delaplaine*, 2 C. R., 117; 2 Sandf., 680; and *Bedell* vs. *Steckels*, 4 How., 432; 3 C. R., 105. If there is any reasonable doubt about the matter complained of being pertinent or the reverse, the party should be left to his demurrer. See also, *Littlejohn* vs. *Greeley*, 22 How., 345; 13 Abb., 311.

§ 134. *Objections Considered.*

(*a.*) Irrelevancy or Redundancy.

As might naturally have been expected, the exact limits of this class of objections, have been the subject of considerable difference of opinion, some judges inclining to a more liberal, others to a stricter view of the subject.

Before entering into the detailed consideration of the decisions in question, a few preliminary observations will not be out of place.

In the first place, the distinction between irrelevancy and redundancy must not be lost sight of. "The terms are not equivalent. Matter which is irrelevant, it is true, is also redundant; but the converse is by no means true. A needless repetition of material averments is redundancy, although the facts averred, so far from being irrelevant,

may constitute the whole cause of action." *Bowman* vs. *Sheldon*, 5 Sandf., 657 (660); 10 L. O., 338.

In *Blake* vs. *Eldred*, 18 How., 240 (242), it was considered that the section now in question, was intended as a substitute for exceptions for impertinence, as allowed under the former chancery practice. See also, *Carpenter* vs. *West*, 5 How., 53; *Rensselaer and Washington Plank Road Company* vs. *Wetsel*, 6 How., 68; *Harlow* vs. *Hamilton*, 6 How., 475; *Benedict* vs. *Dake*, 6 How., 352; *Burget* vs. *Bissell*, 5 How., 192; 3 C. R., 215.

A motion of this description appears to be admissible, for the expunging of matter as scandalous, being in the nature of the former exception for scandal. The power of the court to strike out matter of this nature "is certainly not affected by the provisions of the Code; it is essential to the due administration of justice, and to the protection of the character and feelings of suitors." *Vide Bowman* vs. *Sheldon*, *supra*. See also *Carpenter* vs. *West*, 5 How., 53, in which case relief of this nature was granted.

It may be convenient, with a view to the eliciting some few dominant principles, in order to assist at arriving at some definite conclusion on the subject, to consider the questions of irrelevancy or redundancy, first individually, and then in connection.

(*b.*) Irrelevancy.

One grand test by which the question of the irrelevancy or non-irrelevancy of an allegation may be tried, is as to whether that allegation does or does not constitute, or assist in constituting, a material cause of action or ground of defence. "If it can in any measure be made the subject of a material issue, it has a right to be found in the pleadings. If not, it ought not to be there." *Williams* vs. *Hayes*, 5 How., 470; 1 C. R. (N. S)., 148. See also, *Ingersoll* vs. *Ingersoll*, 1 C. R., 102; *Rensselaer and Washington Plank Road Company* vs. *Wetsel*, 6 How., 68; *Stewart* vs. *Bouton*, 6 How., 71; 9 L. O., 353; 1 C. R. (N. S.), 404; *Herkimer County Mutual Insurance Company* vs. *Fuller*, 7 How., 210; *Harlow* vs. *Hamilton*, 6 How., 475; *Martin* vs. *Kanouse*, 2 Abb., 390; *Edgerton* vs. *Smith*, 3 Duer, 614. See also collaterally, *Newman* vs. *Otto*, 4 Sandf., 668; *Connoss* vs. *Mier*, 2 E. D. Smith, 314; *Arrangois* vs. *Frazer*, 2 Hilt., 244; *Dovan* vs. *Dinsmore*, 33 Barb., 86; 20 How., 503.

In *Martin* vs. *Kanouse*, 2 Abb., 330, this principle is approved, but extended, to the effect that matter affecting the question of the relief to be granted in the suit, is also material, and has a right to be inserted. See *Howard* vs. *Tiffany*, 3 Sandf., 695; 1 C. R. (N. S.), 99;

In *Root* vs. *Foster*, 9 How., 37, this principle is further extended to allegations, material to the question of damages.

In *Averill* vs. *Taylor*, 5 How., 476, a still more liberal view was taken, and it was held that no part of a pleading ought to be stricken out, if it can in any event become material. See likewise, to a similar effect, *Follett* vs. *Jewett*, 11 L. O., 193; and *Hynds* vs. *Griswold*, 4 How., 69; seeming to hold that any fact material for a party to prove on the trial, may be alleged by him in his pleading, and will not be irrelevant.

In *Averill* vs. *Taylor*, a prayer for relief in an answer was refused to be stricken out, on the ground that the plaintiff could not be prejudiced by it, as it raised no issue. This view, however, has scarcely been sustained to its full extent. In *Lamoureux* vs. *The Atlantic Mutual Insurance Company*, 3 Duer, 660, such portions of a prayer for relief, as made that prayer hypothetical, were ordered to be stricken out. In *Durant* vs. *Gardner*, 19 How., 94; 10 Abb., 445, demands for alternative judgments, and a prayer for general relief, superadded to a demand of judgment on a money demand, were likewise stricken out. See also *Meyer* vs. *Van Collem*, 28 Barb., 230; 7 Abb., 222; *Lord* vs. *Vreeland*, 13 Abb., 195.

In *Fabbricotti* vs. *Launitz*, 3 Sandf., 743; 1 C. R. (N. S.), 121, irrelevant matter is defined to be, that "which has no bearing on the subject of the controversy, and cannot affect the decision of the court." See, also, *Bright* vs. *Currie*, 10 L. O., 104; 5 Sandf., 433.

An allegation that a party had unreasonably refused to make partition by deed, with a view to charge him with costs, was held to be irrelevant in *McGowan* vs. *Morrow*, 3 C. R., 9.

In *Moffatt* vs. *Pratt*, 12 How., 48, matter grossly immaterial, and obviously designed for a different purpose than that of mere pleading, was stricken out, part of it as irrelevant.

In *Edgerton* vs. *Smith*, 3 Duer, 614, part of an answer, merely denying the receipt of notice of protest, was stricken out as irrelevant, and as tendering a wholly immaterial issue. See also *Arrangois* vs. *Fraser*, 2 Hilt., 244, above referred to.

The addition of a second cause of defence, inconsistent with the first, was held not to render the former irrelevant, and a motion on that ground was denied, in *Townsend* vs. *Platt*, 3 Abb., 323.

An allegation in slander, evidence in proof of which, if tendered, would have been clearly inadmissible, was stricken out as irrelevant, in *Van Benschoten* vs. *Yaple*, 13 How., 97. See also *Ross* vs. *Brooks*, 4 E. D. Smith, 644. See generally, as to the striking out of matter, sham and irrelevant in its nature, *The People* vs. *McCumber*, 27 Barb., 632.

A liberal view is taken upon the subject of irrelevancy, and the prin-

ciple laid down that an allegation of facts which the plaintiff would be allowed to prove at the trial, ought to be permitted to stand, in *Deyo* vs. *Brundage*, 13 How., 221. See also *Blaisdell* vs. *Raymond*, 4 Abb., 446; 14 How., 265.

In *Butler* vs. *Mason*, 16 How., 546; 5 Abb., 40, matter inserted in anticipation of a probable plea of the statute of limitations, was held irrelevant. See also *Sands* vs. *St. John*, 23 How., 140. In *Bracket* vs. *Wilkinson*, however, 13 How., 102, it was held that a plaintiff was at liberty to state his case in an equitable form, so as to anticipate a probable defence of payment, and a motion to strike out as impertinent, refused. See, however, *Stone* vs. *De Puga*, 4 Sandf., 681, holding matter in anticipation not properly pleadable in a common-law action.

In *Cheesebrough* vs. *The New York and Erie Railroad Company*, 26 Barb., 9; 15 How., 557, allegations of an agreement to contract, merged in a subsequent contract entered into upon its basis, were ordered to be stricken out.

The view taken in *Herr* vs. *Bamberg*, 10 How., 128, that matter not sufficient to constitute or tend to constitute a defence, by way of justification, in slander, must be stricken out, even when pleaded in mitigation only, seems clearly untenable. *Vide Bush* vs. *Prosser*, 1 Kern., 347. See also *Heaton* vs. *Wright*, 10 How., 79, where such a motion was denied.

New matter in an answer, which was palpably no defence, either total or partial, and which could not be pleaded by way of counterclaim, was stricken out as irrelevant, in *Kurtz* vs. *McGuire*, 5 Duer, 660. See also, as to matter wholly inadmissible by way of defence, *O'Brien* vs. *Brietenbach*, 1 Hilt., 304.

The statement by answer, of a defect of parties, apparent on the face of the complaint, was held irrelevant, as being waived by omission to demur, in *Gassett* vs. *Crocker*, 10 Abb., 133.

Averments of fraud, in an action sounding in contract, are also clearly irrelevant, and will be stricken out. *Lee* vs. *Elias*, 3 Sandf., 736; 1 C. R. (N. S.), 116; *Sellar* vs. *Sage*, 12 How., 531; *Same case*, 13 How., 230. See also, on the general principle, *Corwin* vs. *Freeland*, 2 Seld., 560; reversing 6 How., 241; *Barker* vs. *Russell*, 11 Barb., 303; 1 C. R. (N. S.), 57; reversing 1 C. R. (N. S.), 5; *Secor* vs. *Roome*, 2 C. R., 1; *Cheney* vs. *Garbutt*, 5 How., 467; 1 C. R. (N. S.), 166; *Masten* vs. *Scovill*, 6 How., 315; *Field* vs. *Morse*, 7 How., 12; *Same case*, 8 How., 47; also, as to a reply, *Brown* vs. *McCune*, 5 Sandf., 224; *Rider* vs. *Whitlock*, 12 How., 208; *Union Bank* vs. *Mott*, 6 Abb., 315. By this series of decisions, *Barber* vs. *Hubbard*, 3 C. R., 156, and *Gridley* vs. *McCumber*, 5 How., 414; 3 C. R., 211, are clearly overruled.

This rule does not, of course, apply to an action brought as in tort, where allegations of this nature necessarily form part of the cause of

action, and, as such, are clearly admissible. See *Benedict* vs. *Dake*, 6 How., 352 (354); *Republic of Mexico* vs. *Arrangois*, 11 How., 1, and *Masten* vs. *Scovill*, 6 How., 315.

Although a defence may not be *primâ facie* sustainable, it does not necessarily follow that it can be stricken out as irrelevant. *Hill* vs. *McCarthy*, 3 C. R., 49.

Matter inserted merely for the purpose of aiding the plaintiff to obtain an injunction, was considered irrelevant, in *Putnam* vs. *Putnam*, 2 C. R., 64. The matter complained of seems, however, to have been clearly probative, in great part at least, if not entirely. There can be no doubt that matter tending to show the title of a plaintiff to relief by injunction, will, if properly alleged, be admissible in a suit for that purpose. *Vide Howard* vs. *Tiffany*, 3 Sandf., 695; 1 C. R. (N. S.), 99; *Wooden* vs. *Waffle*, 6 How., 145; 1 C. R. (N. S.), 392. See likewise *Martin* vs. *Kanouse*, 2 Abb., 330, above cited.

Where a party himself tenders immaterial allegations, he cannot move to strike out his adversary's answer to them as immaterial. *King* vs. *The Utica Insurance Company*, 4 How., 485. See also *Parshall* vs. *Tillou*, 13 How., 7; *Dovan* vs. *Dinsmore*, 33 Barb., 86; 20 How., 503.

Portions of a complaint, inconsistent with the summons might, it has been held, be stricken out for irrelevancy. *Campbell* vs. *Wright*, 21 How., 9. But, in a responsive pleading, inconsistency is no ground for striking out a portion. *Smith* vs. *Wells*, 20 How., 158. See also cases cited in a subsequent chapter, under the head of *Answer*. An allegation, wholly contradictory to admitted facts, was however stricken out in *Shoe and Leather Bank* vs. *Camp*, 21 How., 443; 13 Abb., 87, note.

(*c.*) Redundancy.

This defect, as distinguished from that of irrelevancy, consists in the insertion of matters, pertinent to the case, but superfluous or impertinent, as regards the immediate purposes for which a pleading is designed, either by undue repetition, prolixity of statement, or insertion of collateral or probative matter.

A motion for this purpose has, in fact, its ultimate basis in the prohibitions of "unnecessary repetition" in a complaint, as contained in section 142, and of "repetition" in an answer or reply, as contained in sections 149 and 153.

Statements of probative matter will, as a general rule, be stricken out as redundant, under the broad principle laid down in the first chapter of this book, that facts, and not the evidence of facts, form alone the proper subject of pleading, of whatever nature. See above section 122, and decisions there cited.

In motions of this description, whether the pleading be legal or equita-

ble, the same general principle will be strictly and indiscriminately applied. In either of them, mere statements of evidence, as contradistinguished from facts, will equally be stricken out. See, as to the application of this rule in common-law actions, *Stone* vs. *De Puga*, 4 Sandf., 681; *Lecomte* vs. *Jerome*, 11 L. O., 126; *Floyd* vs. *Dearborn*, 2 C. R., 17; *Root* vs. *Harris*, 12 Abb., 446. In suits in equity, *Putnam* vs. *Putnam*, 2 C. R., 64; *Wooden* vs. *Waffle*, 6 How., 145; 1 C. R. (N. S.), 392; *Howard* vs. *Tiffany*, 3 Sandf., 695; 1 C. R. (N. S.), 99; *Rensselaer and Washington Plank Road Company* vs. *Wetsel*, 6 How., 68. The greater latitude of averment in matters of substance, permitted in the latter class of actions, as contradistinguished from the former, will not, as a general rule, be permitted to interfere with that application. See, however, *Rochester City Bank* vs. *Suydam*, and *Burget* vs. *Bissell*, below cited.

The application of the rule is further evidenced in *Shaw* vs. *Jayne*, 4 How., 119; 2 C. R., 67, where a long statement of facts and circumstances was stricken out as redundant, in a complaint for false imprisonment. See likewise *Radde* vs. *Ruckgaber*, 3 Duer, 684. Also by the striking out of a long history, embracing the evidence relied on to sustain a defence of alleged fraud, in *Knowles* vs. *Gee*, 4 How., 317. The chancery rules of pleading in this respect are, on the contrary, applied to a very liberal extent, to a complaint or statement of defence of a clearly equitable nature, in *The Rochester City Bank* vs. *Suydam*, 5 How., 216, and *Burget* vs. *Bissell*, 5 How., 192; 3 C. R., 215.

A pleading, obnoxious to the objection that several causes of action or grounds of defence are mixed up in the same general allegation, instead of being separately stated, is, as above shown, impeachable by a motion of this nature, the relief sought being that the party be compelled to elect, on which cause or ground he will rely, and that the rest of such pleading be stricken out as redundant. See the last previous section, and *Benedict* vs. *Seymour*; *Waller* vs. *Raskan*; *Willis* vs. *Webster*; *Gooding* vs. *McAllister*; *Robinson* vs. *Judd*; *Dorman* vs. *Kellam*; *Hess* vs. *Buffalo and Niagara Falls Railroad Company*; and *Lippincott* vs. *Goodwin*, there cited.

A motion of the same description will lie, to compel an election by the plaintiff between inconsistent causes of action. *Smith* vs. *Hallock*, 8 How., 73.

As regards inconsistent defences, however, the rule is not so strict, provided only they be separately stated. See this subject more fully considered hereafter, under the head of *Answer*.

Allegations in slander, averring a repetition of the offence previously alleged, and of other similar words not specifically stated, were held liable to a motion of this description, in *Gray* vs. *Nellis*, 6 How., 290.

In *Dollner* vs. *Gibson*, 3 C. R., 153; 9 L. O., 77, the rule was overstrictly applied, and an averment of facts as they actually happened, instead of according to their legal effect, was stricken out. This case cannot, however, be considered as of authority, and is indeed stated to have been reversed. See *per contra*, *St. John* vs. *Griffith*, 1 Abb., 39.

Any matter, not involving a statement of fact, as, for instance, a series of pretences and charges, according to the old chancery system, is clearly redundant, and will be stricken out. *Clark* vs. *Harwood*, 8 How., 470. So also, matter stated by way of argument only, is clearly redundant. *Gould* vs. *Williams*, 9 How., 51.

Where, too, any portion of a pleading is unnecessary, as, for instance, where matter is stated in reply to an answer not constituting a counterclaim, it will be held redundant and stricken out. *Putnam* vs. *De Forest*, 8 How., 146. See also *Quin* vs. *Chambers*, 1 Duer, 673; 11 L. O., 155.

The statement of the same matter in different counts, according to the old common-law practice, is no longer admissible, and, where this mode of allegation is employed, all of them, except one, will be stricken out as redundant, the party being generally put to his election. *Stockbridge Iron Company* vs. *Mellen*, 5 How., 439; *Blanchard* vs. *Strait*, 8 How., 83; *Wood* vs. *Anthony*, 9 How., 78; *Sipperly* vs. *The Troy and Boston Railroad Company*, 9 How., 83; *Dows* vs. *Hotchkiss*, 10 L. O., 281; *Churchill* vs. *Churchill*, 9 How., 552; *Fern* vs. *Vanderbilt*, 13 Abb., 72; *Higgins* vs. *Thomas*, 13 Abb., 72, note; *Lackey* vs. *Vanderbilt*, 10 How., 155; *Dunning* vs. *Thomas*, 11 How., 281; *Dickins* vs. *The New York Central Railroad Company*, 13 How., 228; *Whittier* vs. *Bates*, 2 Abb., 477; and *Ford* vs. *Mattice*, 14 How., 91, where it is characterized as "unnecessary repetition." See also on demurrer, *St. John* vs. *Pierce*, 22 Barb., 362. In *Adams* vs. *Holly*, 12 How., 326, where the complaint would clearly have been open to this objection, it does not seem to have been attacked on this ground.

See likewise, as to a pleading containing multifarious matter stated in the same count, being open to the same description of motion, *Cheney* vs. *Fisk*, 22 How., 236.

The same rule is applied to the statement of hypothetical defences in *Hamilton* vs. *Hough*, 13 How., 14. See also, *Wies* vs. *Fanning*, 9 How., 543.

The above principle is somewhat qualified, and a complaint, stating the same cause of action in two different forms, sustained, in *Jones* vs. *Palmer*, 1 Abb., 442. It is, however, stated that such an allowance should be made with great caution, and only where it is very clear that the nature of the case renders it proper and necessary, to protect the rights of the plaintiff, and to secure him against the danger of a non-

suit on the trial. The case is, therefore, clearly of an exceptional nature. See likewise, as to similar statements, in a reply to an answer obnoxious to the same objection, *Stewart* vs. *Travis*, 10 How., 148.

In *Birdseye* vs. *Smith*, 32 Barb., 217, a complaint, containing two separate counts upon the same instrument, was sustained, the causes of action thus stated being separate and distinct in their nature.

A joint answer by two parties severally liable, but verified by one only, was held to be void, as to the party not swearing to it, and stricken out, so far as regarded his defence. *Andrews* vs. *Storms*, 5 Sandf., 609.

The words, "as plaintiff is informed and believes," were held to be redundant, and stricken out of an answer, in *Truscott* vs. *Dole*, 7 How., 221, it being laid down, that all allegations in an answer must be positively made, the form of affidavit of verification being a sufficient qualification, where made on information and belief. See, similar views in *Dollner* vs. *Gibson*, above cited. Whether this doctrine is sound, when carried to its full extent, is very doubtful. In a modified sense, however, it is highly desirable that, whenever an allegation can be positively made, that form of expression should be used.

Matter in mere mitigation of a recovery, and not constituting an affirmative defence to the plaintiff's case, is clearly redundant, and will be stricken out, save only in cases of libel and slander, under the special authority conferred by section 165. *Smith* vs. *Waite*, 7 How., 227; *Roe* vs. *Rogers*, 8 How., 356. See also, *Barnes* vs. *Willett*, 35 Barb., 514; 12 Abb., 448.

In ejectment, a detailed statement of the plaintiff's title is redundant, and may be stricken out. *Warner* vs. *Nelligar*, 12 How., 402.

The motion in that case was, however, somewhat unwillingly granted, on the ground that the prolixity complained of was trifling, and not calculated to be injurious to the defendant. See also, as to the disregard of trifling redundancies, *Carpenter* vs. *West*, 5 How., 53; *Williams* vs. *Hayes*, 5 How., 470; 1 C. R. (N. S.), 148; *Clark* vs. *Harwood*, 8 How., 470.

It has even been held that undue prolixity will not, of necessity, render a pleading redundant. *Warren* vs. *Struller*, 11 L. O., 94. See also, collaterally, *Johnson* vs. *Snyder*, 7 How., 395. The doctrine in the former case seems, however, to be strained too far, and the distinction between constitutive and probative facts to have been practically lost sight of.

Where the answer, taken as a whole, contained no defence whatever, a motion to impeach it, on the ground of redundancy, was held inadmissible, the plaintiff's remedy being to attack it as a whole. *Harlow* vs. *Hamilton*, 6 How., 475.

Unnecessary allegations, as to the mode of an alleged conversion, were stricken out as redundant, in *Moffatt* vs. *Pratt*, 12 How., 48.

A party who has himself made distinct though immaterial allegations, cannot impeach his adversary's pleadings in answer to them for redundancy. *King* vs. *Utica Insurance Company*, 6 How., 485. See also, *Parshall* vs. *Tillou*, 13 How., 7.

Nor can he do so with reference to facts omitted to be averred by himself, but necessary to be alleged by the adverse party. *Lord* vs. *Cheeseborough*, 4 Sandf., 696; 1 C. R. (N. S.), 322.

(*d.*) As to both Objections, Generally Considered.

Motions of this description being, except in extreme cases, of a strictly technical nature, the courts have generally shown a disposition rather to discourage them than the reverse. See *St. John* vs. *Griffith*, 1 Abb., 39. Especially has this view been held, on the ground that full force must be given in the construction of the section to the word "aggrieved," and that a party, before he can sustain a motion of this description, must show that he is actually prejudiced, by the continuance of the matter impeached in the adverse pleading. *Vide White* vs. *Kidd*, 4 How., 68; *Hynds* vs. *Griswold*, 4 How., 69; *Bedell* vs. *Steckels*, 4 How., 432; 3 C. R., 105; *Burget* vs. *Bissell*, 5 How., 192; 3 C. R., 215; *The Rochester City Bank* vs. *Suydam*, 5 How., 216; *Denithorne* vs. *Denithorne*, 15 How., 232; *Molony* vs. *Dows*, 15 How., 261; *Hollenbeck* vs. *Clow*, 9 How., 289 (292); *Martin* vs. *Kanouse*, 2 Abb., 390; *Brockleman* vs. *Brandt*, 10 Abb., 141; *Root* vs. *Foster*, 9 How., 37.

In *Bedell* vs. *Steckels* it is held, further, that the rule to be acted upon in these cases, should be in analogy to that of the old Supreme Court, in relation to frivolous demurrers; and that, therefore, in all cases where there was any question, or ground for argument about the matter being irrelevant or not, the application should be refused. See also *Littlejohn* vs. *Greeley*, 22 How., 345; 13 Abb., 311.

In *Follett* vs. *Jewett*, 11 L. O., 193, the rule is also laid down that, unless it is clear that no evidence can properly be received under the allegations objected to, they should be retained until the trial. See also *Blaisdell* vs. *Raymond*, 14 How., 265; 4 Abb., 446; and *Deyo* vs. *Brundage*, 13 How., 221.

That the plaintiff should be allowed full latitude in the mode of stating his case, especially in equity, and even to the extent of anticipating a supposed defence, is maintained in *Bracket* vs. *Wilkinson*, 13 How., 102.

The tendency of the court, as regards these motions, was shown in *Whitney* vs. *Waterman*, 4 How., 313, holding that an order leaving in immaterial matter was not appealable, though an order striking it out

might be so, if made to appear that such matter involved the merits. See also *Otis* vs. *Ross*, 8 How., 193 (195); 11 L. O., 343; *Bedell* vs. *Steckels*, 4 How., 432; 3 C. R., 105.

The above doctrine has, however, been somewhat qualified in some few cases. In *Carpenter* vs. *West*, 5 How., 53, thus: "My own impressions are," says the learned judge, "that, as to scandalous and impertinent, irrelevant, and redundant matter, the Code has not in any respect changed the former practice in equity cases." "Its effect upon what, before the Code, would have been cases at law, is not now under consideration. If this view is correct, the adverse party may always be considered aggrieved by scandalous, irrelevant, impertinent, and redundant matter, in a pleading. I think one may be considered aggrieved by the interpolation of matter into the pleadings, in a cause in which he is a party, foreign to the case; and he always had a right to have the record expurgated, for that reason, without reference to the question of costs."

In *Williams* vs. *Hayes*, 5 How., 470; 1 C. R., (N. S.), 148, the above views, and the qualification of the doctrine held in *Hynds* vs. *Griswold*, which they involve, were assented to by the learned judge who pronounced that decision. "It is not every unnecessary expression, or redundant sentence which should be expunged on motion. But, where entire statements are introduced, upon which no material issue can be taken, the opposite party may be 'aggrieved' by allowing them to remain in the pleading. If not answered, it may be claimed that such allegations are admitted, and, if denied, the record is embarrassed with immaterial issues. In such cases, it is the right of the adverse party to have the matter improperly inserted in the pleading removed, so that the record, when complete, shall present nothing but the issuable facts in the case. This I understand to be the true spirit and general policy of the system of pleading prescribed by the Code."

In *Isaac* vs. *Velloman* also, 3 Abb., 464, a similar qualification is made, and declared to be the view of the Court of Common Pleas. "A party is aggrieved, if called upon to answer an irrelevant or redundant statement, and thus to create issues which the rules of pleading do not encourage or sustain. That imposes upon him a legal obligation, by a system of pleading which does not otherwise exist, and he is aggrieved by it. Every infraction of a legal right is a grievance, however made, and unless the legislature intended by the word 'aggrieved' some bodily or personal inconvenience, injury, or suffering, in addition thereto, that grievance is enough to justify the courts in expunging the irrelevant matter."

There can be little doubt but that, to the extent to which they go, these qualifications are sound. They leave the matter, however, sub-

stantially very much where it stood before, as regards the extended discretion which the judiciary are entitled, and have been accustomed, to exercise in such cases; and as regards the necessity of an objection of this description being substantial, and not merely formal or trifling in its nature.

In *Smith* vs. *Brown*, 6 How., 383, a motion to strike out portions of a demurrer, as irrelevant and redundant, was denied, and it was considered that the remedy under section 160 was not properly applicable to that description of pleading. See also *Smith* vs. *Greenin*, 2 Sandf., 702. In connection with this view, it may be observed that "repetition" is not prohibited by the Code, as regards the framing of a demurrer, as in the case of other pleadings. All that is required is, on the contrary, a distinct specification. See section 145.

In *White* vs. *Joy*, 3 Kern., 83 (90), it was held that a reply was impeachable by motion, in respect of a departure, by insertion of new matter, "inconsistent with the complaint." See section 153.

§ 135. *Uncertainty.*

A motion on this ground is admissible under section 160—

"When the allegations in a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent."

The object of the application being "that the pleading so impeached be made definite and certain by amendment."

This remedy has been granted in the following cases:

In *Broderick* vs. *Poillon*, 2 E. D. Smith, 554, reported as *Broderick* vs. *Boyle*, 1 Abb., 319, a subcontractor, seeking to enforce a mechanic's lien, was required to show his subcontract to be in conformity with that between the contractor and the owner.

A bare allegation of ownership of land, in a suit for an accounting for its proceeds, was ordered to be made more definite, by the allegation of some issuable fact showing such ownership, in *Adams* vs. *Holley*, 12 How., 326.

Where a cause of action against several defendants, capable of severance as to their several liabilities, was stated in one single count, its division into separate statements of the separate causes, according to rule 19 (86), and section 167, was enforced by means of a motion of this description, in *Forsyth* vs. *Edminston*, 11 How., 408.

A separation of this description, and a statement of how much the plaintiff sought to recover on each cause, was thus enforced, in *Clark* vs. *Farley*, 3 Duer, 645. See also, generally, *Harsen* vs. *Bayaud*, 5 Duer, 656; *Blanchard* vs. *Strait*, 8 How., 83; *Wood* vs. *Anthony*, 9 How., 78; *Lippincott* vs. *Goodwin*, 8 How., 242.

Where, on a creditor's bill by several plaintiffs, they omitted to allege, specifically, the nature and extent of their several claims, a motion of this description was granted. *Gray* vs. *Kendall*, 5 Bosw., 666; 10 Abb., 66. So also where, in an action for use and occupation, the plaintiff omitted to allege the time for which, and the rate at which, rent was claimed, it was held that a motion would lie. *Waters* vs. *Clark*, 22 How., 104.

An amendment of alternative or inconsistent pleading may be compelled in the same manner. *Vide Corbin* vs. *St. George*, 2 Abb., 465; *Willett* vs. *The Metropolitan Insurance Company*, 2 Bosw., 678; *Smith* vs. *Hallock*, 8 How., 73.

A complaint for an account, not stating the nature and character of the claim, and period within which it arose, was held deficient, and ordered to be made more definite and certain in *Farcy* vs. *Lee*, 10 Abb., 143. See also *Cheesebrough* vs. *The New York and Erie Railroad Company*, 26 Barb., 9; 13 How., 557.

A general statement, however, is all that is necessary for this purpose. The statement of specific items and matters of detail cannot be so enforced. The mode of obtaining that description of information, is by means of an application for particulars under section 158. *Farcy* vs. *Lee*, *supra*; *McKinney* vs. *McKinney*, 12 How., 22; *Cudlipp* vs. *Whipple*, 4 Duer, 610; 1 Abb., 106; *Sloman* vs. *Schmidt*, 8 Abb., 5; *Adams* vs. *Holley*, 12 How., 326; *West* vs. *Brewster*, 1 Duer, 647; 11 L. O., 157; see also, generally, *Allen* vs. *Patterson*, 3 Seld., 476.

The general principle that a party complaining of the uncertainty of an adverse pleading, must seek his relief in this form, is laid down in *Richards* vs. *Edick*, 17 Barb., 260; *Graham* vs. *Camman*, 5 Duer, 697; 13 How., 360. See also *Atwell* vs. *Le Roy*, 15 How., 227; 4 Abb., 438; *The People* vs. *Ryder*, 2 Kern., 433 (440); *Village of Warren* vs. *Phillips*, 30 Barb., 646.

In *Vanderbilt* vs. *The Accessory Transit Company*, 9 How., 352, defendants were allowed to amend their answer in this respect upon their own motion.

In *Wiggins* vs. *Gans*, 3 Sandf., 738; 1 C. R. (N. S), 117, two successive answers, pleading a set-off, the first, by mere reference to the complaint, without stating particulars, and the second, in the words of a common count for work and labor, in *assumpsit*, under the old practice, were both held indefinite and uncertain; and the former of them was stricken out, with costs.

Where the defendant pleaded the breach of an agreement on the part of the plaintiff, he was required to state that agreement, with sufficient detail to make the breach apparent. *Lynch* vs. *Murray*, 21 How., 154. See also, as to the imperfect statement of matter in defence.

Currie vs. *Cowles*, 6 Bosw., 452; *Smith* vs. *Wells*, 20 How., 158; *Farmers and Citizens' Bank of Long Island* vs. *Sherman*, 6 Bosw., 181.

The old common counts were held deficient in certainty, and the plaintiff only relieved on condition of amending his complaint, in *Blanchard* vs. *Strait*, 8 How., 83. See also *Wood* vs. *Anthony*, 9 How., 78.

On the other hand it has been considered that a motion on this ground, does not apply to defences which consist in mere denials of the plaintiff's allegations, but only to those consisting of new matter, involving distinct affirmative grounds. *Otis* vs. *Ross*, 8 How., 193; 11 L. O., 343.

Where, too, the pleading is sufficient to raise an adequate issue, this proceeding will not be appropriate; as, where an answer merely alleged, on information and belief, that the plaintiff had received something on account of his demand, and was not entitled to the whole sum claimed, a motion of this nature was denied. *Smith* vs. *Shufelt*, 3 C. R., 175.

Less definiteness will also be required in pleading matters within the knowledge of the adverse party, than those more peculiarly within the cognizance of the party pleading. *Vide West* vs. *Brewster*, *supra*.

An allegation that another action was pending between the same parties for the same cause, was held sufficient, and a motion requiring a fuller statement denied, in *Ward* vs. *Dewey*, 12 How., 193.

A motion, requiring the time and consideration of an assignment to be stated, was denied in *Kanouse* vs. *Martin*, 2 Abb., 330. So also a motion asking the plaintiff, in a suit for contribution, to state legal conclusions, or matter of defence. *Van Demark* vs. *Van Demark*, 13 How., 372. And a motion requiring a plaintiff, alleging an assignment to be fraudulent on its face, and in intent, to state his grounds of impeachment. *Hastings* vs. *Thurston*, 18 How., 531; 10 Abb., 418.

An answer to matter in the complaint which is itself objectionable, and might have been stricken out, cannot be required to be made more definite. *Parshall* vs. *Tillou*, 13 How., 7. See also, *King* vs. *The Utica Insurance Company*, 4 How., 485.

Nor can a motion of this nature be sustained, in respect of matters not apparent upon the face of the pleading required to be amended. *Brown* vs. *The Southern Michigan Railroad Company*, 6 Abb., 237.

Where the pleading is ambiguous, and the adverse party goes to trial, without availing himself of the remedy prescribed by this section, that pleading will be taken most strongly against him. *Wall* vs. *The Buffalo Water Works Company*, 18 N. Y., 119.

But where a pleading is radically defective, as in the case of an insufficient plea of usury, the adverse party will not be put to his motion on this ground of defect, but may proceed at once to impeach it, on others, to the charge of which it may be open. See *Manning* vs. *Tyler*, 21 N.Y., 567.

§ 136. *Form and Incidents of Motion.*

It remains to consider, in the last place, the mode in which the different objections, for which a remedy is provided by section 160, may be made available.

The motion being technical, and in fact in the nature of a partial plea in abatement, must be made at once, or the objection will become untenable. Rule 50 (40) is positive and express upon this subject. A motion on either ground must be noticed, before demurring or answering the pleading; and within twenty days from the service thereof.

Of course, when so noticed, it may be actually made, on a proper adjournment, after the expiration of that period.

See the following decisions, to the same effect as the rule, with regard to the necessity of an objection of this nature, being taken promptly and at once. *Corlies* vs. *Delaplaine*, 2 Sandf., 680; 2 C. R., 117; *Isham* vs. *Williamson*, 7 L. O., 340. See also, under the rule, *Rogers* vs. *Rathbun*, 6 How., 66; *Roosa* vs. *The Saugerties and Woodstock Turnpike Road Company*, 8 How., 237; *Bowman* vs. *Sheldon*, 5 Sandf., 657; 10 L. O., 338; *New York Ice Company* vs. *North Western Insurance Company*, 21 How., 234; 12 Abb., 74.

As to express waiver, by demurring, or answering, or replying, see *Corlies* vs. *Delaplaine*, *supra*; *White* vs. *Joy*, 3 Kern., 83 (86); *Harlow* vs. *Hamilton*, 6 How., 475 (478); *Seeley* vs. *Engell*, 3 Kern., 542 (548).

Any act, too, which admits the sufficiency of the pleading sought to be impeached, will equally effect a waiver of the defect. Thus a waiver has been held to be effected: By the service of an answer, pending a motion for irrelevancy in the complaint, *Goch* vs. *Marsh*, 8 How., 439. By an unconditional extension of the time to answer or reply, *Bowman* vs. *Sheldon*, and *Isham* vs. *Williamson*, *supra*. See, however, *Lackey* vs. *Vanderbilt*, 10 How., 155, holding that a stipulation, extending the time to answer, "and to make such application as he should be advised," had the effect of saving this right to a defendant.

The same effect of a waiver, by implied admission of the sufficiency of the adverse pleading, has also been ascribed to the service of a notice of trial, in *Esmond* vs. *Van Benschoten*, 5 How., 44. Or by demanding a copy of the plaintiff's account, where the objection subsequently taken was for uncertainty of statement. *McKinney* vs. *McKinney*, 12 How., 22.

The principle of waiver, by a failure to take the objection in due time, is also generally laid down in *Youngs* vs. *Seeley*, 12 How., 395;

Seeley vs. *Engell*, 3 Kern., 542 (548); *Wood* vs. *Anthony*, 9 How., 78; *Wall* vs. *The Buffalo Water Works Company*, 18 N. Y., 119.

The principle of this rule does not extend, however, to motions on the ground of a total irrelevancy, or insufficiency of a pleading or ground of defence. An objection of this nature may be taken at any time before the trial. *Stokes* vs. *Hagar*, 1 C. R., 84; 7 L. O., 16; *Miln* vs. *Vose*, 4 Sandf., 660; *Darrow* vs. *Miller*, 5 How., 247; 3 C. R., 241.

A party moving to strike out, must specify upon the face of his notice of motion, the portions of the pleading which he objects to, and also the grounds of his objection. Otherwise, his motion will not be entertained. *Benedict* vs. *Dake*, 6 How., 352; *Blake* vs. *Eldred*, 18 How., 240; *Bowman* vs. *Sheldon*, 5 Sandf., 660; 10 L. O., 338. This view accords with the principle as to motions on the ground of irregularity, laid down in rule 39.

Objections to a pleading must not be split up into different motions. They should all be taken at once, or a second application will not be granted, after the failure of the first. *Desmond* vs. *Woolf*, 6 L. O., 389; 1 C. R., 49; *Mills* vs. *Thursby*, (No. 2.), 11 How., 114. As to the power, *per contra*, of combining motions on different grounds in one single application, *vide the People* vs. *McCumber*, 27 Barb., 632.

In *Rogers* vs. *Rathbun*, 6 How., 66, it was held that, on a motion of this description, the moving party is bound to show affirmatively, that it was made in due time. This view seems, however, too strict. The contrary, and that this objection, if tenable, is matter of defence, the burden of showing which rests upon the opposing party, is maintained in *Barber* vs. *Bennett*, 4 Sandf., 705; and *Roosa* vs. *The Saugerties and Woodstock Turnpike Road Company*, 8 How., 237. See too, collaterally, *Darrow* vs. *Miller*, *supra*.

This description of motion being applied directly to defects, patent upon the face of the pleading impeached, no affidavit need, as a general rule, be served with the notice, but the latter may, and in most cases should be grounded upon that pleading alone. *Ford* vs. *Mattice*, 14 How., 91. See also *Darrow* vs. *Miller*, *supra*. In *Lackey* vs. *Vanderbilt*, 10 How., 155, an affidavit was used, the singleness and identity of the transaction, as stated in different counts, on which ground the pleading was objected to, requiring some explanation to make it clearly apparent. The motion was, however, in fact, decided upon the pleading, in connection with the affidavit, which of itself was considered insufficient, and the opinion, as given, by no means bears out the positive statement in the head-note, that this objection can only be made to appear by affidavit.

On such a notice, the usual demand for further and other relief should of course be inserted. It cannot be extended, however, so as to

effect a substantial change in the application, as by the striking out the whole of the pleading, on motion for partial irrelevancy. *Mott* vs. *Burnett*, 2 E. D. Smith, 50.

In *Carpenter* vs. *West*, 5 How., 53, it was considered competent for any one, not even a party to the record, to move for the striking out of scandalous matter, and the practice in these cases would appear not to have been changed. *Vide Bowman* vs. *Sheldon*, 5 Sandf., 657 (660); 10 L. O., 338.

In the *Trustees of Pen Yan* vs. *Forbes*, 8 How., 285, it was held that an appeal from an order, striking out a defence as irrelevant, effected, during its pendency, a stay of proceedings, so far as to prevent the noticing of the cause for trial by the adverse party.

An order to strike out portions of a pleading would not seem to involve, *per se*, any extension of the mover's time to answer or reply to that pleading, when corrected. A definite extension had better therefore in all cases be applied for, either as part of the motion itself, by additional demand in the notice, or by way of further relief on the hearing, or separately in the usual manner. When, on the contrary, the order directs an amendment by the adverse party, either generally, or as the result of a motion for uncertainty, the usual incidents of an amendment will follow, and the time to answer or reply will necessarily not commence to run, until after service of the pleading as amended.

The granting of such a motion works no prejudice to the right of the adverse party to amend as of course, if exercised in due time. *Ross* vs. *Dinsmore*, 20 How., 328; 12 Abb., 4.

BOOK VII.

OF THE COMPLAINT AND ITS INCIDENTS.

CHAPTER I.

OF FIXING THE VENUE.

General Observations.

As section 142 specifically requires that "the name of the county where the plaintiff desires the trial to be had," should be contained in the complaint, the present appears to be the most convenient time for considering the extent to which the designation of that county is either imperative or optional. It is true that, when the summons is served alone, the question, to a certain degree, comes up for consideration (see section 130); but this only takes place collaterally; nor is the designation so made imperative. *Vide Merrill* vs. *Grinnell*, 12 L. O., 286. The proper place for that designation is on the face of the complaint itself.

§ 137. *Statutory Provisions.*

The portion of the Code which makes provision upon this subject is title IV. of part II. It runs as follows:

TITLE IV.

Of the Place of Trial of Civil Actions.

§ 123. (103.) Actions for the following causes, must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by statute.

1. For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property;

2. For the partition of real property;

3. For the foreclosure of a mortgage of real property.
4. For the recovery of personal property, distrained for any cause.

In 1848, this and the next following constituted only one section.

This portion of it differed thus:

In the commencement, the words, "where the cause, or some part thereof, arose," stood after "in the county," and before "in which, &c."

The four subdivisions, as they stand, followed.

After them stood a fifth, thus:

"5. For injuries to the person or personal property."

The present subdivisions, 1 and 2, of section 124, next followed, by the designation of subdivisions 6 and 7.

In 1849, the section was amended as it now stands. Under this amendment, subdivision 5 was totally omitted, thus transferring that particular class from the category of local, to that of transitory, actions.

§ 124. (103.) Actions for the following causes, must be tried in the county where the cause or some part thereof arose, subject to the like power of the court, to change the place of trial, in the cases provided by statute:

1. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in one or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offence was committed;

2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person, who, by his command or in his aid, shall do any thing touching the duties of such officer.

Inserted as it stands in 1849, but formed by the transfer of subdivisions 6 and 7 of section 103, of 1848, to this separate clause, and by the addition of a preamble, substantially the same as in the previous one, *mutatis mutandis*. This section, in connection with section 126, seems clearly to supersede the provision at 2 R. S., 409, section 3.

§ 125. (104.) In all other cases, the action shall be tried in the county in which the parties, or any of them, shall reside at the commencement of the action; or, if none of the parties shall reside in the State, the same may be tried in any county which the plaintiff shall designate in his complaint; subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

§ 126. (106.) If the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand, in writing, that the trial be had in the proper county, and the place of trial be thereupon changed, by consent of parties, or by order of the court, as is provided in this section.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose in the complaint, is not the proper county.

2. When there is reason to believe that an impartial trial cannot be had therein.

3. When the convenience of witnesses, and the ends of justice, would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties, in writing, duly filed, or order of the court; and the papers shall be filed or transferred accordingly.

In 1848 and 1849, this section only consisted of part of the preamble, stopping at the words, "that the trial be had in the proper county." The rest of it, as it stands, was added by amendment in 1851.

In the present chapter, the subject of a change of venue, as provided for in the latter portion of section 126, will not be entered upon, but reserved for separate consideration hereafter, at the stages of the suit to which that proceeding is appropriate.

§ 138. *General Considerations.*

To a certain extent, the former strict distinctions between local and transitory actions are relaxed. No action is strictly local, because a mistake in the venue is no longer a fatal mistake. No action is strictly transitory, because, in every case, except that of all the parties being non-residents, there is some proper county in which the venue ought to be fixed, and the uncontrolled discretion formerly vested in a plaintiff is no longer existent. See *Houck* vs. *Lasher*, 17 How., 520 (522).

In a minor sense, however, the difference still continues, inasmuch as, in the cases provided for in sections 123 and 124, the fixing of the venue on a principle of locality is, in terms, imperative, whilst, as regards other controversies, the plaintiff has the privilege of selection. In a modified degree, therefore, the former may be considered as local, and the latter as transitory in their nature.

In one sense, all actions may now be looked upon as belonging to the latter class, *i. e.*, that it is in the power of the plaintiff to lay the venue at the outset in any county he chooses, even although the controversy be strictly local. He does so, of course, at the peril of a change being compelled; and, if he lays it in a wrong county, that change becomes, and may be enforced as a matter of right. This enforcement rests, however, altogether with the defendant, by means of a demand in due time, and a consequent motion, if it be not complied with; but, if the latter delays the demand, or, if resisted, neglects to obtain the proper order, his otherwise existent right will be no longer enforceable. His only remedy will then be an appeal to the discretion of the court, under one of the other subdivisions of section 126. And,

if he fail in obtaining that relief, or neglect to apply for it, the trial may be had in the county of original designation. *Vide Houck* vs. *Lasher*, *supra*; *Vermont Central Railroad Company* vs. *Northern Railroad Company*, 6 How., 106; 1 C. R. (N. S.), 401; *Marsh* vs. *Lowry*, 26 Barb., 197; 16 How., 41. Any gross abuse of the plaintiff's power in this respect may, however, be corrected. See *Percy* vs. *Seward*, 6 Abb., 326.

(*a.*) Local Actions.—As to Real Estate.

In a suit for foreclosure, the county in which the property, or some part of it is situate, is the only proper county, without regard to that in which the loan may actually have been made. *Miller* vs. *Hull*, 3 How., 325; 1 C. R., 113. See also *Ring* vs. *McCoun*, *infra*.

So also in a suit, of whatever nature, seeking to create or enforce a charge on specific property. *Wood* vs. *Hollister*, 3 Abb., 14; *Mairs* vs. *Remsen*, 3 C. R., 138; *Starks* vs. *Bates*, 12 How., 465. Or in a suit to compel a conveyance, on the ground of trust in the defendant. *Ring* vs. *McCoun*, 3 Sandf., 524.

If, in a case of this description, the suit be brought in a court of limited powers, not extending over the county where the property is situate, the defect will be jurisdictional, and the question may be raised by demurrer. *Ring* vs. *McCoun*, *supra*.

In a suit for specific performance of a contract, the Superior Court held, however, that this rule did not apply, and that the contract, and the act demanded in performance, being personal in their nature, the case did not come within the terms of section 123, and the court had jurisdiction. *Auchincloss* vs. *Nott*, 12 L. O., 119. This doctrine, however, seems somewhat doubtful. See *Ring* vs. *McCoun*, *supra*; and also *Newton* vs. *Bronson*, 3 Kern., 587 (590), per Denio, C. J.

As to the local jurisdiction of the same tribunal, of a controversy affecting property within its limits, see *Nichols* vs. *Romaine*, 9 How., 512.

When taken in due time, the objection on the above ground is a matter of right. See the above cases, *passim*. But, when omitted to be so raised, it will be waived, and a subsequent judgment, wherever obtained, cannot be impeached for irregularity. *Marsh* vs. *Lowry*, 26 Barb., 197; 16 How., 41.

Where lands situate out of the state are the subject of the suit, the provisions of section 123 are wholly inapplicable, and the venue may be laid in any county, otherwise proper. *Newton* vs. *Bronson*, 3 Kern., 587; *Mussina* vs. *Belden*, 6 Abb., 165.

(*b.*) Against Public Officers.

As to the absolute right of a public officer, sued for an act done by virtue of his office, to demand a trial in the county where the cause of action arose, and as to the extent of the term, see *Porter* vs. *Pillsbury*, 11 How., 240; *Park* vs. *Carnley*, 7 How., 355; *The People* vs. *Hayes*, 7 How., 248.

In the last case, it was held that this rule is imperative, even as against the right of the people to lay the venue in any county, in an action to which they are a party. When closely examined, *The People* vs. *Cook*, 6 How., 448, does not seem to conflict with this view, the action there being in the nature of a *quo warranto*, to try the title to an office itself, and not in respect of any act done by virtue of that office.

Where the act of an officer is wholly unauthorized, he will not be entitled to the protection of the statute. An error in judgment, or even an abuse of confidence, will not, however, avail to deprive him of it, when that act is within the scope of his authority. See *Brown* vs. *Smith*, 24 Barb., 419.

Under the Code, this objection will be waived, and the trial may be had in any county, unless it be taken at the outset, by demand under section 126, and a consequent order, if requisite. *Houck* vs. *Lasher*, 17 How., 520 (522).

By section 124, as it now stands, when read in connection with section 126, the former provisions at 2 R. S., 409, section 3, to the effect that, if it shall not appear on the trial that the cause of action arose within the county of venue, the jury shall be discharged, and judgment of discontinuance rendered, appear to be clearly superseded. See, as to waiver, under the old practice, by omission to raise the objection on that occasion, *Howland* vs. *Willetts*, 5 Sandf., 219; affirmed, 5 Seld., 170.

(*c.*) Transitory Actions.

In actions not of a strictly local nature, residence is made the criterion, and the venue should properly be fixed in some county, in which some one of the parties resides, at the commencement. Any of these counties may be selected, at the option of the plaintiff, and, when selected, will be the proper county. See *Hinchman* vs. *Butler*, 7 How., 462.

In *Goodrich* vs. *Vanderbilt*, 7 How., 467, it is laid down as a general, though not an imperative rule, that the place of trial, in a transitory action, should be in the county where the principal transactions between the parties occurred. The convenience of this rule is obvious, and it will be well for a plaintiff to bear it in mind, in making his original

choice, as tending to diminish the probability of subsequent motions upon the subject.

When all the parties are non-residents, the plaintiff's choice will, as under the old system, be perfectly unfettered.

And, *a fortiori*, in cases of this description, an omission on the part of the defendant to take the objection in due time, will be a complete waiver, and any county which the plaintiff may fix upon, whether strictly the proper county or not, will then be admissible as the place of trial. *Vide Milligan* vs. *Brophy*, 2 C. R., 118; *Houck* vs. *Lasher*, *supra*.

When invoked, however, in due time, by a defendant, the principle of residence will be controlling, and a change will be compellable, without regard to other considerations, a motion for which depends upon other principles, and, if admissible, must be made subsequently, and independently. *Moon* vs. *Gardner*, 5 How., 243; 3 C. R., 224. See also *Vermont Central Railroad Company* vs. *Northern Railroad Company*, 6 How., 106; 1 C. R. (N. S.), 401; *Conroe* vs. *The National Protection Insurance Company*, 10 How., 403; *Hubbard* vs. *The Same*, 11 How., 149 (153); *Park* vs. *Carnley*, 7 How., 355; *Askins* vs. *Hearns*, 3 Abb., 184 (190); *New Jersey Zinc Company* vs. *Blood*, 8 Abb., 147. The two motions may, however, it seems, be brought on together, if the defendant delays his application till after issue joined, and then, the ground of convenience may prevail. *Vide Mason* vs. *Brown*, 6 How., 481.

A gross abuse in fixing the venue may, too, be collaterally corrected. Where, therefore, the plaintiff had brought sixty-two separate actions for the same libel, one in every county of the state, all parties being resident in Albany, a motion for consolidation and trial of the whole in that county was granted, and the objection that separate motions should have been made in each of the eight judicial districts, overruled. *Percy* vs. *Seward*, 6 Abb., 326.

In actions to which the people are a party, the rule is, that the venue may be laid in any county, they being equally resident in each, and a change cannot be enforced, on the ground of the residence of the defendant. *The People* vs. *Cook*, 6 How., 448.

For the purposes of the fixing of venue, a corporation will be considered as a resident of the county in which its office is located, and its general business is carried on. *Conroe* vs. *The National Protection Insurance Company*, 10 How., 403. Nor does the fact that they have another office elsewhere, where some of their business is transacted, avail to change this rule. *Hubbard* vs. *The Same*, 11 How., 149. Where, however, the business of the defendants is general, and carried on in a principal manner in more counties than one, each place of business must be deemed a place of residence, and the venue may be fixed

accordingly. *Pond* vs. *The Hudson River Railroad Company*, 17 How., 543. In *The Vermont Central Railroad Company* vs. *The Northern Railroad Company*, 6 How., 106; 1 C. R. (N. S.), 401, the court declined passing upon the point—the decision resting upon other grounds.

The decision in *Pond* vs. *The Hudson River Railroad Company*, agrees with the general principle, that, for the purposes of the jurisdiction of justices' courts, a railroad company will be considered as an inhabitant of every county where its track is laid. *Vide Johnson* vs. *The Cayuga and Susquehanna Railroad Company*, 11 Barb., 621; *Sherwood* vs. *The Saratoga and Washington Railroad Company*, 15 Barb., 650; *Belden* vs. *The New York and Harlem Railroad Company*, 15 How., 17.

It has been held, however, that a foreign corporation is not a resident in any county of the state, though it may have, in one of them, an office for the transaction of its business; and that the proper county, under such circumstances, will be that of the residence of the adverse party. *International Life Assurance Company* vs. *Sweetland*, 14 Abb., 240.

In actions for a limited divorce, the common-law maxim that the domicile of the wife follows that of the husband, will not necessarily govern; and the wife, so suing, is entitled to lay the venue in the county of her actual residence at the commencement of the action, without regard to the actual residence of the defendant, and her own late residence in another. *Vence* vs. *Vence*, 15 How., 497; affirmed, *ibid.*, 576; *Vide* 2 R. S., 147, section 50, subdivision 3. See also, as to a total divorce, 2 R. S., 144, section 37.

CHAPTER II.

OF THE COMPLAINT.

This pleading answers to the declaration at common law, or the bill in chancery, under the old practice. It contains the statement of the case of the plaintiff, under which he seeks relief, and a definition of the relief sought by him. It is, therefore, the foundation of the action, and the original source of all other proceedings, down to the period of its final termination.

§ 139. *Formal Requisites.*

Before entering on the essentials of this pleading, a few words on its formal requisites will be proper. It must contain:

The title of the cause, specifying—

The name of the court in which the action is brought;

The name of the county in which the plaintiff desires the trial to be had; and

The names of the parties to the action, plaintiff and defendant. Section 142, subdivision 1.

(*a.*) Name of Court.

Where both the summons and complaint omitted to state the name of any court, it was held there was no suit pending, and a motion to amend was refused. *Ward* vs. *Stringham*, 1 C. R., 118.

Where the name of the court, though absent from the complaint, has appeared upon the summons, the courts have considered it their duty to disregard the defect. *Yates* vs. *Blodgett*, 8 How., 278; *Van Namee* vs. *Peoble*, 9 How., 198; *Van Benthuysen* vs. *Stevens*, 14 How., 70.

These, like many other cases of a similar description, ought in no wise to be taken as an excuse for omitting to comply with so plain and simple a requisition as that in question. Although it may be disregarded, such an omission is unquestionably loose and bad practice.

(*b.*) Designation of Venue.

This subject has been dwelt upon in the preceding chapter. An omission in this respect will receive a less indulgent construction than that of the name of the court, and the naming of a county in the summons will not avail to cure it. An amendment may, however, be granted. *Merrill* vs. *Grinnell*, 10 How., 31; 12 L. O., 286; *Hotchkiss* vs. *Crocker*, 15 How., 336. These cases, taken together, seem to overrule *Davison* vs. *Powell*, 13 How., 287, holding that, for the purposes at least of a motion, the venue is sufficiently indicated, by the naming of a county in the summons. The remedy for this species of defect is by motion, not by demurrer. *Vide Dorman* vs. *Kellam*, 14 How., 184; 4 Abb., 202.

In courts of special jurisdiction, such as the New York Superior Court and Court of Common Pleas, the name of the court itself supplies all necessary information, without any further designation of the county.

(*c.*) Names of Parties.

These should be correctly inserted with all proper designations, where necessary.

It is decidedly loose practice, and might be held a defect, to omit a statement of the names of all the parties, and to use the common formula of naming one, and adding the words *et al.*, to signify that there are others. In subsequent papers this may be admissible, but, as regards the complaint, the wording of the section is clearly adverse to it.

Where the plaintiff sues as an officer, or by virtue of any special authority, it is usual and proper, in stating the title, to add to his name a designation, stating the special character in which he intervenes. This designation must, however, be accompanied by a proper averment of that character, in the body of the complaint. Standing alone, in the title, it is a mere *descriptio personæ*, and will of itself be unavailing. *Sheldon* vs. *Hoy*, 11 How., 11; *Merritt* vs. *Seaman*, 2 Seld., 168; *White* vs. *Joy*, 11 How., 36. (N. B. Not affected as to this by the reversal, 3 Kern., 83, which proceeded on the ground of subsequent waiver.) *Blanchard* vs. *Strait*, 8 How., 83. See likewise, *Bank of Havana* vs. *Wickham*, 7 Abb., 134; 16 How., 97; also 288; *Bright* vs. *Currie*, 5 Sandf., 433; 10 L. O., 104; *Root* vs. *Price*, 22 How., 372; *Hallett* vs. *Harrower*, 33 Barb., 537.

A very short and general averment, if clear in its terms, will, however, avail to support the designation, where the plaintiff sues simply as an officer. *Smith* vs. *Levins*, 4 Seld., 472; *Root* vs. *Price*; *Hallett* vs. *Harrower*, *supra*. A special authority must, on the contrary, be averred with sufficient fulness, to make it clearly apparent.

An omission to make a proper designation and averment, in the case of a party suing as trustee, may involve a personal liability for costs. *Murray* vs. *Hendrickson*, 1 Bosw., 635; 6 Abb., 96.

In *Hill* vs. *Thacter*, 3 How., 407; 2 C. R., 3, a description in the title, of "Emily Hill, &c.," an infant suing by guardian, was sustained, inasmuch as the name and appointment of her guardian appeared in the body of the complaint. This is another case of the description above alluded to. In correct practice, the title would have been, "Emily Hill, an infant, by Daniel Hill, her guardian."

A misnomer of defendants renders the plaintiff liable to a motion to set aside the complaint for irregularity. *Elliott* vs. *Hart*, 7 How., 25; *Dole* vs. *Manley*, 11 How., 138.

The power of a plaintiff, under section 175, to designate by a fictitious appellation, a defendant, of whose real name he is for the time ignorant, has been before noticed, and the cases cited, under the head of *Summons*.

(*d.*) Other Questions.—Variance.

It is not necessary that any date whatever should be inserted on the face of the complaint. *Maynard* vs. *Tallcott*, 11 Barb., 569.

Care must be taken to avoid a variance between the complaint and the summons, by praying general relief in an action for a money demand, under section 129, subdivision 1, or the converse. If this error be committed, the complaint will be irregular, and liable to be set aside on motion. See heretofore, under the head of *Summons*, and cases there cited. See, especially among others, *Tuttle* vs. *Smith*, 14 How., 395; 6 Abb., 329; *Allen* vs. *Allen*, 14 How., 248; *Boington* vs. *Lapham*, 14 How., 360; *Johnson* vs. *Paul*, 14 How., 454; 6 Abb., 335, note; *Rider* vs. *Whitlock*, 12 How., 208; *Shafer* vs. *Humphrey*, 15 How., 564; *Davis* vs. *Bates*, 6 Abb., 15.

(*e.*) Other Formalities.

Especial care should be taken as to plainly numbering, as well as separately stating, distinct causes of action, as prescribed by rule 19. As to the penalty to which an omission may subject a party making it, see heretofore, under the head of *Motion for Redundancy*, and especially *Benedict* vs. *Seymour*, and *Blanchard* vs. *Strait*, there cited.

Attention must also be paid to the requisites as to legible writing, marking of folios, indorsement with the title of the cause, &c., &c., prescribed by rule 20.

The fact that defects of this nature are easily and promptly waived, and are likely, in most cases, to be disregarded if objected to, should not by any one, aspiring to the title of a correct practitioner, be allowed to form a pretext for the disregard of regulations, so obvious and so generally useful, and even convenient, in their purport, as the above.

§ 140. *Joinder of Causes of Action.*

Several causes of action may now, under section 167, be joined in the same complaint.

And this joinder may be effected, whether they be of a legal or an equitable nature, or of both.

But only under the following restrictions:

1. They must all belong to one of the seven classes specified in the section.
2. They must affect all the parties to the action.
3. They must not require different places of trial.
4. They must be separately stated.

The classification established is as follows. Causes of action are capable of joinder as above, where they all arise out of—

1. The same transaction, or transactions connected with the same subject of action.
2. Contract, express or implied.

3. Injuries, with or without force, to person or property, or either.

4. Injuries to character.

5. Claims to recover real property, with or without damages for its withholding, and also its rents and profits.

6. Claims to recover personal property, with or without damages for its withholding.

7. Claims against a trustee, by virtue of a contract, or by operation of law.

It is proposed to enter upon the treatment of this subject in the following order:

First, as to its bearing, in a general point of view.

Second, to cite any cases specially applicable to the different classes established.

Thirdly, to consider the different restrictions imposed upon the privilege accorded.

(*a.*) General Bearing.

Since the special provision to that effect inserted in the opening clause, on the amendment of 1851, there is now no doubt left, as to the power of a plaintiff to join claims for legal and equitable relief in the same complaint. It is distinctly recognized and asserted to its full extent, in *Getty* vs. *The Hudson River Railroad Company*, 6 How., 269; *New York Ice Company* vs. *North Western Insurance Company*, 23 N. Y., 357; 21 How., 296; 12 Abb., 414.

And alternative relief of the latter description, may be alleged and obtained now as heretofore. *Young* vs. *Edwards*, 11 How., 201.

But although, as a general rule, claims of both natures are now capable of joinder, they must not be inconsistent in their nature, so as to be legally incapable of collateral assertion. Thus equitable relief cannot be obtained, in connection with a judgment for a forfeiture. The two are incapable of combination, without violating a principle of law, and the Code is only a system of practice. See *Linden* vs. *Hepburn*, 2 Sandf., 668; 5 How., 188; 3 C. R., 65; 9 L. O., 80; *Lamport* vs. *Abbott*, 12 How., 340.

Nor has the Code changed the former rules in the above respects, or given a right of action, where none existed before. *Frost* vs. *Duncan*, 19 Barb., 560.

Causes of action not falling within any of the specified classes, remain subject to the former rules. Where inconsistent, they cannot be joined. So held, as to a bill in the nature of a creditor's suit, and also claiming partition of the property, an interest in which was sought to be charged. *Dewey* vs. *Ward*, 12 How., 419. But in a suit for partition, defendant's accounts may be taken, or claims involving interests in or liens upon

the property may be litigated as between co-defendants. *Bogardus* vs. *Parker*, 7 How., 305.

The power of joinder, as given, does not carry with it any ulterior or collateral operation, as to other incidents in a suit. Thus, a plaintiff, by uniting in the same complaint, claims against the same defendant, in part as a delinquent fiduciary, and in part on ordinary contract, was held to have waived a previous arrest for the former. *Lambert* vs. *Snow*, 17 How., 517; 9 Abb., 91; 2 Hilt., 501.

The nature of the relief demanded in the complaint will be held to determine the class to which an action belongs. *Spalding* vs. *Spalding*, 3 How., 297; 1 C. R., 64; *Dows* vs. *Green*, 3 How., 377. See also *Rodgers* vs. *Rodgers*, 11 Barb., 595, and *Bishop* vs. *Houghton*, 1 E. D. Smith, 566.

The power to join in one proceeding, separate claims, divisible in their nature, does not involve the duty to do so, but they may, if thought fit, be separately asserted. *Secor* vs. *Sturgis*, 2 Abb., 69; *Staples* vs. *Goodrich*, 21 Barb., 317; *Cashman* vs. *Bean*, 2 Hilt., 340; 16 N. Y., 348; affirming *same case*.

But, where not properly divisible, as in the case of simultaneous breaches of a single contract, such claims must all be joined, or a recovery in one separate action will bar any other. *Coggins* vs. *Bullwinkle*, 1 E. D. Smith, 434.

The objection of misjoinder is one which, to be available, must be taken by way of demurrer, and will be waived, if not so raised. See Code, section 144–148; *Wright* vs. *Storrs*, 6 Bosw., 600.

(*b.*) Classification.

1. *Connected Claims.*

The rule established by subdivision 1, is of the most extended nature and operation.

As above stated, it was first inserted on the amendment of 1851, and would seem as if passed expressly to obviate the limited construction put upon the section, as it before stood, by Barculo, J., in *Alger* vs. *Scoville*, 6 How., 131; 1 C. R. (N. S.), 303, in relation to the union in the same complaint, of causes of action, practically inconsistent according to the former rules of pleading, though all strictly sounding in contract, and arising out of the same transaction.

The doctrine of that case is, therefore, now so far untenable. The same may be said as to that in *Cahoon* vs. *The Bank of Utica*, 4 How., 423; 3 C. R., 110; *Same case*, 7 How., 134; reversed, 7 How., 401; *Cobb* vs. *Dows*, 9 Barb., 230, and *Furniss* vs. *Brown*, 8 How., 59.

The following are instances in which the joinder of claims, otherwise

falling under different classes, has been sustained, as arising out of the same transaction:

A claim against a carrier for loss of goods, and also to recover freight overpaid. *Adams* vs. *Bissell*, 28 Barb., 382.

A claim of damages, for false representations inducing to a contract, and also for breach of such contract, when made. *Robinson* vs. *Flint*, 16 How., 240; 7 Abb., 393, note. See, however, *Waller* vs. *Raskau*, 12 How., 28.

A claim for damages for violation of an agreement for printing and binding a work, and another for injuries to stereotype plates, while in the use of the defendant for the purposes of that agreement. *Badger* vs. *Benedict*, 1 Hilt., 414; 4 Abb., 176.

Assault and slander, both committed on the same occasion. *Brewer* vs. *Temple*, 15 How., 286.

Claims for sums due under a building contract; others for damages for delay; and a demand to set aside an award, on disputes growing out of the same contract. *See* vs. *Partridge*, 2 Duer, 463.

Claims by the same plaintiffs, for the assertion of different liens on the same property, and for relief against fraud, by which their discharge had been obtained, were held capable of joinder, as arising out of the same transaction in *Vermeule* vs. *Beck*, 15 How., 333.

A claim for reformation of a contract, and another for damages, for breach of it, as it should stand. *Bidwell* vs. *The Astor Mutual Insurance Company*, 16 N. Y., 263.

Causes of action by the same plaintiff, as devisee, in respect of rent of a farm leased by the testator, accrued after his decease, and as executrix, for breaches of covenant under the same lease, during the testator's lifetime, were held properly joined in *Armstrong* vs. *Hall*, 17 How., 76.

So also as to causes of action against executors, for rent due from their testator, and likewise for a continued occupation by them in their representative capacity. *Pugsley* vs. *Aiken*, 1 Kern., 494; reversing *same case*, 14 Barb., 114.

See likewise, as to joinder of claims arising out of a tenancy, against the same defendant in different capacities, *Lord* vs. *Vreeland*, 13 Abb., 195.

In *Van Name* vs. *Van Name*, 23 How., 247, it was held that an action for recovery or assignment of dower, may include the damages for withholding, or mesne profits.

Causes of action for moneys received on account of the estate of a testator, and also for a note, part of such estate, but payable to the executor individually, were held not improperly joined in *Welles* vs. *Webster*, 9 How., 251.

Where the subject-matter of the suit is identical, and the same judgment is prayed against all defendants; claims arising out of the same

transaction are capable of joinder, though the liabilities of those defendants may have arisen from different causes, or under several contracts.

Thus, causes of action against a constable for different breaches of duty, and also against his surety in respect of his official liability so incurred, were held capable of joinder in *Moore* vs. *Smith*, 10 How., 361.

A general suit to cancel a spurious issue of certificates, was held maintainable against all persons who held them. *New York and New Haven Railroad Company* vs. *Schuyler*, 17 N. Y., 592; 7 Abb., 41; reversing *same case*, 1 Abb., 417, where such a complaint was held multifarious.

And a suit was held maintainable, by a party standing in relation of stockholder and judgment-creditor of a corporation, against the corporation itself, against its other stockholders, on their individual liability, and against its other creditors, with a view to ascertain and provide for the rights and interests of all parties. *Geery* vs. *New York and Liverpool Steamship Company*, 12 Abb., 268. Nor does the demand of multiplicity of relief make the pleading multifarious. *Same case.*

So, too, all parties to a bond, though severally liable, may join or be joined in the same suit, under the authority of section 120 of the Code. *Brainard* vs. *Jones*, 11 How., 569. And this, though their claims may differ as to character and amount. *Loomis* vs. *Brown*, 16 Barb., 325.

On similar principles, a mechanics' lien may now be sought to be enforced against the owner, and a personal judgment claimed against the contractor, in the same proceeding.

A creditor's bill has been held maintainable by more than one judgment-creditor, against the judgment-debtor, and also against his fraudulent grantees, claiming under different grants, on the ground that, in fact, it was only one cause of action, all being equally concerned, though under distinct interests. *Hammond* vs. *Hudson River Iron and Machine Company*, 20 Barb., 378; *Morton* vs. *Weil*, 33 Barb., 30; 11 Abb., 421; *Reed* vs. *Stryker*, 12 Abb., 47; *Newbold* vs. *Warrin*, 14 Abb., 80. See also, as to joinder of both fraudulent assignor and fraudulent assignee in one suit, *Mott* vs. *Dunn*, 10 How., 225.

So likewise, a claim for a partnership accounting, and a claim against a third party fraudulently holding part of the partnership property, were held capable of joinder, as being a single cause of action, for an accounting and application of the joint property, in *Wade* vs. *Rusher*, 4 Bosw., 537.

A grantee was also held entitled to join his grantor with warranty, and the holder of an incumbrance, alleged to be, in fact, paid off, in the same proceeding, with a view to obtain satisfaction of such incumbrance, and a recovery over against the grantor, for any amount found due on it. *Wandle* vs. *Turney*, 5 Duer, 661.

As to the power to settle dependent questions, in a suit for partition, *vide Bogardus* vs. *Parker*, 7 How., 305.

Assignor and assignee, having a common interest in having a fraudulent judgment cancelled, were also held to be properly joined as co-plaintiffs in *Monroe* vs. *Delavan*, 26 Barb., 16.

Allegations of conversion, and prayer for specific delivery of a chattel, were held no misjoinder, and to be, in fact, a statement of one cause of action in *Vogel* vs. *Badcock*, 1 Abb., 176. The doctrine that a plaintiff cannot frame his complaint, so as to recover either the property itself or damages for its conversion, as held in *Maxwell* vs. *Farnam*, 7 How., 236, seems no longer tenable, under subdivision 1, as it now stands.

As to the power of a party to allege matters of fraud, by way of inducement or explanation, in stating a cause of action, *ex contractu*, without incurring the objection of misjoinder, *vide Roth* vs. *Palmer*, 27 Barb., 652.

Separate demands, under one and the same right, may properly be joined in the same action, and may properly be stated in one single count. *Longworthy* vs. *Knapp*, 4 Abb., 115.

Claims for specific performance of a contract to convey land, and also for intermediate use and occupation, were held capable of joinder in *Spier* vs. *Robinson*, 9 How., 325.

So also, as to a suit for reformation and simultaneous foreclosure of a mortgage. *Depeyster* vs. *Hasbrouck*, 1 Kern., 582.

So likewise, as to a suit demanding a judgment for moneys had and received, and a claim to deliver up satisfied promissory notes, arising out of the same transaction. *Cahoon* vs. *The Bank of Utica*, 7 How., 401; reversing *same case*, 7 How., 134.

In *Rodgers* vs. *Rodgers*, 11 Barb., 595, it was held that a reversioner might combine, in the same proceeding against the tenant for life, a cause of action for wrongfully cutting wood, and also one for conversion of the wood, when cut, where such causes affect the same parties.

The stating the cause of action in two separate counts, on different assumptions, was held not to be a misjoinder, in *Birdseye* vs. *Smith*, 32 Barb., 217.

Liberal as the above rule is in its terms and application, that application will not, however, in all cases be indiscriminately granted.

Where two causes of action, though arising out of the same transaction, or connected with the same subject, are, in themselves, radically and wholly inconsistent in their nature, their joinder in the same pleading will be inadmissible.

See, as to the inconsistency of a claim for a legal forfeiture, in connection with one for equitable relief, *Linden* vs. *Hepburn*, and *Lampert* vs. *Abbott*, cited at the commencement of this section.

Also, as to the incompatibility of a claim for damages in respect of a fraudulent sale of land, with one against the purchaser, for a reconveyance or accounting, see *Gardner* vs. *Ogden*, 22 N. Y., 327.

A cause of action for money received, and another for misfeasance in neglecting to collect it, were held wholly incompatible, in *Hunter* vs. *Powell*, 15 How., 221. So also as to a claim in *assumpsit* for warranty of a horse, and a count in fraud for wrongfully concealing his defects. *Sweet* vs. *Ingerson*, 12 How., 331; *Springstead* vs. *Lawson*, 23 How., 302. So also as to a suit, seeking to recover the value of goods from a party whose representations had induced a sale, and also the price of the same goods from the same party, as guarantor of payment, *Waller* vs. *Raskan*, 12 How., 28; or to claim on accounting and judgment for money intrusted to a party to buy goods, and misapplied, and also delivery of goods purchased with that money. *Bank of Beloit* vs. *Beale*, 20 How., 331; 11 Abb., 375.

So likewise, as to the joinder of a claim by one tenant in common against another, for an accounting; with one against the same party, for injuries to the property, and damages in respect of an injunction obtained by him, in derogation of the plaintiff's rights, and denying his title as co-tenant. *Hall* vs. *Fisher*, 20 Barb., 441.

So further as to the joinder of claims against a railway company for killing animals, through defect in keeping up a proper fence; with another for breach of a contract for carriage of cattle. *Colwell* vs. *The New York and Erie Railroad Company*, 9 How., 311.

In *Budd* vs. *Bingham*, 18 How., 494, it was held that a plaintiff could not join causes of action for trespass and ejectment, and also trespass *quare clausum fregit*, as to the same premises, in the same complaint. See also *Frost* vs. *Duncan*, 19 Barb., 560.

A claim in ejectment, by way of forfeiture for breach of a condition, has been held incompatible with one for damages, for breach of covenants contained in the same agreement. *Underhill* vs. *Saratoga and Washington Railroad Company*, 20 Barb., 455.

So also, a claim in ejectment against a vendor, and an equitable claim that such vendor execute a conveyance. *Lattin* vs. *McCarty*, 17 How., 239; 8 Abb.,225. Or, a claim for enforcement of a specific equitable lien upon property, in connection with a demand for its possession, in replevin. *Otis* vs. *Sill*, 8 Barb., 102. See likewise generally, as to the incompatibility of ejectment with a demand for equitable relief, *Onderdonk* vs. *Mott*, 34 Barb., 106.

On like principles, it has been held that a claim in ejectment for a piece of land, cannot be asserted, in connection with one in damages for obstructing a right of way over part of it. *Smith* vs. *Hallock*, 8 How., 73.

In *Hulce* vs. *Thompson*, 9 How., 113, it was held that two causes of action, the one in ejectment for a house and one part of a farm, and the other for trespass on other portions of the same property, committed by the same defendant, who occupied both, were not connected with the same subject of action, and, as such, were improperly united.

Claims for an absolute and also for a limited divorce, are incompatible in the same proceeding. *McIntosh* vs. *McIntosh*, 12 How., 289.

A cause of action to restrain part owners of a vessel from disposing of her in derogation of the rights of others, was held incapable of joinder with a cause of action for her hire, in *Coster* vs. *The New York and Erie Railroad Company*, 6 Duer, 43; 3 Abb., 332; also 5 Duer, 677.

A cause of action against a debtor, on a sealed contract, and one against a guarantor, by another sealed instrument in the same paper, were held incapable of joinder, in *De Ridder* vs. *Schermerhorn*, 10 Barb., 638. So also as to a separate guaranty for goods sold, in connection with an action against the purchaser. *Le Roy* vs. *Shaw*, 2 Duer, 626; *Spencer* vs. *Wheelock*, 11 L. O., 329.

The same is the case, as regards a promissory note with a guaranty written upon it. *Allen* vs. *Fosgate*, 11 How., 218. Or as regards an action against a lessee and his surety. *Phalen* vs. *Dingee*, 4 E. D. Smith, 379; *Tibbetts* vs. *Perey*, 24 Barb., 39.

These cases proceed upon the view that the original liability and the guaranty are separate and distinct contracts. See the law upon this question as settled by *Brewster* vs. *Silence*, 4 Seld., 207. They must be considered as overruling *Enos* vs. *Thomas*, 4 How., 48, holding that two such instruments, taken together, were to be regarded as one transaction.

In *Sage* vs. *Mosher*, 28 Barb., 287, it was held that a common-law judgment for damages, could not be sustained, in a suit brought for equitable relief by way of creditor's bill.

A complaint, stating divers circumstances in relation to a contract for sale, and injurious acts of the defendant as to the property, then proceeding to allege assault and battery, and lastly praying a general judgment for damages, was held bad in *Ehle* vs. *Haller*, 10 Abb., 287; *Ehle* vs. *Haller*, *same case*, but different opinion, 6 Bosw., 661.

Where, in any respect, inconsistent in their nature, claims of a plaintiff in his own right, cannot be joined with claims held by him as administrator of another, though both he and his intestate were tenants in common of the same estate. *Hall* vs. *Fisher*, 20 Barb., 441.

So also, it was held generally, that an individual and representative claim cannot properly be joined in the same action, in *Lucas* vs. *The New York Central Railroad Company*, 21 Barb., 245.

And that judgment against a defendant personally, and also as trus-

tee, cannot properly be sought together. *Landon* vs. *Levy*, 1 Abb., 376. See also *McMahon* vs. *Allen*, 1 Hilt., 103; 3 Abb., 89; also, 12 How., 39.

Nor can an action be brought, against the executor of a deceased partner, and also against the survivor of the firm, unless inability to procure satisfaction from the latter is expressly charged. *Voorhis* vs. *Child's Executor*, 17 N. Y., 354; affirming *same case*, 18 Barb., 592; 1 Abb., 43; *Higgins* vs. *Rockwell*, 2 Duer, 650; *Tracy* vs. *Suydam*, 30 Barb., 110. See also, as to the representatives of a deceased joint owner, *Bucknam* vs. *Brett*, 22 How., 233; 13 Abb., 119; 35 Barb., 596; also, collaterally, *Pinckney* vs. *Wallace*, 1 Abb., 82. See, however, as to assertion of a joint and several demand of this nature, by proceedings in equity, *Parker* vs. *Jackson*, 16 Barb., 33.

The same was held, where the same party stood in the capacity of survivor, and also in that of one of the executors of the deceased partner. *Morehouse* vs. *Ballow*, 16 Barb., 289.

The above cases clearly overrule *Ricart* vs. *Townsend*, 6 How., 460.

An action against the personal representatives, and also the devisees and heirs of the same testator, to recover a debt due from his estate, will clearly be bad, even though the same parties be entitled to the whole property, both real and personal. The statute is imperative, and requires the creditor, in all cases, to resort to the personalty in the first instance, and to the descended real estate in the second, before resorting to property in the hands of devisees. The joinder in the same pleading of causes of action against parties standing in these three several, and, as it were, successive capacities, is therefore clearly incompatible, and cannot be effected. *Stewart* vs. *Kissam*, 11 Barb., 271. See likewise *Roe* vs. *Swezey*, 10 Barb., 247. And, as to a similar proceeding by a legatee, *Gridley* vs. *Gridley*, 33 Barb., 250.

A complaint, setting forth a liability on the part of the defendant, partly joint and partly several, was held fatally defective, in *Lewis* vs. *Acker*, 11 How., 163.

The payee of a note cannot claim to recover against both maker and indorser, in the same action. Nor can he resort to an original sale to one, upon the credit of the other. The contracts were several. *Young* vs. *Knapp*, 7 Abb., 399, note.

And, in *Palen* vs. *Lent*, 5 Bosw., 713, a claim for a personal judgment against the husband, and for enforcement of a lien against the wife's estate, in respect of the same note, were held incompatible. See also, generally, as to the impropriety of the joinder of incompatible causes of action, *Alger* vs. *Scoville*, 6 How., 131, 1 C. R. (N. S.), 303, before noticed.

The statement of several grounds of liability against the same de-

fendant, arising out of the same transaction, does not constitute a misjoinder. They are in fact one cause of action. *Durant* vs. *Gardner*, 19 How., 94; 10 Abb., 445. Nor is it a misjoinder, to pray for different classes of relief, in respect of a single cause, as stated. *Moses* vs. *Walker*, 2 Hilt., 536.

(*c.*) Other Subdivisions.

The principles which enter into the consideration of subdivision 1, are so extensive in their scope, that the citation of the cases applicable to that class anticipates, almost entirely, those having reference to the others.

A few, however, are governed by independent considerations.

Several causes of action on several judgments, were held to be properly joined in one suit, in *The Bank of British North America* vs. *Suydam*, 1 C. R. (N. S.), 325; 6 How., 379.

Crim. con. has been held to be an injury to the person. *Delamater* vs. *Russell*, 4 How., 234; 3 C. R., 147.

Claims for damages for personal injury, consequential upon injuries to property, forming the main subject of the suit, have been held properly joined. *Howe* vs. *Peckham*, 6 How., 229; 10 Barb., 656; 1 C. R. (N. S.), 381; *Grogan* vs. *Lindeman*, 1 C. R. (N. S.), 287. These decisions proceed upon general views, antecedent to the present framing of subdivision 3, which clears up all doubt upon the matter.

Slander, libel, and malicious prosecution, are all capable of joinder in the same proceeding. All are injuries to character. *Martin* vs. *Matteson*, 8 Abb., 3; *Watson* vs. *Hazard*, 3 C. R., 218.

A claim against parties standing in the character of trustees, for a fraudulent conversion of property, was held to fall strictly within subdivision 6, and that the fact that a breach of trust was incidentally alleged, and an account prayed, did not change the character of the action, or bring it within the scope of subdivision 7, so as to create a misjoinder. *Dennis* vs. *Kennedy*, 19 Barb., 517.

On the other hand, proof of a rightful sale of property, but a wrongful detention of its surplus proceeds, will defeat a recovery in a suit brought for conversion, and bring the case within subdivision 7, as a claim against a trustee by operation of law, so as to effect a misjoinder. *Pettit* vs. *King*, 5 Seld. Notes (Dec. 31st, 1853), p. 36.

Claims against a defendant personally, and as trustee, cannot be joined. *Landon* vs. *Levy*, 1 Abb., 376.

Restrictions.

(*d.*) 1. *All must belong to one Class.*

The first restriction, *i. e.*, that causes of action, to be capable of joinder, must all belong to one of the seven classes above specified, has

been substantially considered in the two preceding subdivisions, and will not require, therefore, any separate observations.

Subdivision 1, as it now stands, is of so extended a scope, that few if any cases where causes of action are not radically inconsistent, will fail to be comprised within it, and the cases of radical inconsistency have been already noticed. Before the insertion of that subdivision, the provision, as it then stood, had received a stricter construction, and the incompatibility of uniting causes, properly belonging to different subdivisions, though all, in a wider sense, arising out of contract, was firmly maintained in *Alger* vs. *Scoville*, 6 How., 131; 1 C. R. (N. S.), 303, before cited.

(*e.*) 2. All Parties must be Affected by the Causes Joined.

On this point, the decision in *Alger* vs. *Scoville*, although, in its wider scope, its authority is impaired by the subsequent insertion of subdivision 1, is still of authority, and would be good law, under the section as it now stands.

The old form of declaring in ejectment, by separate counts in the names of different plaintiffs, is, under the Code, no longer admissible. *St. John* vs. *Pierce*, 22 Barb., 362.

So also is the statement of separate causes of action, in different counts, some directed against a portion, others against the whole of the defendants. *Wells* vs. *Jewett*, 11 How., 242. So also, where one cause stated would give an action to the plaintiff alone, and another to the plaintiff, in common with others. *Bell* vs. *Mali*, 11 How., 254. A plaintiff, too, cannot demand alternative relief, in two different capacities, one personal, and the other as a member of the public. *Warwick* vs. *The Mayor of New York*, 28 Barb., 210; 16 How., 357; 7 Abb., 265.

A claim for equitable relief against a corporation, and one for damages against individual directors, were held incapable of joinder, in *House* vs. *Cooper*, 30 Barb., 157; 16 How., 292.

A complaint in the nature of a bill of peace and interpleader, filed by a company, against all holders of a fraudulent issue of stock, is admissible, because, though the interests of the defendants are several, still all are equally affected by the relief sought. *New York and New Haven Railroad Company* vs. *Schuyler*, 17 N. Y., 592; 7 Abb., 41; reversing *same case*, 1 Abb., 417, before cited. See also, as to similar proceedings, *Geery* vs. *New York and Liverpool Steam Ship Company*, 12 Abb., 268.

Where all the parties are in some manner affected by the causes joined, though in unequal degrees, the joinder will be admissible. *Vermeule* vs. *Beck*, 15 How., 333. See also, as to several claims for rent, against joint assignees of a lease, *Van Rensselaer* vs. *Layman*, 10

How., 505. See likewise, generally, *Wandle* vs. *Turney*, 5 Duer, 661, before cited.

But, where the interests of defendants are several, and not arising out of one and the same subject, a plaintiff cannot join demands for relief against them, though such relief be of the same nature as regards all.

So held, where the plaintiffs sought to annul different contracts for sale of securities, made with different persons, by an agent, in violation of his authority. It was held that separate suits must be brought against the several purchasers, the agent being joined in each. *Lexington and Big Sandy Railroad Company* vs. *Goodman*, 25 Barb., 469; 15 How., 85; 5 Abb., 493.

So also, in a creditor's action, it was held that the plaintiff could not join a claim against the assignor and assignee, in respect of a fraudulent assignment, with others, seeking to set aside various other fraudulent conveyances made by the debtor to other persons, at different times, no connection between them, or privity among the different transferees being shown. *Reed* vs. *Stryker*, 6 Abb., 109. In *Jacot* vs. *Boyle*, 18 How., 106, it was held, on the contrary, that the plaintiff might include in one suit, a claim to set aside two several conveyances, fraudulently made by a judgment-debtor to several grantors, on the ground that the cause of action, as regarded both, in connection with the judgment-debtor, was single.

A suit by an infant, after his majority, seeking to avoid two separate grants to different persons, and not only joining both, but also sub-purchasers from one of them, was held to be badly brought. *Voorhies* vs. *Voorhies*, 24 Barb., 150.

Claims by the commissioners of highways, in two separate towns, for an encroachment, cannot be maintained in the same action. *Bradley* vs. *Blair*, 17 Barb., 480.

A husband and wife cannot maintain a joint action for several services. *Avogadro* vs. *Bull*, 4 E. D. Smith, 384.

So also held, as to a claim, seeking relief against a wife's estate, and a separate money judgment against her husband, in *Sexton* vs. *Fleet*, 2 Hilt., 477; 15 How., 106; 6 Abb., 8.

A complaint, demanding a joint judgment, but only alleging facts sufficient to show several liabilities, was held bad, in *Hess* vs. *The Buffalo and Niagara Falls Railroad Company*, 29 Barb., 391.

The joinder of two claims in respect of the same premises, the one against both defendants, for recovery of possession and damages, the other against one only, for rents received, was held to be incompatible, in *Tompkins* vs. *White*, 8 How., 520. See also, as to a claim for damages against a broker, and for a reconveyance and accounting against a purchaser of property, *Gardner* vs. *Ogden*, 22 N. Y., 327.

(*f.*) 3. SEPARATE PLACES OF TRIAL.

The third restriction, *i. e.*, that the causes of action joined must not require separate places of trial, has not been made the subject of any specific decision.

The inconvenience would be too obvious, nor is the question likely to be of frequent occurrence.

(*g.*) 4. SEPARATE STATEMENT.

The last requisition imposes the condition that, if separate causes of action are sought to be asserted in the same proceeding, they must be separately stated.

This subject has been, to a certain degree, anticipated in a previous section (125), in considering the provision of rule 19, that distinct causes of action, &c., shall not only be separately stated, but plainly numbered. See that section and the cases there cited.

The separation to be so made, must be in a manner equivalent to that adopted in framing separate counts in a declaration under the old practice. *Durkee* vs. *The Saratoga and Washington Railroad Company*, 4 How., 226; *Pike* vs. *Van Wormer*, 5 How., 171.

In *Benedict* vs. *Seymour*, 6 How., 298, the doctrine is rigidly laid down, and it is held that a defect in this respect will render all allegations, not tending to constitute a single cause of action, liable to be stricken out as redundant. The words, "And for a further cause of action the plaintiff complains," &c., are also suggested, though not imperatively, as a proper mark of separation. See similar views as to separation of grounds of defence, in *Lippincott* vs. *Goodwin*, 8 How., 242.

Each separate cause of action must, as stated, be complete in itself, and must stand by itself. *Lattin* vs. *McCarty*, 17 How., 239; 8 Abb., 225. Defects in one, cannot be supplied by reference to another. *Landon* vs. *Levy*, 1 Abb., 376; *Sinclair* vs. *Fitch*, 3 E. D. Smith, 677. Preliminary allegations may be made, however, applicable to different counts, if properly connected with them, so that each cause in itself, and by reference to such general statements, will be perfect. *Same case.*

Some discussion has arisen as to the mode of taking the objection, some few decisions maintaining that it can be taken by demurrer, but a controlling majority, that motion is the proper remedy. The necessity of a proper separation being made, and the validity of an objection to the complaint, on the ground of a neglect in this particular, is maintained in the following series of decisions, in addition to those above referred to: *Getty* vs. *The Hudson River Railroad Company*, 8 How., 177; *Gooding* vs. *McAllister*, 9 How., 123; *Van Namee* vs. *Peoble*, 9 How.,

198; *Wood* vs. *Anthony*, 9 How., 78; *Strauss* vs. *Parker*, 9 How., 342; *Robinson* vs. *Judd*, 9 How., 378; *Woodbury* vs. *Sackrider*, 2 Abb., 402; *Harsen* vs. *Bayaud*, 5 Duer, 656; *Peckham* vs. *Smith*, 9 How., 436; *Moore* vs. *Smith*, 10 How., 361; *Accome* vs. *The American Mineral Company*, 11 How., 24; *Forsyth* vs. *Edmiston*, 11 How., 408; *Waller* vs. *Raskan*, 12 How., 28; *Dornan* vs. *Kellam*, 14 How., 184; 4 Abb., 202; *Badger* vs. *Benedict*, 1 Hilt., 414; 4 Abb., 176. See also, collaterally, *White* vs. *Low*, 7 Barb., 204, as to the assertion of several liabilities in one action.

This provision, as to separation, does not, however, impose any necessity of doing so, with reference to separate items under the same right, and which, therefore, may be properly included in one statement. *Longworthy* vs. *Knapp*, 4 Abb., 115.

And, where there are numerous items of such a description, belonging to distinct classes, a separation of them by classes, stating each class as a distinct count, is the proper course. *Adams* vs. *Holley*, 12 How., 326.

The fact that the pleader has taken upon himself to separate and state in different counts, different claims, which, in fact, only constitute one single cause of action, will not render the pleading demurrable. *Hillman* vs. *Hillman*, 14 How., 456.

§ 141. *Actions Sounding in Tort, Generally Considered.*

It is proposed to consider, in the first place, some matters of general bearing, and then to consider in detail, the averments appropriate to this class of actions.

(*a.*) General Considerations.—Jurisdiction.

Where an action for a wrong, not redressable at common law, is given by special statute, the operation of that statute is local, and the courts cannot entertain jurisdiction, where the wrongful act complained of has occurred within the limits of another state, unless the laws of that state give similar redress. In this latter case, the action must be brought under those laws, and they must be averred and proved as facts. *Vandeventer* vs. *The New York and New Haven Railroad Company*, 27 Barb., 244; *Beach* vs. *The Bay State Company*, 30 Barb., 433; 18 How., 335; reversing *same case*, 27 Barb., 248; 16 How., 1; 6 Abb., 415; *Whitford* vs. *The Panama Railroad Company*, 23 N. Y., 465; affirming *same case*, 3 Bosw., 67; *Crowley* vs. *The Same*, 30 Barb., 99.

In *Molony* vs. *Dows*, 8 Abb., 316, it was held that an action could not be maintained, for assault and false imprisonment committed in

California. The case seems, however, to have been hastily decided (p. 326), the remedy not being statutory, but lying at common law.

(*b.*) ELECTION.

In cases where the wrong complained of arises out of the violation of a contract, express or implied, the plaintiff has, as formerly, his election, whether he will maintain his action for the wrong, or, waiving the tort, sue only for the breach of contract. *Hinds* vs. *Tweedle*, 7 How., 278 (281); *McKnight* vs. *Dunlop*, 4 Barb., 36; *Dows* vs. *Green*, 3 How., 377; *Sellar* vs. *Sage*, 12 How., 531; *Fish* vs. *Ferris*, 5 Duer, 49; *Rider* vs. *Whitlock*, 12 How., 208; *Roth* vs. *Palmer*, 27 Barb., 652; *Chambers* vs. *Lewis*, 2 Hilt., 591; 10 Abb., 206; *Henry* vs. *Marvin*, 3 E. D. Smith, 71; *Fowler* vs. *Abrams*, 3 E. D. Smith, 1; *Kayser* vs. *Sichel*, 34 Barb., 84.

Having made such election, the plaintiff will be bound to abide by it, with all its consequences. If the suit be brought by him in tort, he will be bound to full proof of his case in that form, and cannot take a mere money judgment, should his proof fall short of what is requisite, and only establish a liability *ex contractu*. *Walter* vs. *Bennett*, 16 N. Y., 250; *Slawson* vs. *Conkey*, 10 How., 57; 1 Abb., 228; *Springstead* vs. *Lawson*, 23 How., 302. The form of summons will be material, and may be controlling, in determining in which form the action is brought. *Rider* vs. *Whitlock*, *supra*. See likewise next case, and *Atwell* vs. *Le Roy*, 15 How., 227; 4 Abb., 438.

If the statement of facts shows the commission of a wrong, and the prayer for relief is not inconsistent, the action will be considered as sounding in tort. *Chambers* vs. *Lewis*, 2 Hilt., 591; 10 Abb., 206; affirmed, 11 Abb., 210. See also, generally, *Atwell* vs. *Le Roy*, *supra*. But where the allegation of a wrong is simply by way of inducement, and the action otherwise sounds in contract, it will not govern. *Roth* vs. *Palmer*, *supra*. See also *Doedt* vs. *Wiswall*, 15 How., 128.

On the other hand, a plaintiff, commencing his action in one form and continuing it in another, will lose the benefit of an antecedent provisional remedy. So held, as to a change from replevin to trover, *Seymour* vs. *Van Curen*, 18 How., 94. As to the addition of a second cause of action arising purely in contract, to one sounding in tort, and on which a previous arrest had been granted, *Vide Lambert* vs. *Snow*, 2 Hilt., 501; 17 How., 517; 9 Abb., 91.

And, where the plaintiff took a money judgment, for funds intrusted to an agent and misapplied, it was held that he thereby waived all claim to property purchased with those funds. *Bank of Beloit* vs. *Beale*, 20 How., 331; 11 Abb., 375.

Where the complaint merely stated a cause of action capable of

either construction, but without any positive election, a judgment, justified by the allegations, was sustained. *Hudson River Railroad Company* vs. *Lounsberry*, 25 Barb., 597. See also *Yertore* vs. *Wiswall*, 16 How., 8. And causes of action, sounding both in tort and in contract, have been held capable of joinder in the same complaint, when arising out of the same transaction. *Robinson* vs. *Flint*, 16 How., 240; 7 Abb., 393, note.

By waiving the tort, or neglecting to allege it in proper form, a plaintiff may be held as having elected to sue on contract, and may thus let in a defence, which would otherwise be inadmissible. So held as to the defence of infancy. *Munger* vs. *Hess*, 28 Barb., 75.

Retention of any part of the consideration on a fraudulent contract, will waive the tort, and bar a suit for its rescission. Such consideration must be restored, or restoration offered. *Fisher* vs. *Conant*, 3 E. D. Smith, 199. So likewise as to retention of any benefit derived from such a contract. *Rosenbaum* vs. *Gunter*, 3 E. D. Smith, 203.

(*c.*) Relation of Employer and Employee.

The subject of this relation, and the responsibilities arising out of it, enters largely into the consideration of actions for injuries to person or property, and its preliminary and separate consideration may therefore be the more convenient course.

The rule may be broadly and definitely laid down, that the master or employer, whether a natural person or body corporate, is liable for any negligent or wrongful act, committed by his or its servant or employee, in the regular course, and within the scope of his employment or authority. *Weed* vs. *The Panama Railroad Company*, 17 N. Y., 362; *Russell* vs. *Livingston*, 16 N. Y., 515; *Ransom* vs. *The New York and Erie Railroad Company*, 15 N. Y., 415; *Smith* vs. *The New York and Harlem Railroad Company*, 19 N. Y., 127; affirming *same case*, 6 Duer, 225; *Weynant* vs. *The New York and Harlem Railroad Company*, 3 Duer, 360; *Wright* vs. *The New York Central Railroad Company*, 28 Barb., 80; *Russell* vs. *The Hudson River Railroad Company*, 5 Duer, 39; but see reversal, 17 N. Y., 134; *Althof* vs. *Wolfe*, 22 N.Y., 355; affirming *same case*, 2 Hilt., 344; *Blackstock* vs. *The New York and Erie Railroad Company*, 1 Bosw., 77; affirmed, 20 N. Y., 48; *Wolfe* vs. *Mersereau*, 4 Duer, 473; *Chapman* vs. *The New York Central Railroad Company*, 31 Barb., 399; *Hanvey* vs. *City of Rochester*, 35 Barb., 177. See also as to negligence, *Brown* vs. *New York Central Railroad Company*, 31 Barb., 385; disapproving *Knapp* vs. *Dugg*, 18 How., 165; *Porter* vs. *New York Central Railroad Company*, 34 Barb., 353; *Sanford* vs. *Eighth Avenue Railroad Company*, 23 N. Y., 343.

Where, however, injury is occasioned by reason of the act of a third

person, not employed at the time in the service of the common employer, the latter will not be liable. *Weldon* vs. *The Harlem Railroad Company*, 5 Bosw., 576.

And the master will be liable for gross negligence of this nature, even although the contract with the plaintiff provided that the latter is to assume all ordinary risks. *Wells* vs. *The Steam Navigation Company*, 4 Seld., 375.

The fact that a party injured is carried gratuitously, will not discharge the liability. *Nolten* vs. *The Western Railroad Corporation*, 15 N. Y., 444; 10 How., 97. See however, as to a special contract for exemption from liability in such cases, *Boswell* vs. *Hudson River Railroad Company*, 10 Abb., 442. Nor will the contract for carriage having been made with another, and not with the party injured, be available as a defence.

So also as to wrongs committed by an agent, within the scope of his authority. *Hunter* vs. *Hudson River Iron and Machine Company*, 20 Barb., 193. And one partner is similarly liable for the torts of another, or of that other's servant, committed in the course of the partnership business. *Cotter* vs. *Bettner*, 1 Bosw., 490.

The common employer is not liable, however, to one of its servants or employees, for injury occasioned by the negligence of another, in the course of their common employment. *Boldt* vs. *The New York Central Railroad Company*, 18 N. Y., 432; *Karl* vs. *Maillard*, 3 Bosw., 591; *Russell* vs. *The Hudson River Railroad Company*, 17 N.Y., 134; reversing *same case*, 5 Duer, 39; *Sherman* vs. *The Rochester and Syracuse Railroad Company*, 17 N. Y., 153; affirming *same case*, 15 Barb., 574; *Coon* vs. *The Syracuse and Utica Railroad Company*, 1 Seld., 492.

There is, however, no privity between the corporation and the servants of its contractor, and it is under the same liability for injuries done to the latter, as if they were not connected with the works. *Young* vs. *The New York Central Railroad Company*, 30 Barb., 229.

But, generally, the rule is otherwise, where the injury complained of results in any manner from negligence on the part of the common employer or principal. *Wright* vs. *The New York Central Railroad Company*, 28 Barb., 80; *Keegan* vs. *The Western Railroad Company*, 4 Seld., 175; *Byron* vs. *The New York State Printing Telegraph Company*, 26 Barb., 39.

In order to make the employer liable to his servant, for injuries received in the course of his employment, from defects of machinery, &c., notice of such defect to the employer should be alleged and proved. *McMellan* vs. *The Saratoga and Washington Railroad Company*, 20 Barb., 449.

For the wilful torts of the servant or agent, committed beyond the scope of his authority, or out of the regular course of his employment,

the principal or employer will not be liable. *New York Life Insurance and Trust Company* vs. *Beebe*, 3 Seld., 364; *Mechanics' Bank* vs. *The New York and New Haven Railroad Company*, 3 Kern., 599; 4 Duer, 570; reversing *same case*, 4 Duer, 480; *Steele* vs. *Smith*, 3 E. D. Smith, 321; *Wintersen* vs. *The Eighth Avenue Railroad Company*, 2 Hilt., 389. See also, as to the use of necessary force for a lawful purpose, *Hibbard* vs. *The New York and Erie Railroad Company*, 15 N. Y., 455 (467), per Brown, J. This rule does not apply, however, to the case of a strike by the servants of a railroad company, in a suit, by one of the public injured by its consequences. *Blackstock* vs. *The New York and Erie Railroad Company*, 1 Bosw., 77; affirmed, 20 N. Y., 48.

The liability of a master, only extends to his immediate servants whose acts he can control. A lessor therefore is not responsible for the acts of a servant of his lessee. *Blackwell* vs. *Wiswall*, 24 Barb., 355; 14 How., 257; *Norton* vs. *Wiswall*, 26 Barb., 618. Or the owner, for those of a servant of a contractor. *Vanderpool* vs. *Husson*, 28 Barb., 196; *Gilbert* vs. *Beach*, 4 Duer, 423; *Potter* vs. *Seymour*, 4 Bosw., 140; *Gilbert* vs. *Beach*, 5 Bosw., 445.

Nor is a vendor answerable for the negligence of a servant of the purchaser, in removing goods sold, though the injury arises in the use of such vendor's appliances for moving such goods. *Stevens* vs. *Armstrong*, 2 Seld., 435.

But, if a servant employ a subagent, to do an act within the scope of that servant's authority, the master will be liable for the subagent's negligence. *Simons* vs. *Momer*, 29 Barb., 419. See also *Althof* vs. *Wolf*, 2 Hilt., 344.

A municipal corporation is not liable for the negligence of a servant of its contractor or grantee. *Pack* vs. *The Mayor of New York*, 4 Seld., 222; *Blake* vs. *Ferris*, 1 Seld., 48; *Lockwood* vs. *The Mayor of New York*, 2 Hilt., 66; *Kelly* vs. *The Mayor of New York*, 1 Kern., 432; *Same case*, 4 E. D. Smith, 291. See, as to the liability of the contractor himself in such a case, *McCleary* vs. *Kent*, 3 Duer, 27.

So also, where an obstruction was occasioned by the act of one of its own citizens, and notice of such obstruction was not shown to have been received by its officers, the corporation was held not liable. *Griffin* vs. *The Mayor of New York*, 5 Seld., 456; *McGinity* vs. *The Same*, 5 Duer, 674.

But, where any negligence in not repairing is imputable to the corporation itself, it will be liable. *Wallace* vs. *The Mayor of New York*, 2 Hilt., 440; 18 How., 169; 9 Abb., 40; *Hutson* vs. *The Same*, 5 Seld., 163.

So also, will it be held for the negligence of its subordinate officers, or persons standing in that relation. *Conrad* vs. *The Trustees of*

the Village of Ithaca, 16 N. Y., 158; *Hickok* vs. *The Trustees of the Village of Plattsburgh*, 16 N. Y., 161, note; *Storrs* vs. *The City of Utica*, 17 N. Y., 104.

And, where an injury is occasioned, not through any fault of the contractor or his servants, but as the result of an act which the corporation by their contract direct to be done, it will be answerable. *Lockwood* vs. *The Mayor of New York*, 2 Hilt., 66.

And the same rule is applicable to a contract by an individual owner. Or, when an act of the contractor creates a nuisance, and he suffers it to remain. *Gilbert* vs. *Beach*, 4 Duer, 423. See also *Vanderpool* vs. *Husson*, *supra*.

And especially, if a person interferes with the rights of the public, by excavation under a highway, without special authority, he does so at his peril. *Congreve* vs. *Morgan*, 5 Duer, 495; affirmed, 18 N. Y., 79. See previously in *same case*, 4 Duer, 439. As to the general responsibility of a principal for the wrongs of his agent, see *Thomas* vs. *Winchester*, 2 Seld., 397

(*d.*) Of the Attribution of Negligence.

Another general rule, applicable to most cases of actions for personal injury from accident, and to many of those for injuries to property, is this, that, in order to a recovery by a plaintiff, he must not merely show negligence on the part of the defendant, but also that such accident occurred, without fault or negligence on his own part.

A large proportion of the cases by which this rule is established, relate to accidents on railroads and other public conveyances. It is proposed to cite some of the more recent and prominent of these in the first instance, and those of other or more general application subsequently.

The burden of proof of carelessness rests, in the first instance, upon the plaintiff. The mere fact of injury does not, *per se*, throw upon the defendant that of disproving negligence. The presumption of a want of proper care may, however, arise from circumstances attending the injury; in this case, the burden shifts, and the defendant must show that the injury is not attributable to any fault on his part. *Holbrook* vs. *The Utica and Schenectady Railroad Company*, 2 Kern., 236; *Curtis* vs. *Rochester and Syracuse Railroad Company*, 18 N. Y., 534; *Brehon* vs. *Great Western Railroad Company*, 34 Barb., 256.

But, when the presumption has once been established against a carrier of passengers, he is then held to prove that the accident resulted from circumstances, against which the utmost prudence and foresight could not guard. *Bowen* vs. *The New York Central Railroad Company*, 18 N. Y., 408.

In *Button* vs. *The Hudson River Railroad Company*, 18 N. Y., 248, it is laid down that, in an action of this class, the plaintiff must show affirmatively, that he is guiltless of any negligence, proximatively contributing to the injury. It is not, however, to be presumed against him, and, therefore, direct evidence is not required in the first instance; but, where there is conflicting testimony, the preponderance must be in his favor.

The rule is thus laid down by Denio, J., in the later case of *Johnson* vs. *The Hudson River Railroad Company*, 20 N. Y., 65 (73): "The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely necessary that the plaintiff should give any affirmative proof, touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove, *primâ facie*, the whole issue; or the case may be such as to make it necessary for the plaintiff to show, by independent evidence, that he did not bring the misfortune upon himself. No more certain rule can be laid down."

Gross negligence on the part of the plaintiff will defeat his action, though the defendants may have omitted some prescribed precaution, or even been also guilty of negligence themselves. *Steves* vs. *Oswego and Syracuse Railroad Company*, 18 N. Y., 422. See also *Brooks* vs. *The Buffalo and Niagara Falls Railroad Company*, 25 Barb., 600; affirmed by Court of Appeals, *vide* 27 Barb., 532, note; *Brendell* vs. *The Buffalo and State Line Railroad Company*, 27 Barb., 534, note; *Dascomb* vs. *The Same*, 27 Barb., 226; *Mackey* vs. *The New York Central Railroad Company*, 27 Barb., 528; *Sheffield* vs. *The Rochester and Syracuse Railroad Company*, 21 Barb., 339; *Owen* vs. *The Hudson River Railroad Company*, 2 Bosw., 374.

As to the inability of the plaintiff to recover, when his own negligence, or that of the person in whose right he sues, concurred in producing the injury complained of, *vide Gilligan* vs. *The New York and Harlem Railroad Company*, 1 E. D. Smith, 453; *Robertson* vs. *The New York and Erie Railroad Company*, 22 Barb., 91; *Terry* vs. *The New York Central Railroad Company*, 22 Barb., 574; *Bernhardt* vs. *Rensselaer and Saratoga Railroad Company*, 18 How., 427; *Same case*, in reversal on another ground, 32 Barb., 165; 19 How., 199; *Same case*, final affirmance by Court of Appeals, 23 How., 166; also noticed, 33 Barb., 509; *Mentjes* vs. *The New York and Harlem Rail-*

road Company, 1 Hilt., 425; *Munger* vs. *The Tonawanda Railroad Company*, 4 Comst., 349; *Spooner* vs. *Brooklyn City Railroad Company*, 31 Barb., 419; *Higgins* vs. *The New York and Harlem Railroad Company*, 2 Bosw., 132; *Duffy* vs. *The Same*, 2 Hilt., 496; *Ernst* vs. *The Hudson River Railroad Company*, 32 Barb., 159; 19 How., 205; *McGrath* vs. *The Same*, 32 Barb., 144; 19 How., 211; *Beisegal* vs. *New York Central Railroad Company*, 33 Barb., 429; *Carolus* vs. *Mayor of New York*, 6 Bosw., 15; *Brown* vs. *Buffalo and State Line Railroad Company*, 22 N. Y., 191.

But the principle, as thus laid down, is subject to a reasonable modification. Where the acts of the defendants are themselves in any wise illegal or unreasonable, they cannot invoke it. *Sanford* vs. *Eighth Avenue Railroad Company*, 23 N. Y., 343. So, also, where the negligence of the defendant is gross, and that of the plaintiff slight or excusable, the question is one of fact, and cannot be taken from the jury. *Cox* vs. *President of Westchester Turnpike Road*, 33 Barb., 414: *McGrath* vs. *Hudson River Railroad Company*, *supra*; *Ernst* vs. *The Same*, *supra*; *Bernhardt* vs. *Rensselaer and Saratoga Railroad Company*, 32 Barb., 165; 19 How., 199, *supra*; stated to be affirmed by Court of Appeals, 33 Barb., 509; affirmed, 23 How., 166; *Fero* vs. *Buffalo and State Line Railroad Company*, 22 N. Y., 209. See also, generally, *Colegrove* vs. *New York and New Haven and New York and Harlem Railroad Companies*, 20 N. Y., 492.

Nor will it apply, or the plaintiff be charged with negligence, where the act complained of, on his part, has been occasioned by a neglect on the part of the defendants to provide him with proper accommodation, or to notify to him fully his obligation to comply with their regulations. *Willis* vs. *Long Island Railroad Company*, 32 Barb., 398; *Clark* vs. *Eighth Avenue Railroad Company*, 32 Barb., 657; *Edgerton* vs. *New York and Harlem Railroad Company*, 35 Barb., 193; *The Same* vs. *The Same*, 35 Barb., 389.

And a plaintiff may be unable to recover, where the injury has resulted from the negligence of another, employed by him at the time. So held in an action by a passenger, for injury occasioned by the negligence of a driver of a public carriage. *Brown* vs. *New York Central Railroad Company*, 31 Barb., 385, disapproving decision at circuit; *Knapp* vs. *Dagg*, 18 How., 165.

Gross negligence on the part of the defendant, will entitle a plaintiff to recover, even though a general stipulation of exemption may have been made. *Smith* vs. *The New York Central Railroad Company*, 29 Barb., 132. See also, as to an omission to restore a fence, within a reasonable time, *Munch* vs. *The Same*, 29 Barb., 647. But a plaintiff cannot recover upon a mere possibility, or even probability of negli-

gence. It must be positively proved. *Sheldon* vs. *The Hudson River Railroad Company*, 29 Barb., 226.

A railroad company is also responsible for a higher degree of care and skill, than an ordinary carrier of passengers, both generally, and with regard to latent defects. *Hegeman* vs. *The Western Railroad Corporation*, 3 Kern., 9; *Bernhardt* vs. *Saratoga and Rensselaer Railroad Company*, 19 How., 199; *Johnson* vs. *Hudson River Railroad Company*, 6 Duer, 633; also 5 Duer, 21, affirmed, 20 N. Y., 65; *Willis* vs. *Long Island Railroad Company*, 32 Barb., 398; *Clark* vs. *Eighth Avenue Railroad Company*, 32 Barb., 657; *Wilds* vs. *Hudson River Railroad Company*, 33 Barb., 503; *Fero* vs. *Buffalo and State Line Railroad Company*, 22 N. Y., 209; *Edgerton* vs. *New York and Harlem Railroad Company*, 35 Barb., 193; *The Same* vs. *The Same*, 35 Barb., 389. See likewise as to the responsibility of a commander of troops while exercising. *Castle* vs. *Duryea*, 32 Barb., 480.

As to the responsibilities of two companies, whose mutual negligence has concurred in producing an injury, and the degree of caution which a passenger is, under such circumstances, bound to exercise, *vide Colegrove* vs. *Harlem and New Haven Railroad Company*, 6 Duer, 382; affirmed, 20 N. Y., 492.

As to the peculiar liabilities of the New York and Harlem Railroad Company, and the New York and New Haven Railroad Company, for omission to repair fences on the line jointly used by them, see conflicting decisions of *Shanchan* vs. *The Same*, 10 Abb., 398; *Labussiere* vs. *The Same*, 10 Abb., 398, note.

Concurrent negligence on the part of another company, is no defence to an action brought by a passenger, injured without default on his part. *Chapman* vs. *New Haven Railroad Company*, 19 N. Y., 341.

As to the same principle, as regards injuries not immediately connected with accidents of the above nature, see also the following, amongst many other cases bearing upon the subject:

A father, suffering his infant child to be at large in the street, cannot recover for its being run over. *Kreig* vs. *Wells*, 1 E. D. Smith, 74. As to a collision between two vessels. *Crary* vs. *Marshall*, 1 E. D. Smith, 530. As to injuries received by a party, passing after dark through an unfinished building. *Roulston* vs. *Clark*, 3 E. D. Smith, 366. As to the distinction between injuries received by driving against an obstruction in the highway, before and after dark, *vide Clark* vs. *Kirwan*, 4 E. D. Smith, 21. As to leaving a horse loose in the highway, after removing his bit, *vide Morris* vs. *Phelps*, 2 Hilt., 38.

Concurrent negligence may, however, fail in constituting a defence, as against the claim of a passenger injured by collision. *Knapp* vs. *Dagg*, 18 How., 165. See also *Brown* vs. *New York Central Railroad*

Company, 31 Barb., 385; *Colegrove* vs. *Harlem and New Haven Railroad Companies*, 6 Duer, 382; affirmed, 20 N. Y., 492, *supra*; *Chapman* vs. *The New Haven Railroad Company*, 19 N. Y., 341, *supra*.

(*e.*) General Remark.

It is proposed to consider the subject of the specific averments, appropriate to suits in the nature of a common-law action for damages, in the following order, viz.:

1. Wrongs to the character or person;
2. Wrongs in respect of property; and,
3. Wrongs arising out of a breach of duty or contract;

reserving the consideration of the redress of wrongs, either by way of possessory action or equitable proceeding, for consideration in subsequent sections.

The subject of trespasses on real estate is also similarly reserved.

§ 142. *Averments in Tort.—Wrongs to Character or Person.*

(*a.*) Slander and Libel.

In connection with both these proceedings, the provisions of section 164, as above cited, must be borne in mind.

In neither is it any longer necessary to allege in the complaint, extrinsic facts, for the purpose of showing the application to the plaintiff, of the defamatory matter complained of. It is now, in all cases, sufficient to allege generally, that such matter was published or was spoken of or concerning the plaintiff. If the allegation be controverted, the plaintiff is then bound to establish that fact upon the trial. If not, it stands admitted.

The above provision is not, however, obligatory, and is in one respect limited in its nature. It relieves the plaintiff from the necessity of any longer stating extrinsic facts, for the purpose of showing the special application to the plaintiff, of defamatory matter spoken or published. But there its operation seems to stop. If such defamatory matter needs any special averment, by way of *colloquium*, to explain its meaning, or to show the words used to be slanderous or libellous in their nature, the insertion of a special allegation for that purpose is still equally necessary. *Pike* vs. *Van Wormer*, 5 How., 171; *Same case*, 6 How., 99; 1 C. R. (N. S.), 403.

Such extrinsic facts, although in the nature of an innuendo, must be distinctly, and also directly and specifically averred, and it should be shown likewise that the defendant had knowledge of them. *Caldwell* vs. *Raymond*, 2 Abb., 193; *Fry* vs. *Bennett*, 5 Sandf., 54; 1 C. R. (N. S.), 238; 9 L. O., 330; *Culver* vs. *Van Anden*, 4 Abb., 375; *Dias* vs.

Short, 16 How., 322; *Blaisdell* vs. *Raymond*, 14 How., 265; 4 Abb., 446; *Carroll* vs. *White*, 33 Barb., 615. But the effect of the words complained of cannot be thus enlarged. *Weed* vs. *Bibbins*, 32 Barb., 315.

For similar reasons, where the defamatory matter is in a foreign language, the words themselves must be alleged in that language, with an additional averment of their meaning in English, and that the parties to whom they were used understood that meaning. *Lettman* vs. *Ritz*, 3 Sandf., 734; *Debaix* vs. *Lehind*, 1 C. R. (N. S.), 235.

Where several causes of action are entitled in the same complaint, they must be separately stated. *Pike* vs. *Van Wormer*, *supra*.

(*b.*) Slander, Separately Considered.

The cases of *Pike* vs. *Van Wormer*, *Deas* vs. *Short*, *Lettman* vs. *Ritz*, and *Debaix* vs. *Lehind*, although above cited as of general application, bear directly upon the question of slander, and only incidentally upon that of libel.

In actions of this description, it is not sufficient to state the tenor and effect of what was said. The precise words must be alleged, or demurrer will lie. *Forsyth* vs. *Edmiston*, 2 Abb., 430; 5 Duer, 653; *Finnerty* vs. *Barker*, 7 L. O., 316. And, in the last case, it was considered better, though not essential, not to omit a statement of the time and place of uttering.

The words used must be alleged as having been spoken in the presence and hearing of some one, or the complaint will be defective. *Wood* vs. *Gilchrist*, 1 C. R., 117: *Anonymous*, 3 How., 406. An averment to this effect will be the only really safe practice in all cases, though it has been held that the word "published," if used, imports an uttering in the presence and hearing of others, "*ex vi termini*." See *Duel* vs. *Agan*, 1 C. R., 134. See also *Lettman* vs. *Ritz*, and *Debaix* vs. *Lehind*, above cited, as to proper mode of averment of slander in a foreign language.

Words not alleged in the pleadings cannot be given in evidence. *Rundell* vs. *Butler*, 7 Barb., 260. But insinuations, made in indirect terms, may nevertheless be actionable.

In slander, allegations of a subsequent usage of the words complained of, and likewise of other defamatory expressions not specifically averred, are inadmissible, and, on a proper application, they might be stricken out as redundant. *Gray* vs. *Nellis*, 6 How., 290. A repetition may be proved in evidence, without special allegation.

The mere fact that the words used impute to the plaintiff an act subjecting him to a criminal prosecution, punishable by fine, is not necessarily sufficient to constitute slander. They must also impute moral turpitude, or something infamous or disgraceful, in a general sense,

detracting from the character of the offender as a man of good morals. *Quin* vs. *O'Gara*, 2 E. D. Smith, 388.

If they do not impute such a crime or misdemeanor, words so used will not be actionable, *per se*, or without proof of special damage. *Pike* vs. *Van Wormer*, 5 How., 171, *supra*.

The mere use of a word capable of interpretation in a felonious sense, does not necessarily constitute slander, unless its use in such a sense be shown. *Quin* vs. *O'Gara*, *supra*. A mere allegation of passing counterfeit money, has thus been held insufficent. *Pike* vs. *Van Wormer*, 5 How., 171. But that of being "a dealer in counterfeit money," is, on the contrary, actionable, *per se*. *Same case*, 6 How., 99; 1 C. R. (N. S.), 408. See, as to a charge of being a receiver of stolen goods, *Dias* vs. *Short*, 16 How., 322; and also, as to words not necessarily imputing a criminal offence, being made to appear slanderous, by means of an appropriate introductory averment. *Weed* vs. *Bibbins*, 32 Barb., 315.

The following imputations have been held to be slanderous, *per se*, and to be sufficient to sustain an action, standing alone, and without proof of special damage.

An allegation that a married woman has the venereal disease. *Williams* vs. *Holdridge*, 22 Barb., 396. (But such imputation must be made in a present and not in a past sense). *Pike* vs. *Van Wormer*, 5 How., 171, *supra*.) An imputation of wilful perjury, in a suit pending. *Walrath* vs. *Nellis*, 17 How., 72. A charge of being a receiver of stolen goods. *Dias* vs. *Short*, 16 How., 322 (though a mere charge of having received stolen goods, without an additional allegation of *scienter*, might not have been so). The saying of a man that he is the author of an already published libel. *Viele* vs. *Gray*, 10 Abb., 1; 18 How., 550. The imputation of gross ignorance, and a total want of skill in his profession, as against a physician. *Secor* vs. *Harris*, 18 Barb., 425; *Carroll* vs. *White*, 33 Barb., 615.

The imputation of want of chastity in an unmarried female is slanderous, special damage being averred. *Fuller* vs. *Fenner*, 16 Barb., 333. Such special damage must, however, result from injury to the plaintiff's reputation, which affects the conduct of others, and not from mental distress, physical illness, or inability to labor, occasioned by the aspersion. So held, as to such an accusation, as against a man. *Terwilliger* vs. *Wands*, 17 N. Y., 54, or, as against a married woman, *Wilson* vs. *Goit*, 17 N. Y., 442. See likewise *Olmstead* vs. *Brown*, 12 Barb., 657. These last cases tend to overrule the conclusion come to in the former under the special circumstances.

As to the distinction between an action for special damage, or for words actionable *per se*, in the case of a married woman, as regards the

question of parties, see heretofore, under that head, and *Klein* vs. *Hentz*, 2 Duer, 633; and *Williams* vs. *Holdridge*, 22 Barb., 396, there cited. See also *Olmstead* vs. *Brown*, 12 Barb., 657.

Although, when the occasion on which slanderous words were spoken repels the presumption of malice, proof of it is necessary to sustain the action, the facts and circumstances tending to show it need not be alleged, but a bare averment that such words were spoken maliciously will be sufficient. *Viele* vs. *Gray*, 10 Abb., 1; 18 How., 550.

The imputation of insolvency against a petty trader is actionable. *Carpenter* vs. *Dennis*, 3 Sandf., 305.

In *Phincle* vs. *Vaughan*, 12 Barb., 215, it was held that the imputation of false swearing under oath, without any averment that the words complained of were spoken in reference to a judicial proceeding, was not slanderous *per se*. It was held, however, that if an amendment had been allowed, by inserting an allegation of words proved on the trial, to the effect that, if the plaintiff "had had his deserts, he would have been dealt with in the time of it," the action might then have been maintained. See also, as to the necessity of an averment as above, *Bonner* vs. *McPhail*, 31 Barb., 106.

It was held in *Baker* vs. *Williams*, 12 Barb., 527, that slander would lie for an imputation of perjury, on an affidavit made before a justice of the peace, in order to obtain an attachment against a defaulting witness, though such oath was orally taken.

In an action for slander, on a charge of stealing the examination of a witness, taken before a justice of the peace, an omission to allege that such examination was taken in a legally pending proceeding, was held, on demurrer, to render the complaint defective. *Ayres* vs. *Covell*, 18 Barb., 260.

In *Deyo* vs. *Brundage*, 13 How., 221, it was held competent to a plaintiff to allege, if he thinks fit, all that took place at the time, without selecting from the whole conversation, the particular expressions which involved the slanderous charge complained of.

(*c.*) Libel, Separately Considered.

In a complaint of this description, it is not necessary to set out the whole of the obnoxious publication, but the pleader may extract the particular passages complained of, provided their sense be clear and distinct. *Culver* vs. *Van Anden*, 4 Abb., 375.

A statement that the defendant was proprietor of a newspaper, and that the libellous matter was published therein, was held a sufficient averment of publication, in *Hunt* vs. *Bennett*, 4 E. D. Smith, 647; affirmed, 19 N. Y., 173.

Several actions for the same libel, in different counties, are improper,

and a motion to consolidate will be granted. *Percy* vs. *Seward*, 6 Abb., 326.

A general averment of malice, was held insufficient to charge a defendant for the publication of a statement, not libellous, *per se*, but entirely dependent on extrinsic facts, no actual knowledge of which was alleged against him. *Caldwell* vs. *Raymond*, 2 Abb., 193.

But where the facts, constituting the injury, are within the knowledge of the defendant, or the statement involved is in itself libellous, a general allegation of malice will be sufficient, without any statement of facts and circumstances. *Viele* vs. *Gray*, 10 Abb., 1; *Hunt* vs. *Bennett*, 19 N. Y., 173; affirming *same case*, 4 E. D. Smith, 647. See also *Fry* vs. *Bennett*, 5 Sandf., 54; 9 L. O., 330; 1 C. R. (N. S.), 238; *Howard* vs. *Sexton*, 4 Comst., 157; *Buddington* vs. *Davis*, 6 How., 401. See also *Purdy* vs. *Carpenter*, 6 How, 361; *Littlejohn* vs. *Greeley*, 13 Abb., 41.

The responsibility of reporters in and editors of newspapers, is now defined by special statute, chapter 130 of 1854, p. 314, as follows:

§ 1. No reporter, editor or proprietor of any newspaper, shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings, of any statement, speech, argument or debate in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of the publication.

§ 2. Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor, or proprietor, from an action or indictment for any libellous comments or remarks superadded to, and interspersed, or connected with such report.

§ 3. This act shall take effect immediately.

Before the passage of this statute, doctrines in substantial accordance with part of its provisions, had been held in *Stanley* vs. *Webb*, 4 Sandf., 21; 3 C. R., 79, and *Huff* vs. *Bennett*, 4 Sandf. 120.

In *Weed* vs. *Foster*, 11 Barb., 203, an imputation of the receipt of money for procuring a public appointment, made against an influential politician, was held to be libellous *per se*.

So also as to the imputation of insanity. *Perkins* vs. *Mitchell*, 31 Barb., 461.

So likewise as to a charge of corruption, against a member of the legislature. *Littlejohn* vs. *Greeley*, 13 Abb., 41.

In *Bennett* vs. *Williamson*, 4 Sandf., 60, it was held that an imputation of pleading the statute of limitations unfairly, was not libellous *per se*, there being no charge that the plaintiff made that plea dishonestly. In the same case, a distinction is drawn between the speaking

or writing the same words, and it is held that libel in such cases may lie, where slander will not.

A statement by the keeper of an intelligence office, reflecting upon the business capacity of the partners in a mercantile firm, was held libellous, though made honestly, and on seemingly reliable information. *Taylor* vs. *Church*, 4 Seld., 452. See also in court below, *same case*, 1 E. D. Smith, 279.

The same case decided, that a partnership firm may sue for libel, affecting them in their partnership relations. But such is not the case as to members of an association, not having a community of pecuniary interest. They cannot sue jointly, *Giraud* vs. *Beach*, 4 E. D. Smith, 337.

That a caricature may be libellous, is assumed in *Viele* vs. *Gray*, 18 How., 550; 10 Abb., 1.

Although, on the trial, the words alleged must be shown by proof to bear a libellous construction, on demurrer the rule is different, and, if they are capable of bearing such a construction, the complaint will stand. *Wesley* vs. *Bennett*, 6 Duer, 688; 5 Abb., 498.

In relation to privileged communications, the following decisions have been made:

In *Cook* vs. *Hill*, 3 Sandf., 341, it was held that no action would lie in respect of a memorial to the postmaster-general, charging fraud against a successful candidate for a government contract. The communication was held to be a privileged one, if the statements contained in that memorial were true; but otherwise, if they were false. See likewise, *Buddington* vs. *Davis*, 6 How., 401.

As to the privilege of a physician, in granting a certificate of lunacy in a proceeding pursuant to the statute, see *Perkins* vs. *Mitchell*, 31 Barb., 461.

In *Streety* vs. *Wood*, 15 Barb., 105, the preferring of charges by one member of a lodge against another, in due form, was held *primâ facie* to be a privileged communication, and, if made in good faith, no action would lie.

Words spoken or written in a legal proceeding, pertinent and material to the subject of the controversy, are privileged, and the truth of the statement cannot be drawn in question, in an action for slander or libel. *Garr* vs. *Selden*, 4 Comst., 91. *Vide Perkins* vs. *Mitchell*, *supra*.

Although an affidavit made in support of a regular legal proceeding is privileged, one made in relation to an application wholly incompetent for want of jurisdiction, is not so. *Hosmer* vs. *Loveland*, 19 Barb., 111.

The report of a committee of the trustees of the College of Phar

macy, transmitted to the secretary of the treasury with a view to obtain the removal of an inspector of drugs, was held privileged, in the absence of proof of malice or bad faith. *Van Wyck* vs. *Aspinwall*, 4 Duer, 268; affirmed, 17 N. Y., 190.

A written communication from a banker in the country to a mercantile firm in New York, in respect to the pecuniary responsibility of a party whose note had been forwarded for collection, was held privileged in *Lewis* vs. *Chapman*, 16 N. Y., 369; reversing, *same case*, 19 Barb., 252.

An article in a newspaper, reflecting upon the character of a candidate for public office, is not privileged, and the editor will be responsible. It does not stand upon the same footing, as when addressed to the appointing power. *Hunt* vs. *Bennett*, 19 N. Y., 173; affirming *same case*, 4 E. D. Smith, 647.

The imputation of personal corruption against a member of the legislature was held not to be entitled to any privilege in *Littlejohn* vs. *Greeley*, 13 Abb., 41.

As to the responsibility of an editor, in respect of comments upon the manager of a theatre, and how far such comments may or may not be allowable, see *Fry* vs. *Bennett*, 3 Bosw., 200; *Same case*, 5 Sandf., 54; 9 L. O., 330; 1 C. R. (N. S.), 238; *Same case*, 4 Duer, 247.

In *Hunt* vs. *Bennett*, 4 E. D. Smith, 647, above cited, the rule is generally laid down, that a publication is libellous, when its necessary effect is to diminish the plaintiff's reputation for respectability, impair his condition, and abridge his comforts, by exposing him to disgrace and ridicule.

In *Snyder* vs. *Andrews*, 6 Barb., 43, it was held that the reading aloud of a letter containing libellous matter, amounted to a publication.

(*d.*) Seduction.

The fundamental basis of this species of action, is the loss of service, and, unless the relation of master and servant exists between the plaintiff and the female seduced, either actually or constructively, the action will not be sustainable. In the case of parent and child, that relation exists constructively, and so long as the child remains a minor, the former may sue. And it is not necessary that the child should be actually in the service of or residing with the father, at the time of her seduction. It is sufficient that he was then legally entitled to her services, and might have required them, if he chose to do so. *Mulvehall* vs. *Millward*, 1 Kern., 343. And, as regards a minor, it seems one standing "*in loco parentis*" has a similar right. *Bartley* vs. *Richtmeyer*, 4 Comst., 38 (43); *Bracy* vs. *Kibbe*, 31 Barb., 273.

In *Bartley* vs. *Richtmeyer*, it was, however, held that a stepfather

could not sue for seduction of his stepdaughter, while living in the service of another.

But, where the infant daughter had been bound out to service with her seducer, so that the father was not entitled to her services, it was held that the latter could not sue. He had, by the binding out, parted with his legal right to reclaim the services of the daughter at his pleasure. *Dain* vs. *Wycoff*, 3 Seld., 191. It appearing however, on a subsequent trial, that the indenting had been procured by the defendant by fraud, with a view to the seduction, that fact was held to be an answer to the objection. *Dain* vs. *Wycoff*, 18 N. Y., 45.

To render the action maintainable, where pregnancy does not follow, the loss of service must be the direct and immediate, and not a remote consequence of the seduction. *Knight* vs. *Wilcox*, 4 Kern., 413; reversing *same case*, 18 Barb., 212. See also 15 Barb., 279. See, to the same effect, *White* vs. *Nellis*, 31 Barb., 279.

The connivance of the father in the act of seduction, will wholly bar his action; but, where that defence is omitted to be pleaded, it will be waived. *Travis* vs. *Barger*, 24 Barb., 614.

The female seduced, cannot maintain an action for her own seduction *Hamilton* vs. *Lomax*, 26 Barb., 615; 6 Abb., 142.

Where a rape had been committed, however, it was held that the female ravished might maintain an action of assault and battery, for the injury sustained by her. *Koenig* vs. *Nott*, 2 Hilt., 323; 8 Abb., 384.

With reference to an indictment for seduction under promise of marriage, and the circumstances which will be necessary or sufficient to support it, see *People* vs. *Kane*, 14 Abb., 15.

As to the analogous action for damages, for enticing away the wife of the plaintiff, see *Barnes* vs. *Allen*, 30 Barb., 663; *Scherpf* vs. *Szadeczky*, 4 E. D. Smith, 110; 1 Abb., 366. As to the rights of a parent to receive back his child, in consequence of gross misconduct on the part of her husband, see *Barnett* vs. *Smith*, 21 Barb., 439.

(*e.*) Breach of Promise of Marriage.

In this action, the form of the old declaration in such cases may be substantially followed, with some few necessary abbreviations. See *Leopold* vs. *Poppenheimer*, 1 C. R., 39.

An action is maintainable, where the promise is sufficiently averred and proved, though the defendant was, at the time, legally disqualified from performing it, such disqualification being fraudulently concealed by him from the plaintiff; nor is it necessary to aver in terms, that he knew his representations of being unmarried, to be untrue. *Blattmacher* vs. *Saal*, 29 Barb., 22; 7 Abb., 409.

But, to be actionable, the promise must be express. *Buzzard* vs. *Knapp*, 12 How., 504.

And mutual also, but, as regards a counter-promise from the plaintiff, it may be inferred from the circumstances: see *People* vs. *Kane*, 14 Abb., 15.

As to a refusal by the plaintiff, of a subsequent offer of the defendant to fulfil his promise, constituting a defence, see *Liebmann* vs. *Solomon*, 7 Abb., 409, note.

An infant is not competent to make a promise of this description, and no action can be maintained in respect of it. *Hamilton* vs. *Lomax*, 26 Barb., 615; 6 Abb., 142.

If part of the injury claimed to arise from the breach of promise, consist of the loss of health of the plaintiff, such fact must be specially averred, and special damage claimed, or proof will be inadmissible. *Bedell* vs. *Powell*, 13 Barb., 183.

As to the form of summons in these cases, *vide Williams* vs. *Miller*, 4 How., 94; 2 C. R., 55. And as to their clearly sounding in tort, see *Newman* vs. *Cook*, 11 L. O., 62, with reference to the homestead exemption act.

(*f.*) Assault and Battery.

In an action of this nature, the old form of declaration may advantageously be consulted, with a view to framing the complaint in concise and legal language, pruning away, of course, all unnecessary repetitions.

In *Root* vs. *Foster*, 9 How., 37, statements as to the intent of the defendant, and the ridicule brought upon the plaintiff by his conduct, were refused to be stricken out. Though not essential to entitle the plaintiff to sustain his action, they were material on the question of damages, and might be proved.

Averments in aggravation are not, however, traversable, and it is not necessary to confute them in the answer. *Gilbert* vs. *Rounds*, 14 How., 46.

As to the power of a plaintiff to amend his complaint at the trial, by inserting an additional charge, *vide Haquis* vs. *De Hart*, 12 How., 322.

And a plaintiff has, it would seem, the right to aver on the face of his complaint, all that took place at the time, though part constituted an assault, and part a slander. *Brewer* vs. *Temple*, 15 How., 286.

As to the right of self defence, and how far it may be justifiably exercised, or the reverse, see *Keyes* vs. *Devlin*, 3 E. D. Smith, 518.

As to the right of a ravished female, to maintain an action for the assault and battery committed upon her, see *Koenig* vs. *Nott*, 2 Hilt., 323; 8 Abb., 384, above cited.

An action for an assault upon a married woman can now be brought

in her own name, and in hers only. *Mann* vs. *Marsh*, 21 How., 372; 35 Barb., 68.

In this connection, it may be convenient to cite the cases bearing upon the right of ejection from the cars of a railroad company, and of employment of force for that purpose.

The necessity of complying with all reasonable regulations, and of exhibiting a passenger's ticket, whenever requested, is distinctly established by the following series of decisions, which also recognize the forfeiture of the right of being carried further, by any person refusing to comply with such regulations, and the right of ejection of such person by the conductor: *Hibbard* vs. *The New York and Erie Railroad Company*, 15 N. Y., 455; *The Northern Railroad Company* vs. *Paige*, 22 Barb., 130.

So also, if the passenger, having passed the proper station for a change, refuses to return to it, on an offer to convey him back without charge, or to pay additional fare. *Page* vs. *The New York Central Railroad Company*, 6 Duer, 523. Or if, stopping at an intermediate station, he omits to give notice to the conductor, and have the proper indorsement made. *Beebe* vs. *Ayres*, 28 Barb., 275,

But the power of ejection must be reasonably, and not dangerously exercised. It is unreasonable to do so, when the cars are in motion. In that case the passenger will be justified in resistance, and the company liable for any injury he may sustain. *Sanford* vs. *Eighth Avenue Railroad Company*, 23 N. Y., 343.

In *Pike* vs. *Finch*, 24 Barb., 514, it was held that the indorsement, "good for this trip only," did not limit the undertaking of the company to carry the whole distance. If not used before, the ticket is available for any subsequent day, and an ejection of the holder will be wrongful. See however, *per contra*, *Barker* vs. *Coffin*, 31 Barb., 556.

(*g.*) False Imprisonment.

In actions for false imprisonment, the complaint must be confined to a simple pleading of the fact, according to the old practice; and any statements of the attendant circumstances, will, if objected to, be stricken out as frivolous. *Shaw* vs. *Jayne*, 4 How., 119; 2 C. R., 69; *Eddy* vs. *Beach*, 7 Abb., 17. The old forms of declaration may therefore in this case, as in the last, be consulted with special advantage.

A less strict view was, however, taken by the New York Common Pleas in *Moloney* vs. *Dows*, 15 How., 261; and allegations of the circumstances in detail, on a charge of false imprisonment and assault, in connection with an illegal combination and conspiracy, were allowed in a great measure to stand.

No action of this nature, or for assault and battery, can be main-

tained against the agent of a father, using no undue force, in effecting his directions respecting the custody of his minor child. *Hernandez* vs. *Carnobeli*, 4 Duer, 642; 10 How., 433.

In an action for arrest on execution, clearly unwarranted by the judgment, both attorney and client will be liable. *Sleight* vs. *Leavenworth*, 5 Duer, 122.

Where the warrant is not valid on its face, it will be no protection, either to the justice issuing or the officer executing it, and both will be liable. *Williams* vs. *Garrett*, 12 How., 456. And this, even when issued in good faith, and though there was sufficient proof to have sustained a valid warrant, *Blythe* vs. *Tompkins*, 2 Abb., 468; or in a case of misnomer. *Miller* vs. *Foley*, 28 Barb., 630. And it has been held that a sufficient accusation must be recited in the instrument itself, and that a criminal offence must appear to the magistrate to have been committed, or his warrant will not protect. *Wilson* vs. *Robinson*, 6 How., 110. It has been, however, decided on the other hand, that, where a criminal offence was charged, the justice acquired jurisdiction, and, though he grossly err in its exercise, and in deciding that such an offence had been committed, his warrant was a protection. *Campbell* vs. *Ewalt*, 7 How., 399.

The principle that, when a judge has once acquired jurisdiction, error in its exercise will not render process issued by him void, is maintained in *Landt* vs. *Hilts*, 19 Barb., 283, and *Stanton* vs. *Schell*, 3 Sandf., 323, both, decisions on arrest under the former non-imprisonment act. In the latter case it is generally laid down that, where an inferior tribunal acts without acquiring jurisdiction, its proceedings are void, and all concerned are trespassers. But, where it has jurisdiction, and then errs in the exercise of its powers, the act is only erroneous, and not void.

Where the plaintiff fails in an action, in which the defendant is arrestable, he is himself arrestable for the costs, and his imprisonment will be legal. *Merritt* vs. *Carpenter*, 30 Barb., 61.

In an action of this nature for a malicious arrest on order, the complaint must state that the process complained of has been vacated, or else that judgment has been entered against the plaintiff in that action, or it will be defective, unless it appears that the order was a nullity *ab initio*. *Searll* vs. *McCrackan*, 16 How., 262.

Where the process is regular, an action for false imprisonment will not lie, though it appear to have been maliciously issued. The remedy is in a suit for a malicious prosecution. *Sleight* vs. *Ogle*, 4 E. D. Smith, 445; *Waldheim* vs. *Sichel*, 1 Hilt., 45.

The existence of a cause of action is sufficient to justify an arrest, though the damages, if established, would be nominal only. *Gordon* vs. *Upham*, 4 E. D. Smith, 9.

(*h.*) Malicious Prosecution.

In an action of this nature, the plaintiff must aver and must prove an entire want of a probable cause for the accusation, and actual malice of the defendant in preferring it, that is, malice in fact, as distinguished from malice in law. *Bulkeley* vs. *Smith*, 2 Duer, 261; 11 L. O., 200; *Besson* vs. *Southard*, 6 Seld., 236.

In the complaint it is necessary to show, that the alleged malicious prosecution has been legally and finally terminated by acquittal, or so that no further proceedings can be had. *Thomason* vs. *De Mott*, 18 How., 529; 9 Abb., 242. A mere entry of *nolle prosequi* was accordingly held insufficient for that purpose. See also *Bacon* vs. *Townsend*, 2 C. R., 51; *Hall* vs. *Fisher*, 20 Barb., 441. Nor does suffering a default have this effect, where probable cause existed at the first. *Gordon* vs. *Upham*, 4 E. D. Smith, 9. An immediate dismissal by a magistrate, of a prosecution when commenced, is, it would seem, *primâ facie* proof of the want of it. *Gould* vs. *Sherman*, 10 Abb., 441.

The necessity of the concurrence of all three of the above elements, *i. e.*, actual determination in favor of the plaintiff—want of probable cause—and malice in fact, is maintained in *Vanderbilt* vs. *Mathis*, 5 Duer, 304.

In *Hall* vs. *Suydam*, 6 Barb., 83, it is held that proof of express malice is not sufficient, without showing also a want of probable cause, and that the latter does not turn on the actual guilt or innocence of the accused, but on the belief of the prosecutor concerning such guilt or innocence. Probable cause is there defined as, "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the accused is guilty of the offence with which he is charged" (86). See same rule stated, in *Gordon* vs. *Upham*, 4 E. D. Smith, 9; and *Scanlan* vs. *Cowley*, 2 Hilt., 489.

The fact that the plaintiff was convicted by a jury is conclusive, and, if apparent in the complaint, will be fatal to the suit. *Miller* vs. *Deere*, 2 Abb., 1. Nor will a reversal, for error of law, prevent the application of the rule. The only exception is, when fraud in obtaining the conviction, by means which prevented the plaintiff from setting up his defence, is set up and proved.

In a complaint of this nature, an averment of matter tending to show the defendant's motive, was held not to be irrelevant, in *Brockleman* vs. *Brandt*, 10 Abb., 141.

As to the class of cases in which an action for malicious prosecution may be maintainable, though one for false imprisonment will not lie, *vide Sleight* vs. *Ogle*, 4 E. D. Smith, 445; and *Waldheim* vs. *Sichel*, 1 Hilt., 45.

When the facts of the case are established, the existence of probable cause is a question of law, and, even when there is a conflict of evidence as to fact, the judge, in submitting that question to the jury, is bound to accompany that submission with an instruction as to what facts, if established, will constitute probable cause, and to submit to them only the question as to the existence of those facts. See this rule, as established in *Bulkeley* vs. *Keteltas*, 2 Seld., 384; reversing *same case*, 4 Sandf., 450; and followed in *Bulkeley* vs. *Smith*, and several others of the decisions above cited.

A strong case of want of probable cause was shown, and a judgment, dismissing the plaintiff's complaint, reversed in *Grinnell* vs. *Stewart*, 20 How., 478; 12 Abb., 220; 32 Barb., 544.

(*i.*) Statutory Action for Death by Wrongful Injury.

This peculiar form of action is given to the representatives of a person, killed by a wrongful act, neglect, or default, by special statute passed on the 13th of December, 1847, chapter 450, p. 575, amended by chapter 256 of 1849, p. 388. The remedy did not exist at common law, and therefore dates only from the former of those periods.

By the statutes in question, the following requisites are imposed:

The death must be caused by a wrongful act, neglect, or default.

The act, neglect, or default complained of, must be such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect of it.

The action is to be brought in the name of the personal representatives of the deceased person.

It is to be so brought, for the exclusive benefit of the widow and next of kin, to be distributed among them according to the statute of distribution.

The jury may give a fair and just compensation, with reference to the pecuniary injury resulting from such death, to the parties beneficially entitled.

But such damages are not to exceed $5,000.

And the period of limitation is two years.

Although pecuniary damage is the basis of the action, it is not necessary either to aver or to prove any immediate pecuniary or special damage, occasioned to the plaintiff, or to the next of kin. The compensation is prospective in its nature. The statute assumes that every person possesses some relative value to others. It is, however, strictly pecuniary, and bodily suffering of the deceased, or mental distress to the survivors, forms no part of its proper basis. The death of a minor child, though of an age at which its services are for the present valueless, is, accordingly, sufficient to ground the action, the compensation

having respect to their prospective value, in a pecuniary point of view. *Oldfield* vs. *The New York and Harlem Railroad Company*, 4 Kern., 310; affirming *same case*, 3 E. D. Smith, 103; *Green* vs. *Hudson River Railroad Company*, 32 Barb., 25; *Quin* vs. *Moore*, 15 N. Y., 432; *Roeder* vs. *Ormsby*, 22 How., 270; 13 Abb., 334. That the right of the deceased, had he survived, to have brought an action for the same injury, forms, in fact, the test of the remedy of the representatives, is maintained in the same cases. *Lehman* vs. *The City of Brooklyn*, 29 Barb., 234, in so far as it holds that, in such a case, nominal damages only should be given, seems inconsistent with, and must, therefore, be taken as overruled by this class of decisions.

An averment that the deceased left a widow or next of kin, is essential, and without it an action cannot be sustained. *Lucas* vs. *The New York Central Railroad Company*, 21 Barb., 245; *Safford* vs. *Drew*, 3 Duer, 627; 12 L. O., 150.

It is not necessary that the complaint should directly refer to the statute, but, to sustain it, there must be a positive averment, not only of the acts, but also of the qualifications prescribed. See *Brown* vs. *Harmon*, 21 Barb., 508; *Yertore* vs. *Wiswall*, 16 How., 8. Nor can the plaintiff be required to specify, or give a particular of the items entering into the computation of damages. *Murphy* vs. *Kipp*, 1 Duer, 659.

An action of this nature was held maintainable by the administratrix of a railroad engineer, killed by reason of negligence, imputable to the company by which he was employed. *Smith* vs. *The New York and Harlem Railroad Company*, 6 Duer, 225; affirmed, 19 N. Y., 127. See also, as to the higher degree of care which will be required in a railroad company, for the purpose of guarding against accidents, *Johnson* vs. *The Hudson River Railroad Company*, 6 Duer, 633; and *same case*, 5 Duer, 21; affirmed, 20 N. Y., 65; also other decisions above cited.

As to the liability of an individual, as well as a corporation, for death caused by a wrongful injury, see *Baker* vs. *Bailey*, 16 Barb., 54, holding it applicable to a cause of death, the result of an assault.

A master is liable, under this statute, for the negligence of his servant in the course of his employment. *Althof* vs. *Wolf*, 22 N. Y., 355; affirming *same case*, 2 Hilt., 344. See also *same case*, as to the measure of damages.

In *Lehman* vs. *The City of Brooklyn*, 29 Barb., 234, the rule that negligence contributing to the injury will bar a recovery, is applied to an action of this description. So also will accord and satisfaction with the deceased, in his lifetime. *Dibble* vs. *The New York and Erie Railroad Company*, 25 Barb., 183.

A surviving husband may maintain such an action, as administrator, provided it appear upon the face of the complaint that there are next of kin. *Green* vs. *The Hudson River Railroad Company*, 16 How., 263 ; again reported, and also affirmed, 31 Barb., 260; *Same case*, 32 Barb., 25. Whether, in the absence of such an averment, he can sue at all, seems doubtful. *Vide Lucas* vs. *The New York Central Railroad Company*, above cited. In his own right he cannot, where death is the immediate result of the injury. *Green* vs. *The Hudson River Railroad Company*, 28 Barb., 9; 16 How., 230. Nor can he recover any thing for his own loss of services. *Dickens* vs. *New York Central Railroad Company*, *infra*. But, in an action under the statute, it is immaterial whether the result of death from the injury be immediate or consequential. *Brown* vs. *Buffalo and State Line Railroad Company*, 22 N. Y., 191. As to the measure of damages in a case of death of a wife, carrying on a profitable business, and the interests of her surviving husband and children, see *Tilley* vs. *Hudson River Railroad Company*, 23 How., 363.

That a cause of action of this nature survives, against the executors of the wrong-doer, is maintained in *Doedt* vs. *Wiswall*, 15 How., 128 ; and *Yertore* vs. *Wiswall*, 16 How., 8.

It is not necessary that the next of kin should be dependent upon the deceased for their support, or have a right to his services, in order to maintain such an action. Where, therefore, the deceased only left two brothers and a sister, an action was held maintainable by the husband, as administrator, damage to next of kin being averred. *Dickens* vs. *The New York Central Railroad Company*, 28 Barb., 41. Refer, as to statement of questions in this case, to 16 How., 269.

But, in such a case, no account can be taken of the damage accruing to the surviving husband for loss of service. The measure of damages is to be strictly confined to the injury accruing to the next of kin, as such, exclusive of his rights, *The Same* vs. *The Same*, 23 N. Y., 158, reversing the foregoing and ordering a new trial.

As before stated, an action of this nature is not maintainable, for an injury accruing out of the bounds of the state. *Vandeventer* vs. *The New York and New Haven Railroad Company*, 27 Barb., 244; *Whitford* vs. *The Panama Railroad Company*, 23 N. Y., 465; affirming, 3 Bosw., 67; *Crowley* vs. *The Same*, 39 Barb., 99; and *Beach* vs. *The Bay State Company*, 30 Barb., 433; 18 How., 335; reversing *same case*, 27 Barb., 248; 16 How., 1; 6 Abb., 415.

As to what will be a sufficient statement of a cause of action, not founded on the statute, see *Roeder* vs. *Ormsby*, 22 How., 270; 13 Abb., 334.

(*j.*) Personal Injuries.

Several of the cases bearing upon the matter falling under this subdivision, have been already anticipated in the preliminary section, No. 141, under the heads of the *Relation of Employer and Employee*, and of the *Attribution of Negligence*. It will of course be unnecessary to cite them a second time.

Where two railroad corporations assumed to carry passengers, beyond the limits of the states to which their powers extended, they were held jointly responsible to a party injured by negligence. They were liable under their general duty to the public, and not on any contract for carriage, so as to admit the defence that they were acting *ultra vires*. *Bissell* vs. *Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y., 258.

As to the power of a carrier of passengers, to limit his responsibility in the above respect, by express contract with the party carried, see *Boswell* vs. *Hudson River Railroad Company*, 5 Bosw., 699.

A dealer in medicine, who had carelessly labelled a deadly poison as a harmless medicine, was held liable in damages, to any persons subsequently purchasing from others, and misled in the using by reason of the false label. The liability in such case was held not to arise out of any contract or privity between him and the party injured, but out of the general duty imposed on him by law. *Thomas* vs. *Winchester*, 2 Seld., 397. See as to responsibility for death arising from a similar cause, *Quin* vs. *Moore*, 15 N. Y., 432, cited under last subdivision. Also, generally, as to what may be taken as sufficient averments in an action for negligence causing death. *Roeder* vs. *Ormsby*, 22 How., 270; 13 Abb., 334.

As to the liability of the owner for injuries from the bite of a vicious dog, and what is necessary to be proved, in order to hold him, see *Fairchild* vs. *Bentley*, 30 Barb., 147.

Gross and wilful carelessness in an act, from which injury results, will render it malicious, and its perpetrator liable in punitive damages. *Etchberry* vs. *Levielle*, 2 Hilt., 40.

The cars of railroad companies, running through the streets of a city, are not subject to the ordinary rule of the road, as to turning to the right, nor is a person meeting them bound to observe it. *Hegan* vs. *The Eighth Avenue Railroad Company*, 15 N. Y., 380.

To be the subject of an action, the injury must be the direct and immediate consequence of the act of the defendant, and, if that act involve a breach of duty, that duty must be owing to the plaintiff. Where, therefore, the plaintiff complained that, by reason of the omission of the defendants to maintain a proper fence between their land

and that of a third party, the horse of that party fell down a precipice upon, and injured the plaintiff, his complaint was held demurrable. *Ryan* vs. *The Rochester and Syracuse Railroad Company*, 9 How., 453.

A carrier of passengers was held liable for injury, arising from the explosion of a camphene lamp, and it was laid down that the *onus* of showing that proper care could not have prevented the injury lay upon him. *Wilkie* vs. *Bolster*, 3 E. D. Smith, 327.

In an action against carriers, a general averment, that the accident complained of occurred through the negligence and want of care of the defendants, and not through any want of care, neglect, or default on the part of the plaintiff, will raise a sufficient issue, for the admission of general evidence. *Edgerton* vs. *New York and Harlem Railroad Company*, 35 Barb., 389.

§ 143. *Averments in Tort.—Continued.*

(*a.*) Wrongs as to Property.

Injuries Wilful or Negligent.

As to the liability of the owner of a vicious dog, for injury to the dog of another person, lawfully coming upon the premises where he was, and as to what constitutes viciousness, and the duty of the owner under such circumstances, see *Wheeler* vs. *Brant*, 23 Barb., 324. But a party so complaining, is bound to show that his own dog was not the aggressor. *Wiley* vs. *Slater*, 22 Barb., 506.

Where injury to the plaintiff's horse was inflicted by that of the defendant, whilst trespassing, it was held unnecessary to make any averment of vicious habits. *Dunkle* vs. *Koeker*, 11 Barb., 387.

The owner of bees was held not liable for injury by them to the plaintiff's horse, when they had been kept in the same place for several years without previous injury. The owner of an animal is only liable for injury committed by it, on the ground of actual or presumed negligence on his part. *Earl* vs. *Van Alstyne*, 8 Barb., 630.

The finder of a horse is liable to the owner, for injuries occasioned by use, whilst in his possession. *Murgoo* vs. *Cogswell*, 1 E. D. Smith, 359. So also is the bailee for hire, and the fact that the contract of hiring was upon a Sunday will not be any defence. *Harrison* vs. *Marshall*, 4 E. D. Smith, 271. See also, as to the defence of infancy, *Fish* vs. *Ferris*, 5 Duer, 49; *Conkling* vs. *Thompson*, 29 Barb., 218.

The proprietor of an omnibus line was held liable, for injury to the horse and cart of the plaintiff, arising from negligence of his driver, or defective construction of his stage. *Harpell* vs. *Curtis*, 1 E. D. Smith, 78. See also *Wolfe* vs. *Mersereau*, 4 Duer, 473.

In *Lockwood* vs. *The Mayor of New York*, 2 Hilt., 66, the corporation of that city was held liable, for injuries occasioned to the plaintiff's house, by work done by their contractor in pursuance of his contract. See also *Lacour* vs. *The Same*, 3 Duer, 406.

Where the property of another is injured, in consequence of an act, lawful in itself, misconduct or negligence must be proved, or the party occasioning it will not be liable. *Stuart* vs. *Hawley*, 22 Barb., 619.

The owners of a steam-tug were held liable for injuries to a canal-boat towed by them, occasioned by the gross negligence of their servants, although the contract for towing provided that it was to be at the risk of the master and owners. The phrase was held only to extend to the ordinary risks of navigation. *Wells* vs. *The Steam Navigation Company*, 4 Seld., 375. And the liability of general charterers is the same as that of owners, in the event of a collision. But otherwise, if the contract is merely one of affreightment. *Sherman* vs. *Fream*, 30 Barb., 478.

A complaint for injury by negligence, must show the defendant to be in actual default, or it will not be sustainable. *Taylor* vs. *The Atlantic Mutual Insurance Company*, 2 Bosw., 106.

Where the purchaser from an alleged parol lessee, was suffered by the owner to go into, and remain in possession, a tenancy was held to be created, and that a subsequent bricking up of the door by the owner, and a refusal to allow the removal of the goods on the premises, were tortious acts, for which he was answerable in damages. *Marquhart* vs. *Lafarge*, 5 Duer, 559.

But consent or acquiescence, on the part of the lessee, to acts constituting a trespass, will operate as a license, and bar a recovery in damages. *Walter* vs. *Post*, 6 Duer, 363; 4 Abb., 382.

As to the liability of the city or county, to answer in damages for property destroyed or injured, in consequence of mobs or riots, and the maintenance of an action for that purpose, see Laws of 1855, chapter 428, p. 800. An averment of the facts, and of the damages sustained by the plaintiff, will be sufficient to sustain the action, and it is unnecessary for the plaintiff to negative negligence or carelessness on his own part. *Wolfe* vs. *Supervisors of Richmond County*, 19 How., 370; 11 Abb., 270.

A railroad company are answerable in damages, to the owners of adjoining property, for injuries resulting from their execution of their works, or from not restoring a road or stream, crossed by them, to its former condition. *Robinson* vs. *The New York and Erie Railroad Company*, 27 Barb., 512. So also, as to the invasion by them of property, without previous consent or appraisal of damages. *Williams* vs. *The New York Central Railroad Company*, 16 N. Y., 87.

As to the presumption that ordinary care was used, to which the defendant is entitled, in a case where the injury complained of is the result of an act lawful in itself, see *Lansing* vs. *Stone*, 14 Abb., 199.

That class of injuries to property, where the act complained of results from, or arises out of, a breach of duty or contract, on the part of the defendant, will be considered in the succeeding section.

(*b.*) Breach of Warranty.

A purchaser on warranty, may sue or *recoup* for the difference in value, nor is his right barred, by his omitting to notify the vendor, or disposing of the goods. *Muller* vs. *Eno*, 4 Kern., 597; reversing *same case*, 3 Duer, 421. See likewise, *Burt* vs. *Dewey*, 31 Barb., 540.

See, however, as to the mere exhibition of a sample, not being *per se* sufficient to constitute a warranty, *Hargous* vs. *Stone*, 1 Seld., 73; *Beirne* vs. *Dord*, 1 Seld., 95.

As to what will be sufficient to constitute a warranty, *vide Blakeman* vs. *Mackay*, 1 Hilt., 266; *Fiedler* vs. *Tucker*, 13 How., 9.

When an action is brought for breach of an implied warranty, the existence and terms of the warranty must be specifically alleged, as traversable facts. *Prentice* vs. *Dike*, 6 Duer, 220. As to the extent of the implied warranty, on sale of chattels by the manufactnrer, see *Hoe* vs. *Sanborn*, 21 N. Y., 552.

In an action upon a warranty, it is not necessary that all the representations made by the defendant should be false or actionable. If any part of them are so, it will suffice. A positive affirmation of a fact, in trade negotiations, was held to be a sufficient warranty. *Sweet* vs. *Bradley*, 24 Barb., 549.

An action on the case in the nature of deceit, will lie on a false warranty on a sale of goods, if that warranty be express. Nor is it necessary, in such case, to allege or prove fraud. It is enough to aver and establish the warranty, and that it was false. Nor is it necessary to sue as in *assumpsit*, but the old form of action may be properly followed. *Fowler* vs. *Abrams*, 3 E. D. Smith, 1—a horse case.

Where the purchaser of a horse, represented to be sound and kind, had the option of returning it, if unsound, and retained it, knowing of its unsoundness, it was held he could not defend, on the ground of breach of the original warranty. *Van Allen* vs. *Allen*, 1 Hilt., 524.

As to the amount of liability for resulting injuries, and the measure of damages against the defendant, in an action for a false warranty of gentleness and kindness, see *Sharon* vs. *Mosher*, 17 Barb., 518. Also as to the measure of damages, and rights of the purchaser, on breach of a warranty of soundness. *Kiernan* vs. *Rocheleau*, 6 Bosw., 148.

And, in such a case, it is not sufficient that the vendor tells truth as

to the article sold. He should tell the whole truth, fully and fairly, or he may be liable in damages for the concealment. *Nickley* vs. *Thomas*, 22 Barb., 652.

As to the principle that a general warranty of soundness will not extend to defects, visible at the time of sale, and not requiring skill to detect them, see *Birdseye* vs. *Frost*, 34 Barb., 367.

As to the power of an agent to warrant, and as to the extent to which a purchaser will be warranted in relying on a warranty, when given, as affecting the rule of damages, see *Milburn* vs. *Belloni*, 34 Barb., 607; 22 How., 18; 12 Abb., 451.

(*c.*) False Representations.

An action on the case for damages, will lie against the vendor of land for false representations as to the non-existence of an alleged incumbrance, though he sold the land as trustee for others, and though the purchaser had notice, but relied on his denial. *Haight* vs. *Hayt*, 19 N. Y., 464. So also, for fraudulent representations as to the boundaries of land sold, and suppression of the fact of there being no title to part. *Clark* vs. *Baird*, 5 Seld., 183. So likewise as to a false representation of the ownership of land in another state, inducing an exchange and other outlays, on the part of, and damages incurred by the plaintiff. *McGovern* vs. *Payn*, 32 Barb., 83.

As to the responsibility of a vendor of land, for false statements made by his agent, and for any representations, made without knowledge of their truth or falsity, see *Bennett* vs. *Judson*, 21 N. Y., 238.

In *White* vs. *Merritt*, 3 Seld., 352, it is generally laid down that a false representation, made with intent to injure another, and, in relying on which he is injured, is a good cause of action, though no benefit accrue to the party making it, from the falsehood.

In *Zabriskie* vs. *Smith*, 3 Kern., 322, it is laid down that a party is liable in damages who, in bad faith, and with a view of inducing others to credit a merchant, represents that he has examined into his affairs, and considers him solvent, when such merchant is in fact insolvent, and the party has not investigated his affairs, and knows nothing of his business condition, except that he is largely indebted. And also, that the responsibility of the party making such representations, is not necessarily confined to the credit immediately induced, but may be continuing.

In the *same case* it is laid down that the complaint in such an action should aver, and the plaintiff must prove, that the representations were made, with intent to deceive and to defraud.

In *Robinson* vs. *Flint*, 16 How., 240; 7 Abb., 393, note, it is held that, where the complaint shows a false representation, known by the party

making it to be false—made as the foundation of a contract with a person deceived thereby, and damages in consequence of such deception, it states a sufficient cause of action.

In *White* vs. *Seaver*, 25 Barb., 235, it was held that false representations, as to the vendor being entitled to the benefit of a contract, were actionable, but that, if the intended purchaser, having the means of knowledge within his power, neglects to make inquiry, his right of action will be lost. See also, *Swift* vs. *The City of Williamsburgh*, 24 Barb., 427, as to the similar waiver of a right to sue for false representations inducing a contract, when their falsity might have been ascertained, by examination of the records in the city clerk's office.

These two cases seem, however, to be mainly, if not entirely, overruled by the contrary doctrine, as laid down in *Haight* vs. *Hayt*, above cited.

In *Bean* vs. *Wills*, 28 Barb., 466; 17 How., 90, false representations as to the solvency of another, inducing credit, and made with an express view to secure a benefit to the party making them, were held actionable.

In *Farrington* vs. *Frankfort Bank*, 24 Barb., 554, an indorsement of bills of exchange, obtained by false representations of the drawer, was held void, as against a bank, to which they were delivered by the drawer, as additional security for his protested paper, and that the indorser might have maintained an action against the bank to have such indorsement cancelled.

In *Beckmann* vs. *Bormann*, 3 E. D. Smith, 409, a person, selling personal property as his own, to which in fact he had no right, except as tenant, was held answerable in damages for the failure of title.

A party retaining any part of the benefit of a contract induced by fraud, cannot sue for its rescission. *Fisher* vs. *Conant*, 3 E. D. Smith, 199; *Rosenbaum* vs. *Gunter*, 3 E. D. Smith, 203.

Directors or officers of a public company making false representations as to its prospects, or the value of its shares, are jointly or severally liable, and this not merely to persons directly dealing with them, but also to any members of the public, who, relying upon such false information, may become purchasers of its shares in the market, or from a third person, without any immediate communication soever. *Cross* vs. *Sackett*, 2 Bosw., 617; 16 How., 62; 6 Abb., 247; *Cazeaux* vs. *Mali*, 25 Barb., 578; 15 How., 347; *Newbery* vs. *Garland*, 31 Barb., 121; *Morse* vs. *Swits*, 19 How., 275; also *Wells* vs. *Jewett*, 11 How., 242; and see *Bell* vs. *Mali*, 11 How., 254, in part overruled by the above; and *Seizer* vs. *Mali*, 32 Barb., 76; which, though subsequent in date, seems inconsistent in substance, so far as general liability to the public is concerned.

But such an action is, of course, only maintainable, when it will

otherwise lie. See, as to proceedings by a foreign corporation, not brought within the jurisdictional purview of section 427, *House* vs. *Cooper*, 30 Barb., 157; 16 How., 292.

As to the necessity of alleging in terms, knowledge of falsity of representations, on the part of the person making them, and also of a fraudulent intent in such making, see *Mabey* vs. *Adams*, 3 Bosw., 346. In this case it was considered that directors, as such, are not liable for false statements in the original articles of association, made before their appointment, and that a purchaser from the association itself, cannot sue its directors for violations of the statute, antecedent to his purchase.

As to a conspiracy to defraud, see *Ilion Bank* vs. *Carver*, 31 Barb., 230.

(*d.*) TRESPASS "DE BONIS ASPORTATIS;" OR, TROVER AND CONVERSION.

The action for damages, which now stands in the place of the above forms of remedy, under the former system, affords redress, in cases of the wrongful abstraction or obtaining of property. In many of the cases in which it is applicable, the plaintiff has his election, whether to resort to it or to the closely allied remedy of replevin. The latter is in the nature of a possessory action, and is of course only expedient, when the property in question remains in specie, and can be reached by process. Trover, or trespass, on the contrary, is more peculiarly appropriate to those cases where that property has been either destroyed, removed beyond reach of the plaintiff, or so injured, that a bare restoration, even with damages for its detention, will not afford adequate redress.

Although replevin, as well as trover, has its basis in a wrongful taking or detention of property, it has been thought better to devote a separate section to the consideration of the former, and to confine the observations and citations in the present, to the latter, separately considered.

The two, though so closely allied, cannot be maintained in conjunction. In trover, the relief asked consists wholly and exclusively in damages. The subject-matter of the action is abandoned, and compensation is sought for its loss. In replevin, on the contrary, the restoration of that subject-matter is the gist of the action, and any demand for money damages is only dependent or alternative.

The governing principle by which the distinction is to be drawn is the prayer for relief, which must, of course, be properly adapted to the statement. That prayer determines the nature of the action. If a mere judgment in damages is demanded, the action is trover, or trespass, as above, and the provisional remedy of replevin cannot be obtained. See *Seymour* vs. *Van Curen*, 18 How., 94; *Spalding* vs. *Spalding*, 3 How., 297; 1 C. R., 64; *Dows* vs. *Green*, 3 How., 377; *Maxwell* vs.

Farnam, 7 How., 236. See heretofore, section 139, under the head of *Joinder*.

In cases where the wrongful taking of goods involves also a liability on contract, a plaintiff has his election, between this remedy, and an ordinary action for debt *ex contractu*. But, having once made his election, he must abide by it, and accept its consequences. As to the stricter measure of proof in trover, and otherwise, see heretofore, section 140, subdivision *Election*, and cases there cited.

In one respect, the election of trover may possibly prove a disadvantage, inasmuch as it changes the nature of the claim; and a judgment for the value of exempt property, is no longer the subject of exemption from levy, as the property itself, if recovered, would have been. *Mallory* vs. *Norton*, 21 Barb., 424.

On the other hand, a suit for the conversion of a chattel, may, in some cases, head off a defence, which in a mere action for its value, sounding in contract, would be available. *Fish* vs. *Ferris*, 5 Duer, 49. See, as to the converse of this proposition, *Munger* vs. *Hess*, 28 Barb., 75.

A right of action of this nature is assignable, and the assignee may sue in his own name. See heretofore, section 32, under subdivision *Assignments in Tort*, and cases there cited.

An administrator may maintain trespass or trover, for an unlawful taking of the goods of the deceased after his death, but before administration granted. *Rockwell* vs. *Saunders*, 19 Barb., 473 (480), or during the intestate's lifetime. In this case, he must make special averments, to show his representative character; but, for a conversion after the intestate's death, and even before administration granted, this is not necessary. *Sheldon* vs. *Hoy*, 11 How., 11.

A qualified or limited ownership in the plaintiff, accompanied by the right to immediate possession, is sufficient ground of action. Thus, assignees under an assignment, invalid on its face, but not yet formally set aside, and who had discharged the amount of a levy upon the chattel claimed, were held entitled to recover, as against parties standing in the position of creditors at large of the assignors, though claiming a right to possession in hostility to the latter. *Andrews* vs. *Durant*, 18 N. Y., 496. The maker of a promissory note may maintain a suit for its conversion, against a person wrongfully negotiating it, before it has any legal inception. *Decker* vs. *Mathews*, 2 Kern., 313; affirming *same case*, 5 Sandf., 439. Nor will the existence of a contract for sale of goods, deprive the owner of a right to maintain trover for their conversion, whilst that contract remains uncompleted. *Minzeskeimer* vs. *Heine*, 4 E. D. Smith, 65.

The finder of goods may maintain an action, against a wrongdoer who subsequently converts them. *Mathews* vs. *Harsell*, 1 E. D. Smith,

393. So may a factor, in charge of goods and responsible for their value. *Gorum* vs. *Carey*, 1 Abb., 285. A husband in joint possession with his wife of chattels purchased by her, was held entitled to maintain trover against her mortgagee, on the ground that her contracts were void, and he himself was liable for the price. *Switzer* vs. *Valentine*, 10 How., 109. And a sheriff may also hold a party liable for conversion, who wrongfully removes goods levied upon. *Barker* vs. *Bininger*, 4 Kern., 270. But such action is only maintainable by him, and not by his deputy. *Terwilliger* vs. *Wheeler*, 35 Barb., 620.

Either the owner of goods, or a bailee having a special property therein, may sue for the conversion, but a recovery by the former, is a bar to any subsequent suit by the latter. *Green* vs. *Clarke*, 2 Kern., 343. See also *Alt* vs. *Weidenberg*, 6 Bosw., 176. And possession, and a *primâ facie* title to property, suffice to ground the action as against a wrongdoer. *Beatty* vs. *Swarthout*, 32 Barb., 293. So much so, that a party in possession of estrays, was held entitled to maintain trespass or trover, against any one, except the owner, or a party having a right to their possession. *Hendricks* vs. *Decker*, 35 Barb., 298. See, to the same effect, *Kissam* vs. *Roberts*, 6 Bosw., 154. Likewise, as to the effect of a delivery, under a contract for payment of a debt in specific articles. *Woodford* vs. *Patterson*, 32 Barb., 630.

But a party not entitled to absolute and unqualified possession cannot sue. Trover is, therefore, not maintainable, by one tenant in common of chattels against another, for an appropriation of his share where capable of severance. *Forbes* vs. *Shattuck*, 22 Barb., 568; *Tripp* vs. *Riley*, 15 Barb., 333. See also *Tinney* vs. *Stebbins*, 28 Barb., 290.

But otherwise, when the conversion is in fact a destruction of the property. *Benedict* vs. *Howard*, 31 Barb., 569. Nor can it be brought by the vendee, under an executory contract, not fully performed. *Chapman* vs. *Kent*, 3 Duer, 224; *Comfort* vs. *Kiersted*, 26 Barb., 472. See also *Andrews* vs. *Durant*, above cited.

The holder of goods wrongfully pledged is liable, in trover, for a refusal to deliver them up after demand. *Henry* vs. *Marvin*, 3 E. D. Smith, 71. So also is a third party, refusing to deliver goods in his possession to their purchaser. *McGinn* vs. *Worden*, 3 E. D. Smith, 355; *Hall* vs. *Robinson*, 2 Comst., 293. See likewise *Tuttle* vs. *Gladding*, 2 E. D. Smith, 157, and, as to the consequences of assigning a false pretence for such refusal. So also is a pledgee, delivering over property to the original pledgor, after notice of an assignment. *Duell* vs. *Cudlipp*, 1 Hilt., 166.

A gratuitous bailee is responsible, for the loss of property occasioned by his carelessness. *Rivara* vs. *Ghio*, 3 E. D. Smith, 264. See likewise *Morris* vs. *Third Avenue Railroad Company*, 23 How., 345.

A party hiring a horse for a specific distance, and going beyond it, is, in the event of injury, liable for its conversion. *Fish* vs. *Ferris*, 5 Duer, 49; *Disbrow* vs. *Tenbroeck*, 4 E. D. Smith, 397. In such a case infancy will be no defence. *Fish* vs. *Ferris*, *supra*.

Trover will lie for goods unpaid for, the sale of which has been obtained by fraud. *Schmidt* vs. *Kattenhorn*, 2 Hilt., 157. See also, as to a fraudulent sale, *Ludden* vs. *Hazen*, 31 Barb., 650. Likewise, by an execution creditor, against the purchaser of goods from trustees, under circumstances showing the sale to be in bad faith. *Pine* vs. *Rikert*, 21 Barb., 469.

Trover is maintainable, after demand and refusal to restore it, for stock pledged as collateral security for payment of an usurious loan. *Cousland* vs. *Davis*, 4 Bosw., 619. Also, for stock sold, without authority of the real owner, even although a valuable consideration have been given for it by the holder, in good faith, to a person whose possession is wrongful. *Anderson* vs. *Nicholas*, 5 Bosw., 121.

Trover is maintainable, by the purchaser under a foreclosure sale, for the severance of fixtures, annexed to the freehold by the mortgagor subsequent to the mortgage. *Gardner* vs. *Finley*, 19 Barb., 317. By the lessor of furniture in a building, against his lessee, for its wrongful removal. *Davison* vs. *Donadi*, 2 E. D. Smith, 121. By the bailor of personal property against an assignee of the bailee. *Hyde* vs. *Cookson*, 21 Barb., 92. Against an agent, omitting to account for a specific sum of money received. *Donohue* vs. *Henry*, 4 E. D. Smith, 162. Against a sheriff taking goods out of the possession of a vendee, on execution against his vendor. *Salmon* vs. *Orser*, 5 Duer, 511.

An attachment, regular on its face, even though issued in bad faith, protects all parties, and they will not be liable in trover for a levy under it. The remedy is by action for the alleged fraud. *Whitaker* vs. *Merrill*, 28 Barb., 526. Nor is a sheriff liable in trespass, for taking the goods of the plaintiff out of the possession of a third person, under process of replevin. The remedy lies against the persons who instigated the taking. *Foster* vs. *Pettibone*, 20 Barb., 350.

Trover will not lie against the sheriff, or against an execution-creditor, for selling chattels remaining in the possession of a mortgagor, under stipulation to that effect in the mortgage. All that passes by the sale, is the mortgagor's interest, such as it is, and the mortgagee, when he becomes entitled to possession, may follow and reclaim the goods. *Goulet* vs. *Asseler*, 22 N. Y., 225; *Hull* vs. *Carnley*, 1 Kern., 501; *The Same* vs. *The Same*, 17 N. Y., 202.

As to the right of the mortgagee, to maintain an action for the damage to his reversionary interest, see *Manning* vs. *Monaghan*, 23 N. Y., 539. See also *Parish* vs. *Wheeler*, 22 N. Y., 494, as to the

measure of a mortgagee's recovery against the mortgagor, for conversion of the goods mortgaged, after forfeiture.

A *bonâ fide* subpurchaser of goods, is not liable in trover, to an owner who has delivered them to the original vendee, though such delivery has been induced by fraud, which would authorize a disaffirmance of the contract. *Caldwell* vs. *Bartlett*, 3 Duer, 341; *Keyser* vs. *Harbeck*, 3 Duer, 373. But any thing calculated to give such subpurchaser notice, or to put him upon inquiry as to fraud in the original sale, will deprive him of the benefit of this rule. *Danforth* vs. *Dart*, 4 Duer, 101.

The holder of goods subject to a lien, is not liable for conversion, until after demand and payment, or tender of the amount due, if any. *Coller* vs. *Shepard*, 19 Barb., 305. Refusal to deliver, however, upon tender made, discharges the lien, and constitutes a conversion. *La Motte* vs. *Archer*, 4 E. D. Smith, 46; *Meserole* vs. *Archer*, 3 Bosw. 376. Where, however, the holder claims a lien, his claim must be specifically asserted at the time of demand, or his refusal to deliver may be sufficient proof of conversion. *Heine* vs. *Anderson*, 2 Duer, 318.

An agent to whom goods had been sent for delivery to the vendee, was held not liable in trover, for a refusal to deliver them without payment in cash, though a bill had been drawn against them by the vendee, and accepted by the plaintiff. *Ralph* vs. *Stuart*, 4 E. D. Smith, 627.

If the value of goods, in the possession of a bailee for manufacturing purposes, be enhanced by his labor, he or his assignee, though liable in trover for their return, will be entitled to a deduction in respect of their increased value. *Hyde* vs. *Cookson*, 21 Barb., 92. But, where property has been wrongfully converted, the reverse is the rule, and the owner is entitled to recover the enhanced value, even though owing to the labor and expense of the party illegally withholding. *Walther* vs. *Wetmore*, 1 E. D. Smith, 7.

An unconditional offer to return property claimed, before suit brought, may defeat a recovery in replevin, but, where demand has been previously refused, trover may lie for damage occasioned by such original refusal. *Savage* vs. *Perkins*, 11 How., 17.

Trover will not lie against a party not guilty of an actual conversion, and who has never had possession of the property, but merely claims a lien upon it as mortgagee. *Matteawan Company* vs. *Bentley*, 13 Barb., 641. Nor is a pledgee, who has returned property to the pledgor, before the acquisition of title by the plaintiff as assignee, liable to him. *Duell* vs. *Cudlipp*, 1 Hilt., 166.

Where the possession of the defendant has not been wrongfully acquired, as against the plaintiff in the action, a previous demand and refusal to deliver is essential to its maintenance. So held as to a party

detaining property from a vendee, subsequent to his having taken possession. *Davis* vs. *Kruger*, 4 E. D. Smith, 350. As to an abstract loaned. *Power* vs. *Bassford*, 19 How., 309. So also as to a personally innocent holder of stolen goods. *Gurney* vs. *Kenny*, 2 E. D. Smith, 132.

Where, after goods have come to the possession of the defendant, an assignment of them has been made, there must be a demand, subsequent to that assignment. *Hassell* vs. *Borden*, 1 Hilt., 128; *Duell* vs. *Cudlipp*, *supra*; *Sherman* vs. *Elder*, 1 Hilt., 178; *Cass* vs. *New York and New Haven Railroad Company*, 1 E. D. Smith, 522; *Hall* vs. *Robinson*, 2 Comst., 293; *Bliss* vs. *Cottle*, 32 Barb., 322. After a reversal of judgment, demand must be made upon an officer in possession of property levied upon under it, before he will be liable for a refusal to restore it. *Smith* vs. *Allen*, 2 E. D. Smith, 259.

So also, a demand is proper before suit against the holder of goods wrongfully pledged. *Henry* vs. *Marvin*, 3 E. D. Smith, 71. Or against the holder of goods, purchased by the plaintiff from their owner. *McGinn* vs. *Worden*, 3 E. D. Smith, 155.

But a demand of this nature must be specific, and the party upon whom it is made is entitled to all proper information which he may reasonably require, or it will be insufficient. *Breese* vs. *Bangs*, 2 E. D. Smith, 474. If the party upon whom it is made, have any doubt of the demandant's authority, he must inquire of it at the time, and may require reasonable evidence. But if he omit to do so, or rest his refusal upon a false pretence, he cannot afterwards object. *Tuttle* vs. *Gladding*, 2 E. D. Smith, 157. But the demand should be made by the claimant in person, or some one duly authorized to make it. *Bliss* vs. *Cottle*, 32 Barb., 322.

Demand will be sufficient, if made of one of several joint holders. *Ball* vs. *Larkin*, 3 E. D. Smith, 555. Or against an agent fully authorized, as the baggage master at a railroad station, in an action for loss of baggage. *Cass* vs. *The New York and New Haven Railroad Company*, 1 E. D. Smith, 522.

But, when demand is made, ability to comply with it at the time, must be shown, or an action in this form will not be maintainable. *Whitney* vs. *Slauson*, 28 Barb., 276; *Bowman* vs. *Eaton*, 24 Barb., 528; *Andrews* vs. *Shattuck*, 32 Barb., 396.

As to how far the acts of an officer of a corporation, may or may not amount to a conversion by the corporation itself, and also as to the effect of a qualified refusal to deliver on demand, and as to that of a subsequent offer before suit brought, see *Thomson* vs. *Sixpenny Savings Bank of City of New York*, 5 Bosw., 296.

Where the taking by the defendant into his possession is wrongful, the rule will be reversed, and an action is maintainable without any previ-

ous demand. *Moses* vs. *Walker*, 2 Hilt., 536; *Pringle* vs. *Phillips*, 5 Sandf., 157; *Zachrisson* vs. *Ahman*, 2 Sandf., 68; *McKie* vs. *Judd*, 2 Kern., 622 (626); *Davison* vs. *Donadi*, 2 E. D. Smith, 121; *New York Car Oil Company* vs. *Richmond*, 6 Bosw., 213.

Nor, where the possession of the defendants is of this nature, will any previous tender of any lien which they might otherwise claim, be requisite. *Walther* vs. *Wetmore*, 1 E. D. Smith, 7.

In a complaint of this nature, an actual fraudulent conversion by the plaintiff must be both alleged and proved. *Howell* vs. *Kroose*, 4 E. D. Smith, 357; 2 Abb., 167; *Hall* vs. *Robinson*, 2 Comst., 293. And proof of a demand and refusal are only *primâ facie* evidence, and will not suffice, without further proof of actual fraud and negativing any adverse implication. *Boyle* vs. *Roche*, 2 E. D. Smith, 335.

Where the title of the plaintiff to the subject-matter of the action is dependent upon the construction of a written document, that document should be set forth, or its purport sufficiently alleged. And if an objection to the plaintiff's recovery appears upon the face of the complaint, it will, of course, be held defective. *Fairbanks* vs. *Bloomfield*, 2 Duer, 349.

But, under ordinary circumstances, a general allegation of ownership, without stating details, will be both sufficient and proper, and a bill of sale under which such ownership is derived, may be given in evidence without special allegation. *Heine* vs. *Anderson*, 3 Duer, 318. An issue joined on this allegation, admits any description of counter-evidence on the part of the defendant. *Davis* vs. *Hoppock*, 6 Duer, 254.

In an action for the wrongful taking of goods, ownership in the plaintiff need not be alleged, and even an allegation from which possession may be implied, will suffice. *Kissam* vs. *Roberts*, 6 Bosw., 154.

And in an action on the ground of fraud, a general claim of ownership will be sufficient, without any detailed allegation of the facts constituting the plaintiff's title. *Bliss* vs. *Cottle*, 32 Barb., 322.

Any lengthened statement of details as to the nature of the ownership of the plaintiff, or the mode of conversion by the defendant, will, with the exception above noticed, be not only wholly unnecessary, but may be stricken out as irrelevant and redundant. *Moffatt* vs. *Pratt*, 12 How., 48.

A mere breach of duty, as that of an agent intrusted with property, and selling it at an undervalue, contrary to instructions, will not be sufficient to constitute a conversion, and a variance of this nature between the allegation and the proof, will be fatal. *Moore* vs. *McKibbin*, 33 Barb., 246.

§ 144. *Averments in Tort.—Continued.*

Breach of Duty or Contract.

(*a.*) Common Carriers.

In a suit against a person or a corporation, standing in this relation to the public, the liability to be enforced is of a mixed nature, arising mainly in respect of breach of duty, and also, to some extent, in respect of breach of the implied contract for safe carriage and delivery.

The former is however the dominant principle, and, as a general rule, an action of this description sounds in tort.

It may be maintained, in fact, when there exists no direct contract between the parties, as in the case of a party injured by a railroad accident, when the contract for his carriage was made, not with himself but with his employer. *Nolton* vs. *The Western Railroad Corporation*, 15 N. Y., 444; affirming *same case*, 10 How., 97. See also as to the liability of railroad companies, for injury to a passenger actually carried by them, though the contract under which he was carried was invalid as a contract, being *ultra vires*. *Bissell* vs. *Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y., 258.

An action of this description, in respect of a miscarriage of property, is maintainable by an assignee of the original demand. See heretofore, section 32, under the subordinate head of *Assignments in Tort*. The rule is otherwise as to a personal injury. See this subject heretofore considered.

The old common-law doctrine, that a common carrier of goods stands in the light of a *quasi*-insurer, and is responsible for all accidents, save such as arise from the act of God, or of the public enemy, still governs, though its strictness in application has been somewhat relaxed. See generally as to this responsibility, and the averments necessary to sustain a claim, *Merritt* vs. *Earle*, 31 Barb., 38.

But, although inevitable accident may excuse the carrier, the principle does not apply in a case where he is anywise in fault himself. Unreasonable delay on his part, will render him liable for a loss, occurring under circumstances which, but for his *laches*, would have afforded a sufficient excuse. *Read* vs. *Spaulding*, 5 Bosw., 395.

As regards a carrier of passengers, the rule is less severe, and to hold him answerable for a personal injury, negligence must be shown or must be imputable, and negligence contributing to the injury must be disproved. See above, under the subdivision of *Personal Injuries*.

A carrier of goods is permitted to limit his liability by special contract; he cannot, however, do so by mere notice, even if brought to the knowledge of the owner. *Dorr* vs. *The New Jersey Steam Navi-*

gation Company, 1 Kern., 485; *Mercantile Mutual Insurance Company* vs. *Chase*, 1 E. D. Smith, 115; *Nevins* vs. *Bay State Steamboat Company*, 4 Bosw., 225; *Newstadt* vs. *Adams*, 5 Duer, 43; *Parsons* vs. *Monteath*, 13 Barb., 353; *Moore* vs. *Evans*, 14 Barb., 524. So also as to a carrier of passengers. *Wells* vs. *The New York Central Railroad Company*, 26 Barb., 641; *Smith* vs. *The Same*, 29 Barb., 132; *Boswell* vs. *Hudson River Railroad Company*, 10 Abb., 442.

But such a limitation will not excuse gross negligence, for which, notwithstanding, he may still remain liable. See, as to a carrier of passengers, *Willes* vs. *The New York Central Railroad Company*, and *Smith* vs. *The Same*, *supra*; *Bissell* vs. *The Same*, 29 Barb., 602. As to injury to property, *Wells* vs. *The Steam Navigation Company*, 4 Seld., 375.

A common carrier may, by stipulation, secure to himself the benefit of any insurance effected by the owner, and, in such case, the insurers have no right of action against him, in case of abandonment. *Mercantile Mutual Insurance Company* vs. *Calebs*, 20 N. Y., 173.

A party standing in this relation, is liable for contracts made by his servants, or agents authorized by him to receive goods for carriage, or allowed by him to hold themselves out to the public, as possessing such authority. *Medbury* vs. *The New York and Erie Railroad Company*, 26 Barb., 564; *Schroeder* vs. *The Hudson River Railroad Company*, 5 Duer, 55; *Fenn* vs. *Timpson*, 4 E. D. Smith, 276. Also, for the wrongful acts of his agents or servants, *Weed* vs. *The Panama Railroad Company*, 5 Duer, 193; *Nolton* vs. *Western Railroad Corporation*, *supra*. And likewise, in respect of their neglect of duty, see *Freeman* vs. *Newton*, 3 E. D. Smith, 246; *Porter* vs. *New York Central Railroad Company*, 34 Barb., 353; *Morris* vs. *Third Avenue Railroad Company*, 23 How., 345.

If a carrier undertakes to carry goods to a point beyond his route, he is liable for their safe delivery, at the place to which they are so undertaken to be carried, and for any injury occurring to them in the course of their carriage to that place. And, where the carriage for the whole distance is performed by several companies, employing a common agent to make contracts for carriage, an action is maintainable against any one of them. *Hart* vs. *The Rensselaer and Saratoga Railroad Company*, 4 Seld., 37; *Fox* vs. *The Troy and Boston Railroad Company*, 24 Barb., 382; *Schroeder* vs. *The Hudson River Railroad Company*, 5 Duer, 55; *Mallory* vs. *Burrett*, 1 E. D. Smith, 234; *Thomas* vs. *Mills*, 4 E. D. Smith, 75; *McCormick* vs. *The Hudson River Railroad Company*, 4 E. D. Smith, 181; *Quimby* vs. *Vanderbilt*, 17 N. Y., 306; *Wing* vs. *The New York and Erie Railroad Company*, 1 Hilt., 235; *Krender* vs. *Woolcott*, 1 Hilt., 223. Nor will a direction to deliver a parcel at a particular place, to an agent of the carriers', for further transmission,

avail to discharge their liability and substitute that of the agent. *Russell* vs. *Livingston*, 16 N. Y., 515; reversing *same case*, 19 Barb., 346.

As to the right of a carrier or forwarder to deviate from the mode of transmission agreed upon, in a case of absolute necessity, *vide Johnson* vs. *New York Central Railroad Company*, 31 Barb., 196. In doing so, however, he acts at his peril.

Where no contract is made between the plaintiff and the defendants, or their authorized agents, for transportation for the whole distance, a railroad company, receiving and carrying goods for only part of a mixed route, will only be liable as forwarders, and a delivery, in good order, to other carriers, for a further portion of the route, will discharge them. *Hempstead* vs. *The New York Central Railroad Company*, 28 Barb., 485; *Dillon* vs. *The New York and Erie Railroad Company*, 1 Hilt., 231.

Receipt, or a charge of freight for the whole distance, will reverse the rule, and render parties so receiving goods liable, not as forwarders, but as carriers. *Krender* vs. *Woolcott*, 1 Hilt., 223. But the mere receipt of freight for the whole distance by the last carrier on arrival, merely as agent for the others, his own demand being separate, will not render him liable for previous injury to the goods, before they came into his possession. *Hunt* vs. *The New York and Erie Railroad Company*, 1 Hilt., 228.

Express agents receiving goods to be carried on a mixed route, are liable as common carriers for their safe delivery. *Newstadt* vs. *Adams*, 5 Duer, 43; *Sherman* vs. *Wells*, 28 Barb., 403; *Russell* vs. *Livingston*, 19 Barb., 346; *Same case*, 16 N. Y., 515, the reversal being on another point, and the same doctrine being held in this. *Place* vs. *The Union Express Company*, 2 Hilt., 19; *Read* vs. *Spaulding*, 5 Bosw., 395. See also, *Holford* vs. *Adams*, 2 Duer, 471. By these decisions, *Hersfield* vs. *Adams*, 19 Barb., 577, is clearly overruled. See, however, as to their not being liable, in respect of a fraud or a forgery committed by a third party. *Norwalk Bank* vs. *Adams' Express Company*, 19 How., 462.

The liability of a common carrier commences on the deposit of the goods with him for transportation. *Lakeman* vs. *Grinnell*, 5 Bosw., 625; and the fact that he is also a warehouseman does not postpone his liability. *Blossom* vs. *Griffin*, 3 Kern., 569. Nor will his giving a receipt as forwarder have the effect of varying it, as against an oral agreement to carry. Such liability continues, until actual delivery of the goods according to the contract, and this, even after arrival at the place of destination. *Miller* vs. *The Steam Navigation Company*, 13 Barb., 361, affirmed, 6 Seld., 431. See as to the liability for a passenger's baggage, *Nevins* vs. *Bay State Steamboat Company*, 4 Bosw., 225.

And it only ceases on such actual delivery, or upon notice given to

the consignee, and a reasonable time allowed for removal; or, where the direction is to a more distant point, on delivery in the usual course of business to other carriers, to be forwarded by them. *Barclay* vs. *Clyde*, 2 E. D. Smith, 95; *Clendaniel* vs. *Tuckerman*, 17 Barb., 784; *Gould* vs. *Chapin*, 10 Barb., 612; *Price* vs. *Powell*, 3 Comst., 322. Where the consignee cannot be found, or neglects or refuses to receive the goods, the carrier should put the goods in storage; if he abandons them, without protection, he may be held liable. *Rowland* vs. *Miln*, 2 Hilt., 150. And where his non-delivery is caused by the illegal act of another, he has his remedy over against that other. *Same case.*

As to the carrier's power to terminate his responsibility, by storage of an article, refused to be received by the consignee, and as to the extent of liability of a warehouseman with whom it is so stored, see *Williams* vs. *Holland*, 22 How., 137.

As to the discharge of the carrier's liability as such, by an arrangement with the owner, substituting for it the character of bailee, or agent, see *Labar* vs. *Taber*, 35 Barb., 305.

The delivery to the party to whom a package is addressed must be actual. The mere leaving it at the foot of a staircase of the house in which such party occupies chambers, and notifying him of such leaving, will not be sufficient, unless such mode of delivery be expressly assented to, nor will any allegation of custom in this respect be permitted to control the strict rule of law. *Haslam* vs. *Adams' Express Company*, 6 Bosw., 235.

If the carrier mixes up goods intrusted to him with others, he is liable for delivery of the whole quantity. *Wright* vs. *Baldwin*, 18 N. Y., 428. See also, generally, *Wilson* vs. *Nason*, 4 Bosw., 155. And the carrier can only recover freight for the quantity actually delivered. *Allen* vs. *Bates*, 1 Hilt., 221.

His delivery must be made to the party legally entitled to receive it, or to his agent possessing sufficient authority; but, in the absence of special instructions, delivery to the consignee, or his agent, will be good against the consignor. *Sweet* vs. *Barney*, 23 N. Y., 335; affirming *same case*, 24 Barb., 533.

If the carrier deliver goods by mistake to the wrong person, he may recover them back. *Hudson River Railroad Company* vs. *Lounsberry*, 25 Barb., 597. But if they be taken out of his possession by authority of law, exercised through regular and valid proceedings, it will protect him from responsibility. *Bliven* vs. *Hudson River Railroad Company*, 35 Barb., 188.

And forwarders, who have advanced prior charges, have such a special interest in the goods, as will sustain an action of this description. *Fitzhugh* vs. *Wiman*, 5 Seld., 559.

Where shipping receipts had been stolen from the owners of property shipped, the carriers were held responsible to the latter, for not returning the property, though they had acted in good faith, and had delivered bills of lading to the holder of the receipts. *Brower* vs. *Peabody*, 11 How., 492; reversing *same case*, 10 How., 125.

A carrier intrusted with the duty of collection, is liable if he deliver the goods without payment. *Tooker* vs. *Gorner*, 2 Hilt., 71.

He is answerable to the principal, for loss of the baggage of his agent while travelling as a passenger. *Grant* vs. *Newton*, 1 E. D. Smith, 95.

As to the liability of a telegraph company, for non-transmission of an important dispatch, and the measure of damages under such circumstances, see *Landsberger* vs. *Magnetic Telegraph Company*, 32 Barb., 530.

See generally, as to the liability of railroad companies for baggage checked by them, *Cass* vs. *The New York and New Haven Railroad Company*, 1 E. D. Smith, 522; *McCormick* vs. *The Hudson River Railroad Company*, 4 E. D. Smith, 181; *Garvey* vs. *The Camden and Amboy Railroad Company*, 1 Hilt., 280; 4 Abb., 171; *Davis* vs. *The Cayuga and Susquehanna Railroad Company*, 10 How., 330; *Cary* vs. *The Cleveland and Toledo Railroad Company*, 29 Barb., 35. But if a party, taking a through ticket, retain his baggage in his own possession through part of the route, the carrier for that part will not be liable, though he may subsequently check it. *Straiton* vs. *The New York and New Haven Railroad Company*, 2 E. D. Smith, 184.

If a passenger deliver his baggage, demanding a check, but fails to obtain it, through absence of the proper agent, the carrier is equally liable. *Freeman* vs. *Newton*, 3 E. D. Smith, 246.

If goods, properly subjects of freight, are delivered to and received by the carrier as baggage, his liability for it will be as such, and not as for goods carried for hire. *Berley* vs. *Newton*, 10 How., 490. See however, as to a package of this nature not delivered to the carrier as baggage, *Butler* vs. *The Hudson River Railroad Company*, 3 E. D. Smith, 571. A party, demanding a package of this description, must pay or tender the freight on demand, or he cannot recover. *Langworthy* vs. *The New York and Harlem Railroad Company*, 2 E. D. Smith, 195.

A carrier by land is not responsible for money placed by a passenger in his trunk. *Grant* vs. *Newton*, 1 E. D. Smith, 95. What is, or is not, properly baggage, is usually a question of fact. *Same case.* Nor is a carrier responsible for silver ware so placed. *Bell* vs. *Drew*, 4 E. D. Smith, 59. In *McCormick* vs. *The Hudson River Railroad Company*, 4 E. D. Smith, 181, a decision that he was liable for a gold watch, and articles of jewelry, usually worn on the person, but placed in the passenger's trunk, on that occasion, was refused to be interfered with on appeal. And, in *Davis* vs. *The Cayuga and Susquehanna*

Railroad Company, 10 How., 330, the carriers were held similarly liable for a set of tools and a rifle. See also, several decisions cited in report, as to different items of baggage. See likewise, generally, as to what articles will or will not be included within the scope of the carrier's liability in this respect, *Nevins* vs. *Bay State Steamboat Company*, 4 Bosw., 225.

A carrier by sea is, however, responsible for the loss of money of the passenger put up in his trunk; and the rule is wider as to what articles are properly included under that term. *Duffy* vs. *Thompson*, 4 E. D. Smith, 178; *Van Horn* vs. *Kermit*, 4 E. D. Smith, 453. See also, the last case generally, as to the responsibility of the carriers in such case; and when and to what extent it may be considered as ceasing, on the neglect of the passenger to take his baggage away within a reasonable time.

Where the baggage of an emigrant from Europe was lost, whilst in charge of the agents of the railroad company, allowed to keep ticket offices in Castle Garden during the period that the emigrant was required to attend for the purpose of registering his name, it was held that the commissioners were not liable. *Semler* vs. *The Commissioners of Emigration*, 1 Hilt., 244.

A carrier of goods is responsible for all damages occasioned to goods in his charge—occasioned by detention or delay in their delivery, attributable to him, either by positive negligence, or misconduct on the part of himself or his employees, or to improvidence on his part, in making the contract for carriage within a limited time. *Harmony* vs. *Bingham*, 2 Kern., 99; affirming *same case*, 1 Duer, 209; *Scovill* vs. *Griffith*, 2 Kern., 509; *Harris* vs. *Northern Indiana Railroad Company*, 20 N. Y., 232; *McCotter* vs. *Hooker*, 4 Seld., 497; *Kent* vs. *The Hudson River Railroad Company*, 22 Barb., 278; *Blackstock* vs. *The New York and Erie Railroad Company*, 1 Bosw., 77; *Place* vs. *Union Express Company*, 2 Hilt., 19; *Briggs* vs. *The New York Central Railroad Company*, 28 Barb., 515; *Jones* vs. *The New York and Erie Railroad Company*, 29 Barb., 633. So also, as to damages occasioned by want of care of the goods while in his possession. *Wing* vs. *The New York and Erie Railroad Company*, 1 Hilt., 235.

As to the extent of responsibility of a carrier of animals, see *Clarke* vs. *The Rochester and Syracuse Railroad Company*, 4 Kern., 570.

The question as to the rule of damages in such cases seems still to be open. *Vide Wibert* vs. *The New York and Erie Railroad Company*, 2 Kern., 245 (252).

Where no special limitation as to the time of delivery is made, the rule as to the responsibility of the carrier, for injuries occasioned by delay, is less strict, and he will not be held liable for detention not

occasioned by negligence, fault, or want of skill on his part, or which is attributable to the wrongful act of a third party. *Conger* vs. *The Hudson River Railroad Company*, 6 Duer, 375; *Wibert* vs. *The New York and Erie Railroad Company*, 2 Kern., 245; affirming *same case*, 19 Barb., 36. See also, as to the extent of a carrier's liability, on a contract impossible at the time to be performed. *Briggs* vs. *Vanderbilt*, 19 Barb., 222.

The payment of the illegal demand of a carrier under protest, is no bar to a subsequent action against him, for damages of the above description. *Harmony* vs. *Bingham*, 2 Kern., 99, *supra*.

A complaint against a common carrier must allege him in terms to be such, and also that the carrying by him was for hire. *Bristol* vs. *The Rensselaer and Saratoga Railroad Company*, 9 Barb., 158.

The first count of the former declaration in these cases, has been held to be a proper form of averment in a suit of this nature. *Stockbridge Iron Company* vs. *Mellen*, 5 How., 439. But the succeeding ones were stricken out as redundant. See, generally, as to what will be sufficient by way of averment, *Merritt* vs. *Earle*, 31 Barb., 38. As to the responsibility of parties in this position, for the delivery of false or fraudulent bills of lading, see chapter 326 of 1858, page 532, as amended by chapter 353 of 1859, page 862.

In a case free from fraud, a carrier's receipt for a hollow package shown to contain goods, makes him liable for the contents. *Harmon* vs. *The New York and Erie Railroad Company*, 28 Barb., 323. His mere receipt does not operate to limit or exclude evidence of a parol contract for carriage. *McCotter* vs. *Hooker*, 4 Seld., 497. His admission on a bill of lading, that goods are received in good order, does not estop him, on the other hand, from showing the contrary by parol. *Ellis* vs. *Willard*, 5 Seld., 529.

So far as a bill of lading operates as a receipt it may be so explained, but not as to those portions of it which operate as a contract for carriage. On these it is conclusive, as to the extent of risk assumed. *Fitzhugh* vs. *Wiman*, 5 Seld., 559 (566); *Crery* vs. *Holly*, 14 Wend., 26; *Dorr* vs. *New Jersey Steam Navigation Company*, 1 Kern., 485; *White* vs. *Van Kirk*, 25 Barb., 16. See *Brower* vs. *Brig Water Witch*, 19 How., 241, as to general responsibility of carriers in the absence of a written contract.

(*b.*) Innkeepers.

Closely analogous to the liability of a common carrier, is that of an innkeeper, for damage or injury to the goods of a party, while his guest. This liability arises at common law, and is of the most stringent nature.

It attaches to any one who receives as guests all who choose to visit his house, without previous agreement, as to the duration of their stay or the terms of their entertainment. It continues during the stay of the guest, and ceases on his departure. If, after such departure, the guest leaves his baggage behind him, he does so at his peril, or, if the inn-keeper take charge of it by agreement, his responsibility changes, and becomes that of a mere ordinary bailee. *Wintermute* vs. *Clark*, 5 Sandf., 242.

The liability so accruing is of a more extended nature than that of a common carrier, and extends not merely to personal baggage, but to all property which the innkeeper consents to receive, and likewise to money in a trunk, not exceeding the amount reasonably required by such guest, if a traveller, to pay the expenses of his journey. *Taylor* vs. *Monnot*, 4 Duer, 116; 1 Abb., 325; *Needles* vs. *Howard*, 1 E. D. Smith, 54; *Van Wyck* vs. *Howard*, 12 How., 147. See, however, as to negligence on the part of the guest, discharging the innkeeper from being answerable for a large sum in gold coin, *Purvis* vs. *Coleman*, 21 N. Y., 111.

As to the liability of persons professing to be boarding-house keepers, but being innkeepers in fact, see *Willard* vs. *Reinhardt*, 2 E. D. Smith, 148.

In case of loss, the presumption of negligence is against the innkeeper, and he is bound to extraordinary vigilance. See *Cheeseborough* vs. *Taylor*, 12 Abb., 227. He may, however, rebut that presumption, by proof of negligence on the guest's part, and it is incumbent on the latter to comply with any reasonable regulations the former may make for his security. *Van Wyck* vs. *Howard*, 12 How., 147; *Fowler* vs *Dorlon*, 24 Barb., 384.

In *Stanton* vs. *Leland*, 4 E. D. Smith, 88, it was held, that, where a guest had actually packed his trunks with a view to departure, and delivered the key of his room to the defendant's clerk, the latter was liable for all the contents, notwithstanding a notice given by him requiring money and valuables to be placed in a safe which he provided.

By chapter 421, of 1855, p. 774, this form of limitation of an innkeeper's liability is expressly sanctioned, and it is provided, that, whenever the proprietor of an hotel has provided a safe for the keeping of money, jewels, and ornaments, and has notified his guests by posting a notice in the rooms occupied by them, and the guest neglects to deposit such articles accordingly, the proprietor's liability for their loss, by theft or otherwise, will be discharged.

As to actual notice to the above effect being sufficient to discharge the innkeeper from liability, even though the provisions of the statute

may not have been strictly complied with, see *Purvis* vs. *Coleman*, 21 N. Y., 111; affirming *same case*, 1 Bosw., 321.

It is not necessary, in order to the innkeeper's liability, that the guest should keep his room locked during his absence. *Buddenburg* vs. *Benner*, 1 Hilt., 84.

A mere boarding house or restaurant, to which the plaintiff merely went for the purpose of taking a meal, was, though styled an hotel, held not to be an inn, so as to charge its proprietor, in *Carpenter* vs. *Taylor*, 1 Hilt., 193.

Public and other Officers.

(*c.*) Sheriffs.

An action in damages lies against the sheriff for breach of official duty by him or his deputies.

Several cases of this description have already been noticed in book I., chapter VII., section 28, under the head of *Sheriffs*. It may be convenient to mention also the following:

Since the Code, he is liable in trespass, for taking goods on process of replevin, out of the possession of a third party claiming to be owner. He can only take it from the defendant himself or his agent. *King* vs. *Orser*, 4 Duer, 431.

So also for levying upon goods exempt from execution. And, in the complaint for that purpose, it is not necessary specially to aver that fact. An allegation of unlawful taking is sufficient. *Stevens* vs. *Somerindyke*, 4 E. D. Smith, 418.

He is bound to exercise more than ordinary diligence for the preservation of property levied upon by him, but his liability is not that of an insurer. See *Moore* vs. *Westervelt*, 21 N. Y., 103.

In *French* vs. *Willett*, 4 Bosw., 649; 10 Abb., 99, it was held that a sheriff who, on going out of office, neglected to deliver over, in due form, to his successor a prisoner charged on execution, was liable for an escape by reason of such neglect. The complaint is given *in extenso* in the report, and its allegations were decided by the court to be sufficient.

See generally, as to the liability of a sheriff for escape, 2 R. S., 434, section 47; also, article IV., title VI., chapter VII., part III., 2 R. S., 437, 438.

The action lies in all cases where a prisoner on civil process is, at the time of the commencement of the action, beyond the jail liberties. The summons must, however, be actually served whilst the prisoner is so absent. A return after the summons was issued and delivered to the coroner, but before its actual service, was held a sufficient defence in *Wiggins* vs. *Orser*, 5 Duer, 118.

As to what constitutes a voluntary or a negligent escape, and as to the sheriff's power to retake, see *Lockwood* vs. *Mersereau*, 6 Abb., 206.

When, by failure of a defendant's bail to justify, the sheriff has himself become liable as such, it seems that he possesses the same privileges as other bail, and may discharge himself by rearresting the defendant, in the same manner as ordinary bail may by surrender. *Buckman* vs. *Carnley*, 9 How., 180. See also *McGregory* vs. *Willett*, 17 How., 439.

And, as regards his ultimate liability, it is the same as that of the bail in whose place he virtually stands. *Vide Gallarati* vs. *Orser*, 4 Bosw., 94. See however, *McCreery* vs. *Willett*, 22 How., 91.

But, of course, this doctrine does not apply to a case where other bail have been given, or where the defendant has remained in custody. In such cases, the sheriff can claim no privilege whatever.

On an escape of a prisoner, where charged in execution or on *mesne* process, the measure of damages is the amount due upon the judgment. In the latter case, insolvency of the prisoner may be shown in defence, or rather in mitigation of damages; but, where the prisoner is charged on execution, the liability is absolute. See *int. al.*, *Latham* vs. *Wester velt*, 26 Barb., 256; *Barnes* vs. *Willett*, 19 How., 564; 11 Abb., 225. And the same measure prevails, even when his liability was originally that of bail, owing to the failure of the defendant's sureties to justify. *Metcalf* vs. *Stryker*, 31 Barb., 62; 10 Abb., 12; *Gallarati* vs. *Orser*, *supra*.

See generally, as to his liability for an escape, when the defendant has been charged in execution, *Renick* vs. *Orser*, 4 Bosw., 384; *McCreery* vs. *Willett*, 4 Bosw., 643; affirmed, 23 How., 129; *Barnes* vs. *Willett*, 35 Barb., 514; 12 Abb., 448. He will be liable, though the process on which the defendant was held is irregular; but not so where it is not merely voidable, but void. *Carpenter* vs. *Willett*, 6 Bosw., 25. Nor will he be held for an escape, where the prisoner has been taken out of his custody by authority of law. *Wickelhausen* vs. *Willett*, 21 How., 40; 12 Abb., 319.

As to the distinction between a voluntary and a negligent escape—the principle that the latter must be specially charged, and that a mere general averment will be construed as meaning the former, and as to the rule of damages in the case of a person committed for contempt of court, see *Loosey* vs. *Orser*, 4 Bosw., 391.

(*d.*) Constables.

A constable, having taken property under a justice's attachment, may be liable as a wrongdoer, if he refuse to restore it, on delivery of a bond in double its value, pursuant to the statute. A bond in double the amount of the plaintiff's claim will, however, be insufficient. *Vide*

Kamena vs. *Wamer*, 6 Duer, 698; 6 Abb., 196; reversing *same case*, 15 How., 5; 6 Abb., 193.

A constable, failing to return, in person, an execution delivered to him, is liable to the plaintiff, though his duty may have been substantially performed by another. *Downs* vs. *McGlynn*, 2 Hilt., 14.

(*e.*) Assessors.

Assessors, entering on their roll the name of a party not subject to the assessment, are liable to him for damages resulting from collection. *Mygatt* vs. *Washburn*, 15 N. Y., 316. So also is a corporation, for collection of a wrongful assessment. *Howell* vs. *The City of Buffalo*, 15 N. Y., 512. As to the liability of a corporation to a contractor for neglect to make an assessment for the purpose of paying his claim, and when it will or will not attach, see *Beard* vs. *City of Brooklyn*, 31 Barb., 142; *Richardson* vs. *The Same*, 31 Barb., 152.

(*f.*) Sundry other Responsibilities.

The owner of a machine, hired out to others, is generally responsible for any injury sustained by reason of defects in its construction. Whenever the law imposes a duty on a person, a neglect of that duty renders that person liable, to any one injured by that neglect. *Cook* vs. *The New York Floating Dry Dock Company*, 1 Hilt., 436.

A manufacturing chemist, who had wrongly labelled a poisonous medicine, was held responsible to any purchaser of that medicine, though from others, injured by the mistake. *Thomas* vs. *Winchester*, 2 Seld., 397. See also, as to death arising from a similar cause, *Quin* vs. *Moore*, 15 N. Y., 432. As to the liability of a surgeon for malpractice, see *Belling* vs. *Craigue*, 31 Barb., 534.

As to the analogous responsibility of directors or officers of a public company, induced to purchase its stock, by reason of erroneous published statements, see above, section 142, under the head of *False Representations.*

Under the manufacturing incorporation acts, directors neglecting to make their annual report, may be held liable for the debts of the corporation.

An action of this description is an action for a penalty, with all the usual incidents of that form of remedy. *Merchants' Bank of New Haven* vs. *Bliss*, 21 How., 365; 13 Abb., 220. The liability is personal in its nature, and only extends, as to each trustee, to debts contracted whilst he is in office, and before a report is made and published, and not to debts contracted antecedent or subsequent to the period during which he is in default. *Boughton* vs. *Otis*, 21 N. Y., 261; affirming *same case*, 29 Barb., 196; *Quarry Company* vs. *Bliss*, 34 Barb.,

309; 12 Abb., 470; *The Same* vs. *The Same*, 10 Abb., 211; *Andrews* vs. *Murray*, 33 Barb., 354. A trustee may relieve himself from further liability, by a voluntary resignation. *Squires* vs. *Brown*, 22 How., 35; and, the liability being strictly personal, one trustee cannot claim contribution from his fellow defaulters. *Andrews* vs. *Murray*, *supra*.

The complaint on a liability of this nature will be demurrable, unless it shows on its face that the defendant was in office, and the plaintiff's debt existent, at the time of the wrongful act complained of. *Ogden* vs. *Rollo*, 13 Abb., 300; reversing *same case*, 9 Abb., 8, note. See, as to what may constitute sufficient allegations in a complaint of this nature, *Andrews* vs. *Murray*, 9 Abb., 8.

As to the liability of a landlord, for injuries occurring by reason of his omission to make proper repairs, see *Corey* vs. *Mann*, 6 Duer, 679; 14 How., 163; 5 Abb., 91. The complaint in such a case must show clearly that such duty is incumbent upon the landlord, or it will be demurrable. See also, *Howard* vs. *Doolittle*, 3 Duer, 464.

See, however, as to the liability of a corporation, for injuries arising from an omission to keep in repair a wharf, of which the mere right of wharfage is leased to others, *Taylor* vs. *The Mayor of New York*, 4 E. D. Smith, 559.

In a case of this description, notice of the defect from which the accident has arisen must, it has been held, be brought home to the defendant. *Garrison* vs. *Mayor of New York*, 5 Bosw., 497. And the duty to repair must be shown to be absolute and imperative, and not to rest in discretion. *Peck* vs. *Village of Batavia*, 32 Barb., 634; *Cole* vs. *Trustees of Village of Medina*, 27 Barb., 218.

To charge a public officer with damages for neglect, the nature of his duty, and violation of it, must be clearly shown, or the complaint will be demurrable. So held, in an action against commissioners of highways for neglect to repair a bridge, when the means of repairing it were not shown to be in their possession. *Smith* vs. *Wright*, 27 Barb., 621; reversing *same case*, 24 Barb., 170. But when they are in possession of such means, they will be liable. See *Hutson* vs. *The Mayor of New York*, 5 Sandf., 289; affirmed, 5 Seld., 163.

Where the subject-matter of the controversy is the right to an office, an action for breach of duty will not lie; the question must be brought up by *quo warranto*. *Hartt* vs. *Harvey*, 21 How., 382; 13 Abb., 332.

A railroad corporation, omitting to fence off its road, as required by the general railroad act, is liable in damages from any injuries occasioned by its omission. *Corwin* vs. *The New York and Erie Railroad Company*, 3 Kern., 42; *Duffy* vs. *The New York and Harlem Railroad Company*, 2 Hilt., 496. See also, as to the inability of a party to

sue for trespass on his property, where his own fences are not in conformity with established regulations, *Hardenburgh* vs. *Lockwood*, 25 Barb., 9.

As to how far a tenant or a landlord may both, or either, be responsible for defect or misuse of water fixtures, and the duty which each tenant owes to others, to avoid negligence in their use, see *Eakin* vs. *Brown*, 1 E. D. Smith, 36.

An United States officer unwarrantably taking possession of goods may be held responsible by a carrier of them. See *Rowland* vs. *Miln*, 2 Hilt., 150.

A lessee *in futuro* may, on non-delivery of possession at the time he becomes entitled, sue his lessor, either upon the implied contract to give possession, or in tort for the violation of his duty, arising from the relation of landlord and tenant. *Trull* vs. *Granger*, 4 Seld., 115.

As to the liability of a municipal corporation for the acts of its servants or agents, amounting to a breach of duty, see above, section 140, subdivision of *Relations of Employer and Employee*, and cases there cited.

An action for breach of duty will lie, against a banking or other like incorporation, for a refusal to permit a transfer of stock upon its books or to issue certificates. The measure of damages will, however, be the value of the stock, not the amount paid. *Arnold* vs. *The Suffolk Bank*, 27 Barb., 424.

A broker who has acted in good faith, is not liable to his employer for a purchase by him of fraudulently over issued stock. *Peckham* vs. *Ketchum*, 5 Bosw., 506. As to the allegations which will be sufficient to show a cause of action against a broker, who has sold his employer's stock in violation of instructions, see *Clarke* vs. *Meigs*, 22 How., 340; 13 Abb., 467; reversing *same case*, 21 How., 187; 12 Abb., 267.

As to the extent of the discretion of a factor, acting within the spirit of his instructions, see *Milbank* vs. *Denistoun*, 21 N. Y., 386; 19 How., 126.

(*g.*) Breach of Contract.

In actions of this nature four different requisites must be carefully observed in framing the complaint.

1. The existence of the contract sued upon, and its terms, must be clearly shown upon the face of the pleading.

2. Performance, or a readiness to perform, and tender of performance, must be shown on the part of the plaintiff, and it must not appear that default is imputable to him.

3. The breach of contract complained of must be made clearly apparent; and,

4. Damage to the plaintiff, occasioned by that breach, must be alleged and proved.

The existence and terms of the contract must, as of course, be averred. *Vide Hills* vs. *Stillman*, 18 How., 58. But it may be so according to its legal effect; nor is it necessary or admissible to set forth in the complaint mere matters of evidence. *Dibblee* vs. *Corbett*, 9 Abb., 200. Nor where, according to the legal effect of the transaction, purchases had been made by an agent in his own name, on an agreement to pay over the avails to his principal, was it requisite, in an action for an unpaid balance, to allege that such agent has paid for the goods. *Hay* vs. *Hall*, 28 Barb., 378.

So also, where the action was for damages on non-performance of a contract for purchase of stock, it was held unnecessary for the plaintiff to aver, in terms, that he was owner of the stock at the time, or that the contract was in writing. *Washburn* vs. *Franklin*, 28 Barb., 27.

In like manner, where the plaintiff sued as assignee of an obligation, it was held unnecessary to allege an assignment of the original claim. *Hosmer* vs. *True*, 19 Barb., 106.

Where there has been an offer and acceptance between the parties sufficient to constitute a valid contract, an action will lie for damages for its breach, notwithstanding the subsequent refusal of one of them to execute a formal agreement according to the terms of it as fixed. *Pratt* vs. *Hudson River Railroad*, 21 N. Y., 305.

In an action for general damages for breach of a contract for sale of real estate, an averment of special damage is unnecessary. Such averment is only requisite, where damage constitutes in part the cause of action. *Fagan* vs. *Davison*, 2 Duer, 153. On a contract of indemnity, however, special damage, to be recoverable, must be alleged and proved. *Low* vs. *Archer*, 2 Kern, 277 (282).

The omission to allege an offer or tender of performance on the part of the plaintiff, was held to render the complaint defective, in *Smith* vs. *Wright*, 1 Abb., 243; *Lester* vs. *Jewett*, 1 Kern, 453; *Frey* vs. *Johnson*, 22 How., 316. See also *Hills* vs. *Stillman*, 18 How., 58, as to an omission to show full performance of a completed contract, on the part of the plaintiff.

So also, in an action for damages on a broken contract, for labor and service, it is necessary for the plaintiff to show that he was ready and willing to perform such further services as might be required of him. *Wiseman* vs. *The Panama Railroad Company*, 1 Hilt., 300.

See, likewise, as to a failure on the part of the plaintiff to perform a mutual agreement, invalidating his own claim, and rendering him liable to the defendant for counter-damages, *Placide* vs. *Burton*, 4 Bosw., 512.

Nor can a party sue another for breach of a mutual contract, whilst he himself retains anybenefit derived under it. See *Goelth* vs. *White*, 35 Barb., 76.

See also, as to the necessity of a tender of performance, *Hoyt* vs. *Hall*, 3 Bosw., 42. See likewise, as to similar allegations on the part of a defendant, *Warburg* vs. *Wilcox*, 2 Hilt., 118; 7 Abb., 336. As to what will be a sufficient tender, on a contract for sale of merchandise, see *Dana* vs. *Fiedler*, 1 E. D. Smith, 463; affirmed, 2 Kern., 40.

But a positive refusal to perform on the part of the defendant, will relieve the plaintiff from the obligation of showing performance, or a tender of performance on his part. *Cornwell* vs. *Haight*, 21 N. Y., 462; *Crary* vs. *Smith*, 2 Comst., 60; *Skinner* vs. *Tinker*, 34 Barb., 333. So also, where the defendant has voluntarily put it out of his power, to perform on his part. *Crist* vs. *Armour*, 34 Barb., 378.

As to the right of a vendor to resell goods, where the purchaser has abandoned a contract, and to hold him liable for the deficiency, and as to the circumstances under which this power may be exercised, see *McEachron* vs. *Randles*, 34 Barb., 301.

Where, after breach of a contract for continued delivery of goods at specified periods, the defendants accepted an irregular performance, it was held that the plaintiff might maintain an action for the price of the goods accepted, without tendering further delivery. *Bailey* vs. *The Western Vermont Railroad Company*, 18 Barb., 112.

Where counter agreements between plaintiff and defendant are independent in their nature, the former, on suing on one of them, need not aver performance, or an offer to perform the other. *Smith* vs. *Betts*, 16 How., 251.

An agreement to pay purchase-money by instalments, after payment of one of which a conveyance was to be executed by the plaintiff, at a specified date, was held not to be of this nature, and that the seller, on suing for the second, was bound to aver and prove a tender of the conveyance, on the day stated. *Grant* vs. *Johnson*, 1 Seld., 247. See also, as to the necessity of tendering a fully sufficient deed, in order to sustain an action for breach of a real estate contract, *Smith* vs. *Smeltzer*, 1 Hilt., 287.

As to the inability of a party to maintain an action, when himself in default on the contract sued upon, see *Payton* vs. *Wight*, 2 Hilt., 77; *Placide* vs. *Burton*, above cited.

In *Schenck* vs. *Naylor*, 2 Duer, 675, it was held that, where a complaint failed to show a breach of a covenant sued upon, either by express words or necessary implication, it was bad upon demurrer.

And, where defendants are sued on a joint contract, the breach alleged must affect them all, or the same result will follow. *Lawrence*

vs. *Kidder*, 10 Barb., 641; *Coster* vs. *The New York and Erie Railroad Company*, 6 Duer, 43; 3 Abb., 322. See also 5 Duer, 677.

Although a contract may be broken, it must be shown, by means of proper allegations and proofs, that the plaintiff has been damnified by the breach, or the complaint will be defective. *Rider* vs. *Pond*, 28 Barb., 447. See also *Neary* vs. *Bostwick*, 2 Hilt., 514. And no action will lie, in respect of an act of the defendant, in accordance with the contract itself, though damage may result from it to the plaintiff. *New York Ice Company* vs. *Parker*, 21 How., 302.

The following decisions do not fall specifically under any of the foregoing heads, but are of general bearing.

Accord and satisfaction is, of course, a complete defence to an action of this nature. *Neary* vs. *Bostwick*, *supra*.

As to the invalidity of a contract in restriction of trade, when too large a territory is embraced, *vide Lawrence* vs. *Kidder*, 10 Barb., 641.

General damages for breach of contract, cannot be recovered by a party who has rescinded, but special ones may, on proper allegations and proof. *Coon* vs. *Reed*, 1 Hilt., 511. See also *Mallory* vs. *Lord*, 29 Barb., 454, as to the general liability and rule of damages, on a contract partly performed and then abandoned. As to the inability of founding any recovery upon a rescinded contract, *vide Hart* vs. *Lanman*, 29 Barb., 410.

An action will lie, for breach of an agreement for a future delivery of goods, in part payment of an existing debt. *Fletcher* vs. *Derrickson*, 3 Bosw., 181.

Where one contract is dependent upon the execution of another, the abandonment of the principal, puts an end to all further liability on the accessory engagement. *Hildreth* vs. *Buell*, 18 Barb., 107.

Where time was of the essence of the contract, defendants were held responsible for damages, arising from a delay in performance, even though only from the morning to the afternoon of the same day. *Parmelee* vs. *Wilks*, 22 Barb., 539.

As to an agreement for liquidation of damages, and when the amount so fixed will not be construed as a penalty, see *Hosmer* vs. *True*, 19 Barb., 106; *Pettis* vs. *Bloomer*, 21 How., 317; *Lampmann*, vs. *Cochran*, 19 Barb., 388. In the last case, however, it was held that such a stipulation only applied to a total failure of performance, and that where the failure is only partial, an action for the liquidated amount will not lie.

As to what will or will not be considered as damages on a contract of indemnity, and that a bonus paid for obtaining money to make a payment indemnified against, cannot be recovered, see *Low* vs. *Archer*, 2 Kern., 277.

A suit for specific performance will not lie, and an action for damages is the only appropriate remedy, in a case where the rights of a plaintiff are imperfect, or performance would be oppressive. *Clarke* vs. *Rochester, Lockport, and Niagara Falls Railroad Company*, 18 Barb., 350. Or, where the parties have themselves provided a special measure of damages. *Barnes* vs. *McAllister*, 18 How., 534. Or, where the agreement between the parties is not fair and equal. *Same case.* So likewise, in a case of failure of title to land, rendering actual performance impossible. *Mills* vs. *Van Voorhies*, 23 Barb., 125. See reversal, 20 N. Y., 412; 10 Abb., 152. See also *Stevenson* vs. *Buxton*, 8 Abb., 414, as to the possibility of taking an alternative judgment in such case.

Subsequent performance on the part of the defendant, does not debar an action for special damages, occasioned by a neglect to complete in due course, but not sufficient to enable the aggrieved party to rescind. See *Dibblee* vs. *Corbett*, 9 Abb., 200.

A lessor, failing to give possession to his lessee, according to the terms of his lease, is liable to him in damages. *Trull* vs. *Granger*, 4 Seld., 115.

Where payment for a specified amount, to become due under a contract, was agreed to be received in shares, no specific price at which they were taken being named, it was held that a money recovery might be had, performance having become impossible, owing to depreciation of the stock, so that it bore no money value. *Hart* vs. *Lanman*, 29 Barb., 410.

Where the plaintiff had performed his part of a parol agreement, to give up possession of leased property, a suit was held maintainable by him against the defendant, to recover the stipulated consideration. *Ambler* vs. *Owen*, 19 Barb., 145.

A partner who had engaged in other business, contrary to stipulation, was held liable to his copartner, either in damages, or in action for an accounting. *Moritz* vs. *Peebles*, 4 E. D. Smith, 135.

In *Stevenson* vs. *Buxton*, 8 Abb., 414, a plaintiff, suing for specific performance, was, on an apparent failure of title, allowed to take an alternative judgment, either for the relief prayed, or for damages for the breach of contract, without being put to a fresh action.

As to an action for damages for breach of covenant, see *Tuller* vs. *Davis*, 4 Duer, 187.

As to the liability in damages, of a purchaser of goods to arrive, who neglects to receive or pay for them when delivered. *Dibble* vs. *Corbett*, 5 Bosw., 202; *Havemeyer* vs. *Cunningham*, 35 Barb., 515; 22 How., 87.

No recovery can be had, upon a contract void at law. *Cassard* vs. *Hinman*, 6 Bosw., 8. But the subsequent repeal of a statute which

rendered a contract illegal at the time, gives it validity, and an action may then be maintainable upon it. *Washburn* vs. *Franklin*, 35 Barb., 599; 13 Abb., 140, and decisions referred to in Opinion.

As to the liability in damages, for breach of a contract for support of the plaintiff, founded upon a valuable consideration, see *Dresser* vs. *Dresser*, 35 Barb., 573; *Loomis* vs. *Loomis*, 35 Barb., 624.

As to that in respect of the partial non-performance of a building contract, a power to rescind which has been waived, by omission to claim it at the time, see *Sinclair* vs. *Tallmadge*, 35 Barb., 602.

§ 145. *Replevin.*

This form of action presents itself for consideration in its natural order, in connection with those treated of in the preceding sections. Like them, it points to the redress of a wrong committed by the defendant, by the wrongful taking or detention of personal property, but in a different form. The relief sought does not, as in the other case, consist in the recovery of compensation for the wrong committed: the plaintiff seeks, on the contrary, restitution of the subject-matter of that wrong; and any damages resulting from its commission are merely accessory, not a principal subject of the suit. See *Savage* vs. *Perkins*, 11 How., 17.

The analogous remedy of ejectment will be considered hereafter, under the head of *Real Estate.*

The action itself is, in its essentials, the same as that provided for in title XII., chapter VIII., part III., of the Revised Statutes, 2 R. S., 522 to 534. It absorbs within itself the more ancient forms of replevin in the *cepit*, or in the *detinet*, or *detinue.*

As regards the mode of obtaining the concurrent provisional remedy, and the forms of process and pleadings, proceedings in it are, of course, governed by the new system, and the former provisions are so far abolished. The subject of that provisional remedy has already been considered, in chapter II., of book V.

The analogy, amounting in fact to substantial identity, which exists between the former and the present action, is demonstrated in the following cases: *Roberts* vs. *Randel*, 3 Sandf., 707; 5 How., 327; 3 C. R., 190; 9 L. O., 144; *McCurdy* vs. *Brown*, 1 Duer, 101; *Chappell* vs. *Skinner*, 6 How., 338; *Savage* vs. *Perkins*, 11 How., 17.

A direct and issuable averment must always be inserted, that the goods claimed are the property of the plaintiff. A mere allegation of a right to their possession, and of probative facts tending to show ownership, will not, standing alone, be sufficient. *Vandenburgh* vs. *Van Valkenburgh*, 8 Barb., 217.

The plaintiff in such cases, can only, as a general rule, recover upon a legal title; he must show an absolute or special property, giving him an immediate right to possession. The burden of proof falls upon him; if he fail, the defendants are entitled to a judgment for a return, without proof on their part. *McCurdy* vs. *Brown*, 1 Duer, 101. An equitable lien cannot be enforced in this manner. *Same case; Otis* vs. *Sill*, 8 Barb., 102. Where, however, the property had been taken out of the plaintiff's possession, an equitable interest was held sufficient to maintain an action for its return. *Johnson* vs. *Carnley*, 6 Seld., 570.

That the plaintiff, to maintain such an action, must have the general or special property, and an immediate right to possession of the subject-matter, is also maintained in *Rockwell* vs. *Saunders*, 19 Barb., 473. See too, *Bruce* vs. *Westervelt*, 2 E. D. Smith, 440. Nor will a mere tender of their price, unaccepted by the defendant, avail to change the title, and confer upon the plaintiff a right to sue in this form, for goods manufactured, even under a contract. *Dodworth* vs. *Jones*, 4 Duer, 201.

The complaint must allege a wrongful taking, or a wrongful detention; but such allegation may be made in general terms. *Vide Childs* vs. *Hart*, 7 Barb., 370.

A mere allegation of wrongful possession and detention, in the old form of replevin in the *detinet*, was held sufficient, in an action for goods obtained by fraud, and that neither demand, nor specification of the facts constituting the fraud complained of was necessary. *Hunter* vs. *The Hudson River Iron and Machine Company*, 20 Barb., 493.

It is not necessary to the maintenance of the action, that the provisional remedy should be previously or concurrently asserted. *Vogel* vs. *Badcock*, 1 Abb., 176. In that case, allegations of conversion and detention, as in trover, accompanied by a prayer for specific delivery and damages, were held good, as constituting a single cause of action, though such was not the correct form of pleading, and the averment of conversion wholly unnecessary. Where only part of the goods mentioned in the original affidavit have been taken under the provisional remedy, the remainder having been eloigned before action brought, it is both admissible and proper to make the complaint apply only to the goods so taken, and its discrepancy with the affidavit will be immaterial. *Kerrigan* vs. *Ray*, 10 How., 213.

To sustain the action, the property must, in fact or in law, be in the possession or control of the defendant. Where he has parted with that possession or control without fraud, before the action is brought, it will not be maintainable. See, collaterally, as to the question of arrest, *Roberts* vs. *Randel*, 3 Sandf., 707; 5 How., 327; 3 C. R., 190; 9 L. O., 144; *Merrick* vs. *Suydam*, 1 C. R. (N. S.), 212 (but see as to right to sue, 20 Barb., 558); *Remin* vs. *Nagel*, 1 E. D. Smith, 256; 1 C. R. (N. S.),

219; *Kerrigan* vs. *Ray*, 10 How., 213. See also directly, *Brockway* vs. *Burnap*, 12 Barb., 347; 8 How., 188; *Nash* vs. *Fredericks*, 12 Abb., 147; *Elwood* vs. *Smith*, 9 How., 528. See likewise as to trover, *The Matteawan Company* vs. *Bentley*, 13 Barb., 641.

The doctrine in question is carried somewhat further in some of the above decisions, and substantially extended to all cases, where the defendant was not in possession at the time of bringing suit. So far it is clearly overruled. *Brockway* vs. *Burnap* was afterwards reversed (16 Barb., 309), the parting with possession by the defendant being clearly fraudulent. In *Ellwood* vs. *Smith*, there did not appear to be any actual withholding. See also *Nichols* vs. *Michael*, 23 N. Y., 264.

The action is equally maintainable upon a constructive, as upon an actual possession. *Latimer* vs. *Wheeler*, 30 Barb., 485.

Where the taking had originally been wrongful, and demand had been made of the defendant, a subsequent parting with the property was held to be wrongful, and the action maintainable. *Drake* vs. *Wakefield*, 11 How., 106. So also, where the parting with the goods, though before suit brought, was wrongful or fraudulent in its nature, replevin is still maintainable. *Brockway* vs. *Burnap*, 16 Barb., 309; *Savage* vs. *Perkins*, 11 How., 17; *Nichols* vs. *Michael*, 23 N. Y., 264. So likewise, where the defendant took the goods of another, from a party selling them without authority, such party not making any actual delivery. *Ely* vs. *Ehle*, 3 Comst., 506.

The possession of a defendant has also been adjudged to be fraudulent, and replevin maintainable in the following cases. Where, being in possession of goods wrongfully taken, the defendant offered no proof of good faith or of title in himself, as against the title proved by the plaintiff. *Tallman* vs. *Turck*, 26 Barb., 167. Where the defendant was chargeable with notice, even constructive, that the goods had been obtained from the original owner by fraud. *Pringle* vs. *Phillips*, 5 Sandf., 157. Where a purchaser of goods from a seller, without authority, took them himself, without delivery. *Ely* vs. *Ehle*, *supra*. Where the sale of goods to a company, actually insolvent, had been procured by the fraudulent representations of their agent. *Hunter* vs. *The Hudson River Iron and Machine Company*, 20 Barb., 493. Where the defendant himself had so obtained them. *Van Neste* vs. *Conover*, 20 Barb., 547. See also *same case*, 8 Barb., 509; 5 How., 148.

A fraudulent vendee of goods, and his assignee in trust for creditors, were both held liable to this form of action, in *Nichols* vs. *Michael*, 23 N. Y., 264. Nor will it be necessary for the vendor on such a sale, to tender back the purchaser's note at the time of rescinding; it will be sufficient, if he produce and deliver it upon the trial. *Same case; Stevens* vs. *Hyde*, 32 Barb., 171.

The mere possession of goods, by a factor or agent not intrusted with the documentary evidence of title, or with the goods themselves, for the purposes of sale, was considered insufficient to validate a fraudulent sale by him, and replevin held to be maintainable by his principal, against a purchaser, under such circumstances. So far from such a sale being validated by the factor's act, the sixth section of that measure, by necessary implication, declares it to be void. *Cook* vs. *Adams*, 1 Bosw., 497.

A purchaser of goods, for cash on delivery, who failed to pay in due course, according to the custom, was held to have acquired no title, and that replevin was maintainable by his vendor. *Freeman* vs. *McKean*, 25 Barb., 474.

A mere omission to disclose insolvency, is not *per se* a fraud sufficient to invalidate a sale of goods, where no actual false representations are made. It may be consistent with an honest but abortive purpose to continue business, and to pay, and fraud is not, in the absence of direct proof, to be presumed. *Nichols* vs. *Pinner*, 18 N. Y., 295; *Nichols* vs. *Michael*, 23 N. Y., 264; *Buckley* vs. *Artcher*, 21 Barb., 585. The true point of inquiry in such cases is, whether the defendant purchased the goods with the intention not to pay for them; if this be established, the sale will be fraudulent, but not otherwise. See *Hall* vs. *Naylor*, 18 N. Y., 588. By this decision, the *same case*, 6 Duer, 71, is reversed, but only on points of error in the instructions to the jury. The principle laid down is substantially the same. See also *Buckley* vs. *Artcher*, *supra.*

Representations made by an agent, actually false, but in belief of their truth, and without instructions from his principal, were, in like manner, held insufficient to impeach a sale to him, in *Ward* vs. *Woodburn*, 27 Barb., 346.

Where goods are delivered by the vendee unconditionally, or without notice to subpurchasers of any condition, or are sold by an agent having power to sell, a sale of them, however fraudulently obtained, will avail to pass the title, and a subpurchaser, in good faith, without notice of any condition, will be protected. See *Freeman* vs. *McKean*, and *Cook* vs. *Adams*, *supra;* *Beavers* vs. *Lane*, 6 Duer, 232; *Blossom* vs. *Champion*, 28 Barb., 217; *Wait* vs. *Green*, 35 Barb., 585.

To constitute a *bonâ fide* purchase, the vendee must not merely be in possession, but must have actually paid for the goods; where he does not stand in this position, and the contract for sale to him is merely executory or collateral, he cannot claim protection. *Beaver* vs. *Lane*, 6 Duer, 232; *Freeman* vs. *McKean*, *supra.* See also *Stevens* vs. *Hyde*, 32 Barb., 171.

A bill of lading, obtained by fraud from the owners, when there has, in fact, been no sale of the goods, confers no better title upon an

indorsee, even in good faith and for value, than was possessed by the indorser. The limit of its effect is, to protect against the owner's right of stoppage *in transitu*. It was also held, in the same case, that a party, taking such a paper, when on its face it is signed by a clerk, is bound to make inquiry as to the latter's authority, and, if he omit so to do, he takes it at his peril. *Dows* vs. *Perrin*, 16 N. Y., 325.

On a subsequent trial, under the same controversy, the correctness of the general principle, as laid down in *Dows* vs. *Perrin*, is doubted, and it is claimed not to have been the point in judgment, and therefore not to be a conclusive decision. The authority of the clerk to sign bills of lading having there been proved, the defendants were held estopped from denying their validity, and a verdict in favor of the plaintiffs was sustained. *Dows* vs. *Rush*, 28 Barb., 157.

In the same case, the assignees of the bill of lading were held entitled to stand in the position of consignees, and, as such, to be entitled to a lien for the amount of their advances; and that the existence of such lien entitled them, as such, to maintain replevin, against a party claiming the goods without right, or under an inferior title. See *Dows* vs. *Greene*, 32 Barb., 490.

Indorsees of a bill of lading from a fraudulent vendee, in good faith and for value, were held entitled to similar protection, and that goods actually shipped, on a sale for cash on delivery, could not be claimed from them, without previous payment, or offer to pay the amount of their advance; and also, that the master of a ship who had given such bill of lading, was similarly entitled to indemnity against his liability thereon, in *Blossom* vs. *Champion*, 28 Barb., 217. See also *Williams* vs. *Birch*, 6 Bosw., 299; *Stevens* vs. *Hyde*, 32 Barb., 171. See, however, as to the right of stoppage *in transitu*, by a vendor, and his right to maintain replevin for that purpose, where there has been no *bonâ fide* transfer for value, before its exercise. *Holbrook* vs. *Vose*, 6 Bosw., 76. But such right may be defeated, by the intervention of those of an innocent purchaser. *Williams* vs. *Birch*, *supra*.

In a suit against an agent, however, the mere existence of an alleged lien will form no bar to a recovery by the plaintiff, when the balance of account between him and his principal is against him. *Eno* vs. *Wehrkamp*, 3 Bosw., 398.

Where the possession of the defendant has not been wrongfully acquired, a demand of the goods from him, before suit brought, is essential. A demand on the defendant's wife will be insufficient; she is not her husband's agent for such a purpose. *Livingston* vs. *Stoessel*, 3 Bosw., 19. See also, as to the general principle, *Howell* vs. *Kroose*, 4 E. D. Smith, 357; 2 Abb., 167; *Fuller* vs. *Lewis*, 13 How., 219; 3 Abb. 383; *Ely* vs. *Ehle*, 3 Comst., 508; *Monnot* vs. *Ibert*, 33 Barb., 24.

But, where the possession of the defendant is wrongful in its nature, either originally, or by notice, a demand before suit is unnecessary, and need not be averred or proved. *Hunter* vs. *The Hudson River Iron and Machine Company*, 20 Barb., 493; *Pringle* vs. *Phillips*, 5 Sandf., 157; *The New York Car Oil Company* vs. *Richmond*, 19 How., 505; 10 Abb., 185; *Tallman* vs. *Turck*, 26 Barb., 167; *Pillbury* vs. *Webb*, 33 Barb., 213. Misuse of property by a bailee, will have the same effect. *Vincent* vs. *Conklin*, 1 E. D. Smith, 203.

Where the vendee of an engine and boiler, to be fixed in his steamboat, removed it from the state, before completion of the contract, and on his return refused to comply with the terms of payment, it was held that the vendor's right of property was not lost, and that replevin was maintainable. *Kidd* vs. *Belden*, 19 Barb., 266.

Replevin will lie against a sheriff, for taking the goods of a third person, under a warrant of attachment. *Kuhlman* vs. *Orser*, 5 Duer, 242. Also, for exempt property taken by him. But, in such cases, it is incumbent for the plaintiff to make demand, and, if necessary, his election, between the property claimed, and other of the same nature, at once, and before suit brought. *Seaman* vs. *Luce*, 23 Barb, 240.

Replevin was held maintainable by the vendor, under an uncompleted contract, the terms of which had been changed; and a misuse of the property by the defendant, or a failure on his part to comply fully with the altered terms, was held to render unavailable, a lien he might otherwise have claimed. *Vincent* vs. *Conklin*, 1 E. D. Smith, 203.

Replevin will lie for money, specifically deposited upon an executory contract. *Graves* vs. *Dudley*, 20 N. Y., 76. By a mortgagor of chattels against his mortgagee, when the latter has taken premature possession. *Newsan* vs. *Finch*, 25 Barb., 175. By a brewer, for barrels delivered full of ale, on condition of their being returned, and that a price, named as payable for each in the event of a non-return, merely fixed the rate of damages, and did not operate to give an election to the vendee to retain them. *Westcott* vs. *Thompson*, 18 N. Y., 363.

Replevin will not lie, at the suit of a lessor of personal property, before the expiration of a lease granted by him, even as against a third person, for a wrongful taking. *Bruce* vs. *Westervelt*, 2 E. D. Smith, 440.

Nor by one tenant in common of such property, against another, or his bailee. *Russell* vs. *Allen*, 3 Kern., 173. Nor by one partner against another. *Koningsberg* vs. *Launitz*, 1 E. D. Smith, 215; *Azel* vs. *Betz*, 2 E. D. Smith, 188. Nor by a pledgee of goods, as against a levy on his interest on execution. *Saul* vs. *Kruger*, 9 How., 569. Nor against a chattel mortgagee, possessing himself of the property charged, after discovery that a cancellation of his mortgage had been obtained by fraud. *Lynch* vs. *Tibbitts*, 24 Barb., 51.

A suit of this nature wholly abates by the death of the defendant, and cannot be revived against his representative. *Hopkins* vs. *Adams*, 6 Duer, 685; 5 Abb., 351.

Where goods have already been taken in replevin, a third party cannot assert his claim to them by action; his remedy is to come in in the suit already pending, by making his claim under section 216. *Edgerton* vs. *Ross*, 6 Abb., 189. But, where the taking by the sheriff is wrongful, it seems that this section does not apply. *Vide King* vs. *Orser*, 4 Duer, 431.

Replevin will not lie at all, for property duly in custody of the law. *Willis* vs. *Warren*, 1 Hilt, 590; 17 How., 100.

An unconditional offer to restore the property, after demand and refusal, but before suit brought, will have the effect of a tender, and defeat the action. The plaintiff's remedy will then lie, in an action for damages occasioned by the original refusal. *Savage* vs. *Perkins*, 11 How., 17.

As to the right to maintain this form of action, to recover possession of a vessel, assigned upon the high seas, and as to the operation of such an assignment, executed in another state, as against the rights of a creditor in this, see *Moore* vs. *Willett*, 35 Barb., 663.

§ 146. *Averments on Express Contract.*

Common-Law Actions.

On proceeding to the subject of averments, in actions sounding in contract, those on express or written, as contradistinguished from implied or oral contracts, present themselves in the first instance for consideration. The subject of proceedings of an equitable nature forms the subject of a further section.

Bills, Notes and Checks.

This forms one of the most important classes of actions of this description, and will accordingly be first entered upon.

(*a.*) Averments under Section 162.

The short mode of pleading provided for by this section, is peculiarly applicable to actions of this nature. That section has been already cited at the commencement of the last book. Its purport is, as will be remembered, as follows:

"In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part."

If such allegation be controverted, he is bound to establish such facts

on the trial; otherwise he is relieved from proof of them. So far the section is rather of general application. It proceeds:

"In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party, a specified sum which he claims."

This is the portion which more peculiarly applies to the subject now under consideration: the section will, however, be generally considered in this subdivision, reference being made to it hereafter, where necessary.

A resort to the facilities thus afforded, is voluntary and not imperative, and a complaint is equally good, which, instead of setting out a copy, alleges the contents of the instrument sued upon, according to the former practice. *Mayor of New York* vs. *Doody*, 4 Abb., 127. That section was designed to facilitate "the pleader, not his adversary." p. 129.

As before shown, it is only the former and general portion of the section which forms part of the original Code. The latter sentence was first inserted on the amendment of 1851, and its exact purport and limits have been the subject of considerable discussion; the earlier decisions having rather a tendency to restrict, and the later to enlarge its operation.

The law on the subject has now been substantially defined by the Court of Appeals, in *Prindle* vs. *Carruthers*, 15 N. Y., 425; reversing *same case*, 10 How., 33, and *Keteltas* vs. *Myers*, 19 N. Y., 231; reversing the *same*, 1 Abb., 403; also partially reported, 3 E. D. Smith, 83. Both of the above decisions being unanimous, are therefore *a fortiori* controlling.

The instrument sued upon in *Prindle* vs. *Caruthers*, was of a peculiar nature, being a contingent contract, in the form of a promissory note. It was signed by the defendant, and, for value received, promised to make a specified annual payment to Henry Caruthers, or his wife, Elizabeth, if called for, or needed.

The complaint set forth a copy of the instrument, and averred as follows: property of this contract in the plaintiff by purchase; survivorship, and life of one of the payees; demand made by the plaintiff of a yearly payment; non-payment, and indebtedness; ending with a demand of judgment.

The defendant demurred for insufficiency, by reason of the absence of allegations of consideration, delivery, and of assignment to the plaintiff, and for numerous other minor defects. The demurrer prevailed below —it being laid down that the effect of the section, was merely to relieve the party from the obligation of setting out the instrument relied on,

according to its legal effect, and that a plaintiff, in addition to the copy and demand, must state his interest in, or title to, the instrument, and such other facts outside of it, as are necessary to enable him to recover upon it. That, in this respect, section 162 was subordinate to, and must be controlled by section 142, and that it never could have been intended by the former, to dispense with a statement of other facts necessary to constitute the cause of action, and to connect the plaintiff formally and legally therewith. See *Prindle* vs. *Curruthers*, 10 How., 33.

These views are overruled, and the decision reversed by the Court of Appeals, which held the complaint to be a good pleading under section 162; that the case provided for by that section, was an exception to the general rule of pleading prescribed by section 142 (p. 428); that that section was in effect a continuation and extension to other contracts of the old system of declaring on the money counts, and giving a bill or note in evidence; and that, in effect, a sufficient issue was joined by a general denial, on which the plaintiff was bound on the trial to prove his case, as though every fact necessary to maintain his action had been averred explicitly (pp. 428, 429). As to the old practice above referred to, see *Black* vs. *Caffe*, 3 Seld., 281; *Purdy* vs. *Vermilya*, 4 Seld, 346. It is lastly indicated (pp. 429, 430) that the operation of this clause will not embrace contracts extending to other matters than the payment of money, and, "thus limited, it will be confined almost exclusively to bills of exchange, promissory notes, and other written promises for the payment of money, without any other stipulation."

In *Keteltas* vs. *Myers*, 19 N. Y., 231, the complaint averred the making and delivery of a promissory note, set forth a copy, alleged indebtedness, and demanded judgment.

The defendant demurred for insufficiency.

The court below held the complaint defective, as averring no breach of contract, and that the plaintiff, not having availed himself of the precise form prescribed by section 162, could not sustain his complaint under that section. See *Keteltas* vs. *Myers*, 1 Abb., 403, and partial report, 3 E. D. Smith, 83.

The appellate court reversed the decision, overruled the views taken, and decided that the allegation, being couched in words equivalent to the form prescribed by the section, should be liberally construed, and, being so construed, brought the case within the purview of the section. See also *Adams* vs. *Sherrill*, 14 How., 297.

The views above taken by the appellate court, are in harmony with the following previous decisions: A complaint framed strictly under the section, without any averments of presentment, demand, dishonor, protest, or notice, was held sufficient to charge an indorser. *Roberts* vs.

Morrison, 11 L. O., 60; 7 How., 396. See also generally, as to a complaint by payee against maker, *Chappell* vs. *Bissell*, 10 How., 274; *Marshall* vs. *Rockwood*, 12 How., 452; *Greenbury* vs. *Wilkins*, 9 Abb., 206, note. By payee against acceptor, *Andrews* vs. *The Astor Bank*, 2 Duer, 629. And by indorsee against acceptor, the complaint being, however, fuller than the section required. *Levy* vs. *Ely*, 6 Abb., 89; 15 How., 395. See similar holding as to action upon a bond, *La Fayette Insurance Company of Brooklyn* vs. *Rogers*, 30 Barb., 491.

These cases, as above cited, must be considered as overruling the more restricted views of the powers conferred by the section, as contained in *Alder* vs. *Bloomingdale*, 1 Duer, 601; 10 L. O., 363; *Lord* vs. *Cheeseborough*, 4 Sandf., 696. (See note, 5 Duer, 670); 1 C. R. (N. S.), 322; *Bank of Geneva* vs. *Gulick*, 8 How., 51; *Price* vs. *McClave*, 5 Duer, 670; 3 Abb., 253; affirmed, 6 Duer, 544; *Ranney* vs. *Smith*, 6 How., 420. See also *dicta*, in *Marshall* vs. *Rockwood*, 12 How., 452, (454); *Adams* vs. *Sherrill*, 14 How., 297 (298) and *Cottrell* vs. *Conklin*, 4 Duer, 45 (52).

The instrument set forth must, however, be complete in itself, or any defect in it must be supplied by specific averment. Thus, where no consideration appeared upon the face of a paper in the form of a promissory note, and none was specially averred, the complaint was held demurrable. *Spear* vs. *Downing*, 34 Barb., 522; 22 How., 30; 12 Abb., 437.

The setting forth a copy of a foreign promissory note, in the language in which it was made, was held to be sufficient, though not the better practice, in *Nourny* vs. *Dubosty*, 12 Abb., 128.

As to the import by implication, of the words "signed," and "indorsed," in complaints of this nature, but containing allegations of a wider scope, see *Price* vs. *McClave*, 6 Duer, 544; *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362; *Griswold* vs. *Laverty*, 12 L. O., 316; 3 Duer, 690; *Bank of Geneva* vs. *Gulick*, 8 How., 51.

Whether, in cases in which the liability of the defendant depends on facts extraneous to the terms of an instrument sued upon, as apparent upon a complaint drawn in this form, it may not be still the more prudent course and the better mode of pleading, to aver them specifically, instead of leaving them to a somewhat forced implication, seems at the very least doubtful. It is clearly admissible, and is calculated to avoid the raising of questions pregnant with difficulty, and by no means free from doubt. See especially, *Lord* vs. *Cheeseborough*, and *Price* vs. *McClave*, at general term, above cited.

The subject of averments under section 162, in relation to the contract of indorsement, will be separately considered in a subsequent subdivision of the present section, under the head of *Indorser's Liability*.

Closely allied to the foregoing subject is that of—

(*b.*) Implications and Presumptions.

On which it may be desirable to draw attention to the following recent decisions:

An averment of acceptance of a bill, implies acceptance in writing. *Bank of Lowville* vs. *Edwards*, 11 How., 216.

One of acceptance by a corporation by their treasurer, includes an averment of authority to him to accept. *Partridge* vs. *Badger*, 25 Barb., 146. One of indorsement by a similar body, implies a legal indorsement. *Mechanics' Banking Association* vs. *Spring Valley Shot and Lead Company*, 25 Barb., 419. One of acceptance by the president of a bank, addressed to him as such, implies his authority, and acceptance by the bank. *Andrews* vs. *The Astor Bank*, 2 Duer, 629. But, where the draft is drawn upon him personally, the addition of a statement of treasurership to his acceptance, does not *primâ facie* discharge a person standing in a similar position, or import his authority. *Bruce* vs. *Lord*, 1 Hilt., 247. See as to inadmissibility of parol proof of such authority, *same case*, and *Knight* vs. *Lang*, 2 Abb., 227.

An averment of lawful holding and ownership of a non-negotiable note, implies an assignment, or a sale and delivery to the plaintiff. *Brown* vs. *Richardson*, 20 N. Y., 472. See *same case* below, 1 Bosw., 402. So also, one that such an instrument is "the property of the plaintiff by purchase." *Prindle* vs. *Carruthers*, 15 N. Y., 425.

An averment of making a note, imports signature and delivery to the payee. *Chappell* vs. *Bissell*, 10 How., 274; *Burrall* vs. *De Groot*, 5 Duer, 379.

Averments of making and delivery, or of indorsement, to the plaintiffs, implies ownership and indebtedness. *Niblo* vs. *Harrison*, 7 Abb., 447; *De Santes* vs. *Searle*, 11 How., 477; *Taylor* vs. *Corbiere*, 8 How., 385 (disapproving *Beach* vs. *Gallup*, 2 C. R., 66); *Appleby* vs. *Elkins*, 2 Sandf., 673; 2 C. R., 80; *Giesson* vs. *Giesson*, 1 C. R. (N. S.), 414; *Connecticut Bank* vs. *Smith*, 9 Abb., 168; *Mitchell* vs. *Hyde*, 12 How., 460.

Where indorsement of negotiable paper by the original payee is alleged, the presumption lies, that the actual holder is a *bonâ fide* owner, and no allegation of any intermediate indorsement is necessary. *Mitchell* vs. *Hyde*, 12 How., 460; *James* vs. *Chalmers*, 2 Seld., 209; affirming *same case*, 5 Sandf., 52; *Phelps* vs. *Ferguson*, 9 Abb., 206; 19 How., 143; *Holstein* vs. *Rice*, 15 How., 1; *Lee* vs. *Ainslie*, 4 Abb., 463; 1 Hilt., 277. These cases clearly overrule *Loomis* vs. *Dorsheimer*, 8 How., 9, and *Parker* vs. *Totten*, 10 How., 233. The view taken in *McKnight* vs. *Hunt*, 3 Duer, 615, seems also too strict, when viewed in the light of the foregoing decisions, collectively considered.

But, where no indorsement or delivery over by the payee of a note payable to order was alleged, a mere averment of ownership by the plaintiff was held insufficient, on demurrer, the complaint, on its face, showing ownership in another. *White* vs. *Brown*, 14 How., 282. See *Vanderpoel* vs. *Tarbox*, 7 L. O., 150.

Where no indorsement by the payee is shown, or where the paper is non-negotiable, the title may nevertheless pass by assignment or delivery, and the holder may then maintain an action. *White* vs. *Brown*, *supra*; *Hedges* vs. *Sealey*, 9 Barb., 214; but his right in this case is that of a mere assignee, and he takes, subject to all existing defences. See also *Billings* vs. *Jane*, 11 Barb., 620.

An allegation of indorsement imports delivery, *ex vi termini*, and, coupled with one of ownership or possession, establishes a *primâ facie* title in the holder. *Griswold* vs. *Laverty*, 12 L. O., 316; 3 Duer, 690; *Lee* vs. *Ainslee*, 1 Hilt., 277; 4 Abb., 463; *Bank of Lowville* vs. *Edwards*, 11 How., 216; *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362; *Burrall* vs. *De Groot*, 5 Duer, 379. See also, *Price* vs. *McClave*, 6 Duer, 544 (546).

Possession of negotiable paper is *primâ facie* evidence of good title, and throws the burden on the defendants of showing want of consideration. *James* vs. *Chalmers*, *supra*; *Seeley* vs. *Engell*, 17 Barb., 530. (N. B.—This portion of the decision is not affected by the reversal at 3 Kern., 542.) See also, *Smith* vs. *Schanck*, 18 Barb., 344.

Nor is it necessary to show consideration, upon the face of a complaint on paper of this description. *Hoxie* vs. *Cushman*, 7 L. O., 149. In *Benson* vs. *Couchman*, 1 C. R., 119, it was also decided that the words "for value received," import a consideration, as between indorser and indorsee, and, coupled with the expression, "lawful holder," show a sufficient cause of action.

The omission of the formula does not, however, alter the legal import and effect of the note, or relieve the defendant from the burden of proving want of consideration, both as regards himself and another joint maker, if such want be alleged by him in defence. *Kinsman* vs. *Birdsall*, 2 E. D. Smith, 395. See likewise, as to the import of the words "value received," as averring consideration on a non-negotiable instrument, *Prindle* vs. *Carruthers*, 15 N. Y., 425; reversing *same case*, 10 How., 33; also on a guaranty, *Cooper* vs. *Dedrick*, 22 Barb., 516.

The following presumptions lie, and throw the burden of displacing them, on the defendant:

That the acceptor of a bill has funds of the drawer in his hands, thus constituting him the principal debtor. *Atlantic Fire and Marine Insurance Company* vs. *Boies*, 6 Duer, 583. See also, as to the shifting of presumption in such a case, *Thurman* vs. *Van Brunt*, 19 Barb., 409.

That the note or draft of a corporation, made by their authority, is legitimate business paper, and on valid consideration. *Partridge* vs. *Badger*, 25 Barb., 146. So too as to the note of a corporation, made out of the state by which it is created. *New York Floating Derrick Company* vs. *New Jersey Oil Company*, 3 Duer, 648. Also as to the bill of exchange of such a company accepted by its president. *Belmont* vs. *Coleman*, 1 Bosw., 188. So likewise that their indorsement was lawful, and in the course of their legitimate business. *Mechanics' Banking Association* vs. *Spring Valley Shot and Lead Company*, 25 Barb., 419. So also as to a note discounted by a company. *Central Bank of Brooklyn* vs. *Lang*, 1 Bosw., 202.

That the transfer of negotiable paper was in the usual course of business, for valuable consideration, and before dishonor. *Andrews* vs. *Chadbourne*, 19 Barb., 147. See also *Erwin* vs. *Downs*, 15 N. Y., 575.

But such presumption, to be admissible, must be consistent with the pleading of the party (*same case*), and also with the other facts in evidence. See *Edwards* vs. *Campbell*, 23 Barb., 423. *Peets* vs. *Bratt*, 6 Barb., 662, may be cited as a case, in which the doctrine of sustaining a "very loose" complaint by implication, was carried to its utmost limits, but not, of course, as a precedent to be followed.

(*c.*) Negotiable and Non-negotiable Paper.

Before passing on to the other branches of the question, it may be well to take a glance at some of the recent decisions on this subject, and as to the different classes of instruments which will, or will not, be considered as constituting a promissory note, negotiable, as such, and conferring upon its *bonâ fide* holder for value, without notice, an absolute right to recover, without averment of consideration, or regard to any antecedent controversies that may exist between the original parties.

The statute law on the subject of negotiable paper will be found in title II., chapter IV., part II. of the Revised Statutes. 1 R. S., 768 to 772.

To be a promissory note, negotiable within the statute, the instrument must provide for the payment of a certain sum of money, absolutely and at all events, at a certain and fixed time.

An instrument promising to pay money on an uncertain or contingent event, is, though assignable, not negotiable, or a promissory note. *Prindle* vs. *Carruthers*, 15 N. Y., 425 (430). See also *same case* in court below, 10 How., 33 (35), the reversal not impairing the ruling upon this point. See likewise *Spear* vs. *Downing*, 34 Barb., 522; 22 How., 30; 12 Abb., 437.

So also as to an order to pay part of an instalment on a building con-

tract, on the completion of work to which it was applicable, though accepted in general terms by the drawee. *Van Wagner* vs. *Terrett*, 27 Barb., 181; *Studwell* vs. *Terrett*, 4 Bosw., 520; *Wilson* vs. *Roberts*, 5 Bosw., 100. So likewise, as to a promise to pay a seaman's advance wages, provided he proceeds to sea. *Loftus* vs. *Clark*, 1 Hilt., 310.

A note payable, not in money, but in merchandise, is likewise not negotiable paper within the statute. *Brown* vs. *Richardson*, 20 N. Y., 472; reversing, but not on this point, *Same case*, 1 Bosw., 402. So also, as to a paper in the form of a bill of exchange, similarly payable, *Landau* vs. *Levy*, 1 Abb., 376. Or, an order for payment in same form. *Lenx* vs. *Jansen*, 18 How., 265.

An instrument, informal on its face as a promissory note, as an order to pay for wheat in store at a certain price, may nevertheless be sued upon, as a special agreement. *Lent* vs. *Hodgman*, 15 Barb., 274.

An instrument, stipulating on its face for the performance of other things, independent of, and in addition to, the payment of money, was held to be non-negotiable. The contents formed an entire contract, and the clause of payment of money could not be detached. *Austin* vs. *Burns*, 16 Barb., 643.

An instrument, in form a negotiable promissory note, but to which was added a dependent statement, that the maker had deposited bonds, as collateral security for the amount promised to be paid, accompanied by a power to sell, and an agreement to pay any deficiency, was held, however, not to have lost its negotiable character, and that indorsers were chargeable accordingly, in *Arnold* vs. *Rock River Valley Union Railroad Company*, 5 Duer, 207.

A note to pay a fixed sum on a certain day, for which the maker was to receive stock, was held, on the contrary, not to be negotiable, as not being payable absolutely, but upon a future condition, in *Considérant* vs. *Brisbane*, 6 Duer, 686; 14 How., 487.

A note, not payable to order or bearer, is not negotiable paper. *Vide Barrick* vs. *Austin*, 21 Barb., 241.

Instruments issued by a banking association, in the form of bonds, for the payment of money at a specified date, with coupons for interest attached, and assignments for the obligees indorsed, but convertible at any intermediate time, into shares, on giving a specified notice, and surrender of the obligation, were held to be special contracts, and not to be negotiable in any legal sense of the term, or to be bills or notes, in *Leavitt* vs. *Blatchford*, 17 N. Y., 521 (541).

But an instrument by which a railroad company promised to pay to the payee, or order, a specific sum, at a specified time, with interest semi-annually, as per warrants attached, or, upon surrender of the note and warrants to the treasurer, at any time until six months of its maturity,

to issue stock in exchange therefor, was held to be a negotiable promissory note in *Hodges* vs. *Shuler*, 22 N. Y., 114; affirming *same case*, 24 Barb., 68.

Town improvement bonds, for a specific sum, payable at a specific time to bearer, are, even when under corporate seal, negotiable instruments. *Bank of Rome* vs. *Village of Rome*, 19 N. Y., 20. So also as to similar instruments not under seal, *Gould* vs. *Town of Venice*, 29 Barb., 442; *Finnegan* vs. *Lee*, 18 How., 186.

A statement, upon the face of the warrant of a municipal corporation, for payment of a fixed sum at a specified time, that it was payable "out of any funds belonging to the city, not before specifically appropriated," and "chargeable to general city fund," was held not to deprive it of the character of a negotiable promissory note, but that it might be sued upon as such, without the necessity of any collateral proof, as to the city being in funds. *Bull* vs. *Sims*, 23 N. Y., 570.

A bond, without seal, for payment of a fixed sum, on a day certain, should be regarded as a promissory note. *Woodward* vs. *Genet*, 2 Hilt., 526. So also an instrument, in which the word "guaranty" was used instead of "promise," but otherwise in ordinary form. *Bruce* vs. *Westcott*, 3 Barb., 374.

A due-bill, payable to bearer, is a promissory note, within the statute; but, being payable immediately, and not at any specified time, the maker is not entitled to any days of grace, nor is it transferable, so as to cut off any defence by him. *Sackett* vs. *Spencer*, 29 Barb., 180.

An unconditional order to pay a certain amount, against goods consigned, is, if accepted, a bill of exchange; and a verbal promise of the drawees to the holder, in affirmance of a letter written by them to the drawer, agreeing to accept, is sufficient to constitute an acceptance. *Lowery* vs. *Steward*, 3 Bosw., 505. A promise to accept must, however, be unconditional, to have that effect, nor, if conditional, will a subsequent performance of the condition avail to render it binding. *New York and Virginia State Stock Bank* vs. *Gibson*, 5 Duer., 574.

An order by the president of a company, to its treasurer, to pay a specified sum to one of its contractors or bearer, is a promissory note, and may be declared upon as such. It is not a bill of exchange, because it lacks the essential element of two parties. *Fairchild* vs. *The Ogdensburg, Clayton, and Rome Railroad Company*, 15 N. Y., 337.

But an order by a committee of the board of supervisors, upon the county treasurer, to pay a sum due to a contractor, was held not to be negotiable paper, but to be subject to all equities against the transferor, in *Supervisors of Rensselaer County* vs. *Weed*, 35 Barb., 136.

A note, part of a series, given as security for a continuing loan, on which one payment had been made, was held to be business and not

accommodation paper, in the hands of a transferee, though transferred to secure a previous indebtedness. *Troy City Bank* vs. *McSpedon*, 33 Barb., 81.

(*d.*) Decisions of General Import.

Before entering upon the subject of specific averments, it may also be convenient to notice some few recent decisions of this character.

Where, upon the face of a note, the promise of the makers is joint and several, a several action may be maintained against either, at the option of the plaintiff. *Snow* vs. *Howard*, 35 Barb., 55.

Consideration is essential to the validity of a note. If not apparent upon its face, it must be shown *aliunde*, or no recovery can be had. *Spear* vs. *Downing*, 34 Barb., 522; 22 How., 30; 12 Abb., 437.

Acceptance of a bill imports consideration, at whatever time it may take place, and the accepter then stands in the same position as the maker of a note, and cannot question such import. *Mechanics' Bank* vs. *Livingston*, 33 Barb., 458. *Bank of Louisville* vs. *Ellery*, 34 Barb., 630. See also, as to the extent to which an acceptor is estopped, *Van Duzer* vs. *Howe*, 21 N. Y., 531.

A note dated on a Sunday is not void, either at common law or by statute. *Greenbury* vs. *Wilkins*, 9 Abb., 206, note.

A note, when given, is *primâ facie* evidence of an accounting and settlement between the parties, and of indebtedness on the part of the maker. *Lake* vs. *Tysen*, 2 Seld., 461; *Treadwell's Executors* vs. *Abrams*, 15 How., 219; *Duguid* vs. *Ogilvie*, 1 Abb., 145. The taking of the acceptance of a third party in payment, discharges the debt, and the taker cannot sue upon the original consideration, if he neglect to present and enforce it. *Francia* vs. *Del Banco*, 2 Duer, 133.

Any material alteration of a bill or note, by the holder without the maker's knowledge or consent, avoids it, even though made in good faith, and as against an innocent holder. *Chappel* vs. *Spencer*, 23 Barb., 584; *Bruce* vs. *Westcott*, 3 Barb., 374. But a mere alteration of the date, under supposition of authority, and without fraudulent intention, was held not to render a note invalid, in *Van Brunt* vs. *Eoff*, 35 Barb., 501.

A note, made for the purpose of obtaining the maker's release from an arrest improperly procured, is void for duress, both as against principal and surety. *Strong* vs. *Grannis*, 26 Barb., 122.

Where a bill, drawn by a master upon shipowners, against a claim satisfied out of its proceeds, was refused to be accepted, it was held that a subsequent assignment of that claim to the holder, was a nullity, and gave him no additional claim against the defendants. *Cochran* vs. *Sherman*, 5 Duer, 13.

It is not essential, in order to the recovery of the plaintiff on a prom-

issory note, that he should be in actual possession. He may recover, though it has been deposited with a third party, provided he shows an absolute right to the money due. *Selden* vs. *Pringle*, 17 Barb., 458.

And the fact that the note has been cancelled by mistake, is no bar to a subsequent suit upon it, on due notification of the error, when discovered. *Irving Bank* vs. *Wetherald*, 34 Barb., 323.

It was held that a director, whose note had been given, in payment of his subscription for capital stock in a banking association, could not, by collateral arrangement with his co-directors, diminish or withdraw his general liability, but that such note was, notwithstanding, enforceable in the hands of a receiver. *Cowles* vs. *Gridley*, 24 Barb., 301. See likewise, as to the validity of a note for a subscription for preferred stock, *Magee* vs. *Badger*, 30 Barb., 246. So also, where an insurer had given his note for the premium on an open marine policy, on which the risk had actually commenced, it was held that he could not withdraw from his contract, so as to diminish his liability, by the mere service of a notice of such intent. *New York Fire and Marine Insurance Company* vs. *Roberts*, 4 Duer, 141.

The ratification of a note, originally void as against the party ratifying, operates as an original authority, and does not require any independent consideration to support it. *Commercial Bank of Buffalo* vs. *Warren*, 15 N. Y., 577. See also, as to ratification by an infant, after attaining his majority, *Taft* vs. *Sergeant*, 18 Barb., 320.

In *Conro* vs. *The Port Henry Iron Company*, 12 Barb., 27, it is held that a corporation is liable upon a draft, drawn or accepted by a party authorized for that purpose, though the corporate name be not mentioned in such draft, if it be drawn or accepted under a name adopted by the corporation: and that a subsequent ratification of the acts of an agent of that description, will be equivalent to an original authority.

In *Pratt* vs. *Gulick*, 13 Barb., 297, it was held that an independent action could be maintained, on a promissory note, unconditional on its face, though given originally as part of the terms of an uncompleted contract.

But see, as to failure of title to an estate, for purchase-money of which a note was given, constituting a defence, *Lewis* vs. *McMillan*, 31 Barb., 395.

A note given to an executor, for a consideration, proceeding from the estate of his testator, is enforceable by him as such. *Eagle* vs. *Fox*, 28 Barb., 473; 8 Abb., 40. See also *Merritt* vs. *Seaman*, 2 Seld., 168, and heretofore, under the head of *Parties*.

As to the rights of the payee, in respect of a note payable in merchandise, and his power, in the event of any total or partial failure in his contract on the part of the maker, to require a money payment, see

Gilbert vs. *Danforth*, 2 Seld., 585. See, as to the right of selection in such a case, *Lenx* vs. *Jansen*, 18 How., 265. Also, as to the duty incumbent upon the payee to exercise such right reasonably, and the extent of the maker's obligation, *Buck* vs. *Burk*, 18 N. Y., 357.

As to the amount, claimable on a bill expressed in foreign currency, see *McButt* vs. *Hoge*, 2 Hilt., 81.

As to the right of a creditor to recover on the original indebtedness, on a failure on the part of the debtor, to make and deliver notes, agreed to be taken in composition, *vide Dale* vs. *Fowler*, 12 How., 462; or on a note taken in conditional payment, proving worthless, *Terry* vs. *Hadley*, 27 Barb., 192.

As to the right of a creditor to sue on the original consideration, surrendering notes, his taking of which, in extension of credit, had been induced by fraud; and as to the similar power of an assignee of such a debt, see *French* vs. *White*, 5 Duer, 254. Where a note, given in substitution for another, was subsequently held void, the holder was held to be remitted to his original right, and entitled to enforce his original security. *Sheppard* vs. *Hamilton*, 29 Barb., 156.

But such right cannot be exercised by a mere indorsee. *Battle* vs. *Coit*, 19 Barb., 68. Or, where a note has been taken on account, "without recourse." *Graves* vs. *Friend*, 5 Sandf., 568.

Commercial paper, held as collateral security, cannot, it has been held, be sold in the same manner as stocks or bonds so pledged, but the pledgee must hold it till maturity, and collect and apply the amount to payment. *Brown* vs. *Ward*, 3 Duer, 660; *Wheeler* vs. *Newbould*, 5 Duer, 29; *Nelson* vs. *Wellington*, 5 Bosw., 178.

Where, on the other hand, collateral securities have been given on discount of a note, the holder is not bound to resort to those securities in the first instance, but may sue on the note itself, without regard to their existence. *Butterworth* vs. *Kennedy*, 5 Bosw., 143; *The Lee Bank* vs. *Kitching*, 11 Abb., 435.

A note, payable with use, no time of payment being specified, cannot be considered as payable immediately, and as being overdue, on an early transfer for value, so as to let in claims against the maker, as a defence in an action by a subsequent transferee. *Weeks* vs. *Pryor*, 27 Barb., 79. See also *Merritt* vs. *Todd*, 23 N. Y., 28.

In an action on a bill of exchange, drawn and indorsed in a foreign country, but payable in this state, the law of this state controls the interpretation and validity of the indorsement, as between the indorsee and the drawer. *Everett* vs. *Vendryes*, 19 N. Y., 436; affirming *same case*, 25 Barb., 383. But, as between indorser and indorsee, the rule will, it seems, be otherwise, and the law of the place of indorsement will prevail. See also *Lee* vs. *Selleck*, 32 Barb., 522; 20 How., 275.

The liability on instruments of this nature, made and payable in a foreign state, is regulated by the laws of that state. *Hodges* vs. *Shuler*, 24 Barb., 68; *Bowen* vs. *Newell*, 3 Kern., 290; affirming *same case*, 2 Duer, 584; 12 L. O., 321. But, where made in one state, and payable in another, the law of the place of payment governs. *Berrien* vs. *Wright*, 26 Barb., 208.

A note, indorsed in another state, but payable in this, is governed by the laws of New York, in relation to the effect of the contract of indorsement, and as to the form of protest, and notice of dishonor. *Vide Cook* vs. *Litchfield*, 5 Seld., 279; affirming *same case*, 5 Sandf., 330; 10 L. O., 330: see also, generally, *Smith* vs. *Gardner*, 4 Bosw., 54.

Where no place of payment was expressed upon the face of a negotiable note, made in one state, and indorsed to the plaintiff in another, it was held that the law of the place of indorsement prevailed, in an action by him against the maker, and excluded the setting up by the latter, of the defence of a discharge in insolvency, within his own state. *Ballard* vs. *Webster*, 9 Abb., 404.

And, where the particulars of a loan appear upon the face of an instrument, signed by the parties, the law of the place where it was made will govern, and parol evidence, to show that it was intended to be performed elsewhere, will be inadmissible, in aid of the defence of usury. *Potter* vs. *Tallman*, 35 Barb., 182.

A note given secretly to a creditor, as an inducement to sign a composition deed, on receipt of an apparently lesser amount, is void. *Hughes* vs. *Alexander*, 5 Duer, 488. See also *Carroll* vs. *Shields*, 4 E. D. Smith, 466; *Higgins* vs. *Mayer*, 10 How., 363; and *Pinneo* vs. *Higgins*, 12 Abb., 334.

As to the validity of the note of a *feme covert*, given since the statute of 1860, empowering her to trade in her own name, see *Barton* vs. *Beer*, 35 Barb., 78; 21 How., 309.

(*e.*) Bonâ Fide Holders.

The question as to whether the plaintiff, in an action of this description, is or is not entitled to claim the privilege of a *bonâ fide* holder for value, and to an absolute recovery, in that character, is one of importance, exercising considerable influence on the pleadings and ulterior proceedings in an action, and, as such, presents itself next for consideration.

To entitle the holder to this privilege, the paper on which he sues must, in the first instance, be negotiable, and it must also be valid in its inception. If either of these conditions fails, the privilege no longer exists.

A promissory note has no legal inception, until it is delivered to some person, as evidence of a subsisting debt. Thus, when a note intended to be given, on renewal, was stolen from the desk of the maker before delivery, it was held to have no inception, that every description of defence was available, and that the plaintiff could not recover, although a purchaser for value, in ignorance of the defect, the transaction being tainted with usury in an intermediate stage. *Hall* vs. *Wilson*, 16 Barb., 548. See also, as to the defence, that a note sued upon was usurious in its inception, *Truscott* vs. *Davis*, 4 Barb., 495; *Sweet* vs. *Spence*, 35 Barb., 44.

An accommodation acceptance, payable to the order of the drawer, was held to be void for usury in the hands of the first indorsee, though its true character was not known to him, as it had no previous inception; and a second bill, given on renewal of it, will be subject to the same taint. *Clark* vs. *Sisson*, 32 N. Y., 312; affirming *same case*, 5 Duer, 408. See also *same case*, 4 Duer, 408. See also *Bossange* vs. *Ross*, 17 How., 566.

A bill or note, fraudulently put into circulation, is also invalid in its inception, and imposes upon an innocent holder, the burden of proving a valuable consideration on his part. *Ross* vs. *Bedell*, 5 Duer, 462; *Catlin* vs. *Hansen*, 1 Duer, 309. See also, as to an acceptance procured by fraud, *New York and Virginia State Stock Bank* vs. *Gibson*, 5 Duer, 574; or, an indorsement so obtained, *Holbrook* vs. *Mix*, 1 E. D. Smith, 154.

To entitle a holder to this privilege, the paper must also have been taken by him, in regular course of business, and for a full and fair consideration. *Hall* vs. *Wilson*, 16 Barb., 548.

And such holder must be so in good faith, and without notice of any defect or want of consideration, or knowledge of circumstances which impose upon him the duty of inquiry. *Holbrook* vs. *Mix*, 1 E. D. Smith, 154. See, as to the holder or indorsee of accommodation paper of a manufacturing corporation, accepted by their agent without authority, *Farmers' and Mechanics' Bank* vs. *Empire Stone Dressing Company*, 5 Bosw., 275; 10 Abb., 47; *The Central Bank* vs. *The Same*, 26 Barb., 23; *Bridgeport City Bank* vs. *The Same*, 30 Barb., 421; 19 How., 51; *Morford* vs. *The Farmers' Bank of Saratoga County*, 26 Barb., 568.

But this rule will not be applied, where the corporation itself has procured or had the benefit of a loan so contracted, or where such loan is made, on representations of their authorized agent to that effect. *Central Bank* vs. *The Empire Stone Dressing Company*; *Bridgeport City Bank* vs. *The Same*, *supra*; *Bank of Genesee* vs. *The Patchin Bank*, 3 Kern., 309; *Same case*, 19 N. Y., 312; *Mechanics' Banking*

Association vs. *New York and Saugerties White Lead Company*, 23 How., 74; also, 20 How., 509.

Notice on the part of a plaintiff, who has not paid value, that the original consideration for a note has wholly failed, will defeat his action. *Prall* vs. *Hinchman*, 6 Duer, 351.

Where the plaintiff, under similar circumstances, has been put to, and has given, proof of consideration, the burden of showing notice sufficient to defeat his recovery, lies upon the defendant. *Catlin* vs. *Hansen*, *supra*.

A note, made on no consideration, as on the sale of a wholly void agreement, is invalid. *Sherman* vs. *Barnard*, 19 Barb., 291. So also, as to a note, given in renewal of another, which was, in fact, paid at the time. *Pratt* vs. *Foote*, 5 Seld., 463; reversing *same case*, 12 Barb., 209. So likewise, as to a note given as security for the performance of an award, afterwards abandoned, and never carried out. *Moore* vs. *Cockroft*, 4 Duer, 133. Or, a note, without consideration, given by a deceased parent to his child, when sought to be enforced against his estate. *Phelps* vs. *Phelps*, 28 Barb., 121. See also, as to the inability to sustain an action, where consideration is neither expressed upon the face of the note, nor proved *aliunde*, *Spear* vs. *Downing*, above cited.

To make an indorsee a *bonâ fide* holder of accommodation paper diverted from its original purpose, the indorsement to him must be for value advanced or parted with, or indebtedness actually extinguished at the time. If merely by way of collateral security, it will not so avail him, or exclude an otherwise tenable defence. *White* vs. *Springfield Bank*, 3 Sandf., 222; *Clark* vs. *Dearborn*, 6 Duer, 309; *Farrington* vs. *The Frankfort Bank*, 24 Barb., 554; *Same case*, 31 Barb., 183; *New York Exchange Company* vs. *De Wolf*, 3 Bosw., 86; *Prentiss* vs. *Graves*, 33 Barb., 621; *Scott* vs. *The Ocean Bank*, 5 Bosw., 192. Otherwise, however, where such a note is made for the general accommodation of the payee, and he uses it in this manner, without fraud. *De Zeng* vs. *Fyfe*, 1 Bosw., 335; *Lathrop* vs. *Morris*, 5 Sandf., 7. A deposit, by way of security on a stock loan, was also held good in *Lysaght* vs. *Phillips*, 5 Duer, 106. See likewise *Moore* vs. *Ward*, 1 Hilt., 337.

Where the transfer of a note, by indorsement of an insurance company, was made without previous resolution by the board of directors, the transferee was held not to be a *bonâ fide* holder. *Marsh* vs. *Brett*, 16 How., 95. See as to illegality of such a transfer, *Gillet* vs. *Phillips*, 3 Kern., 114.

But, as regards a really *bonâ fide* holder of negotiable paper, the rule of law is most sweeping and indulgent. That rule is thus stated in *Hall* vs. *Wilson*, 16 Barb., 548, above cited:

"Upon grounds of public policy, growing out of the commercial necessities and wants of the community, a holder of negotiable paper may, under certain circumstances, recover upon it, notwithstanding any defect or infirmity in the title of the person from whom he derived it, even though such person may have acquired it by fraud, theft, or robbery.

"But, to entitle the holder of negotiable securities, which have been obtained or put in circulation fraudulently, feloniously, or without consideration, to the benefit of this rule, he must have become the holder in good faith, for a full and fair consideration, in the usual course of business, and without notice of the defect or infirmity in the title." See also the rule as generally stated in *Farrington* vs. *The Frankfort Bank*, 24 Barb., 554, and *same case*, 31 Barb., 183. Also in *Steinhart* vs. *Boker*, 34 Barb., 436.

In *Gould* vs. *Segee*, 5 Duer, 260, it is laid down, that the rule in question applies to all negotiable paper, whether payable to bearer or order, immediately, or at a future day; and also, that its protection is not confined to those, whose usual business it is to deal in negotiable paper, but extends to every person, to whom such paper may be lawfully transferred, and who, by payment of value, may acquire a title.

The mere fact that paper was accommodation paper between the original parties, does not, *per se*, impose upon a subsequent holder the necessity of showing consideration in the first instance, unless fraud, either in the original negotiation, or in the transfer to the plaintiff, be alleged and proved by his adversary. *Vide Ross* vs. *Bedell*, 5 Duer, 462. And this, it has been held, even although the holder had knowledge of such being its original character. *Pettigrew* vs. *Chave*, 2 Hilt., 546. See also *Pierson* vs. *Boyd*, 2 Duer, 33; *Bank of Vergennes* vs. *Cameron*, 7 Barb., 143; *Bailey* vs. *Lane*, 21 How., 475 (477); 13 Abb., 354.

A fortiori, will a *bonâ fide* holder of accommodation paper be protected, where there is nothing in the circumstances, to put him upon inquiry as to its origin. *Bank of Genesee* vs. *The Patchin Bank*, 19 N. Y., 312. See also *same case*, 3 Kern., 309 (307).

The holder of an accommodation note, wrongfully made in his late firm name, by a late partner, after actual dissolution, was held protected, it appearing that no regular notice of such dissolution had ever been given. *City Bank of Brooklyn* vs. *McChesney*, 20 N. Y., 240; *The Same* vs. *Dearborn*, 20 N. Y., 244. See also, as to the irregular note of a manufacturing incorporation, but given in a form which it had before recognized, and for which consideration had been received, *Mead* vs. *Keeler*, 24 Barb., 20.

Knowledge of the original consideration of a note, will not avail to defeat the right of a *bonâ fide* holder, though such consideration have

actually failed, unless notice of such failure be also brought home to him. *Davis* vs. *McCready*, 4 E. D. Smith, 565.

A subsequent eviction of a tenant by the superior landlord, is no defence to an action on his note, given to his immediate lessor, for rent in advance, in the hands of a *bona fide* holder. *Brooks* vs. *Christopher*, 5 Duer, 216.

Diversion of its avails, from a special purpose for which a note was originally made, is no defence to an action upon it, in the hands of a *bona fide* holder, unless notice be brought home to him. *Noble* vs. *Cornell*, 1 Hilt., 98. And diversion of this nature will not be a defence, where the party seeking to set it up, has in fact received consideration. *Moore* vs. *Ward*, 1 Hilt., 337.

See generally as to the extent to which a holder for value will be protected, notwithstanding the diversion of an accommodation note from its original purpose. *Ayrault* vs. *McQueen*, 32 Barb., 305. Also, as to the right of such a holder, to a presumption in favor of the regularity of his title, and that a transfer to him, on behalf of a corporation, was made with due authority. *Warner* vs. *Chappell*, 32 Barb., 309. See also generally on this last point, *Akin* vs. *Blanchard*, 32 Barb., 527; *Bridenbecker* vs. *Lowell*, 32 Barb., 9; *Houghton* vs. *Dodge*, 5 Bosw., 326; *Marine Bank of City of New York* vs. *Vail*, 6 Bosw., 421; *Merchants' Bank of City of New York* vs. *McColl*, 6 Bosw., 473; *Elwell* vs. *Dodge*, 33 Barb., 336.

See, however, as to the rule which will be applied, where a note given to a corporation for a specific and apparent purpose, has been perverted from that purpose, *Bell* vs. *Shibley*, 33 Barb., 610.

Nor will a party, who has actual or constructive notice of the want of authority, be entitled to claim the benefit of the rule. *Smith* vs. *Hall*, 5 Bosw., 319.

And, where a defendant has himself received value, he cannot object, as against a subsequent holder, that such holder has not given any, on the transfer to him—the latter is equally entitled to recover. See the two last decisions.

Acceptance of an accommodation draft imports consideration, even in favor of a party who has discounted the paper before it was accepted. Its validity cannot afterwards be questioned by the acceptor, except in those cases in which a guarantee, purporting on its face to be for value received, could be questioned by the guarantor. *Mechanics' Bank* vs. *Livingston*, 33 Barb., 458. See also *Bank of Louisville* vs. *Ellery*, 34 Barb., 630, both above cited. See also, as to the extent to which an acceptor will be estopped, from questioning the validity of the paper accepted by him. *Van Duzer* vs. *Howe*, 21 N. Y., 531.

The holder may, under certain circumstances, be entitled to recover

against one, and not against another party to paper of this description. Thus, a party discounting a bill before acceptance, may be a *bonâ fide* holder against the drawer, but not against a subsequent acceptor, if the acceptance be irregular or invalid. *Farmers' and Mechanics' Bank* vs. *The Empire Stone Dressing Company*, 10 Abb., 47; 5 Bosw., 275. So, knowledge on the part of a holder for value, that the makers of a note were married women, was held not to deprive him of the right to rely upon the implied guaranty of the indorser, nor of his character as *bonâ fide* holder as against the latter. *Erwin* vs. *Downs*, 15 N. Y., 575. See likewise *Ogden* vs. *Blydenburgh*, 1 Hilt., 182. So, the drawer of a bill will still be liable, though the indorsement of the payee may have been forged. *Coggill* vs. *The American Exchange Bank*, 1 Comst., 113.

And the holder of business paper for value, may maintain a suit upon it, notwithstanding a defect in his title as indorsee, according to the rules of the common law. *Houghton* vs. *Dodge*, 5 Bosw., 326.

Where the contract out of which a note originated is tainted with illegality, a party to that illegality cannot recover upon it, though he may have paid off, and otherwise acquired the rights of an innocent holder for value. *Devlin* vs. *Brady*, 32 Barb., 518.

Although a bill or note may be in itself void for usury, yet, if it be accompanied by a certificate of the maker, that it is given for value and will be paid when due, such certificate will operate as an estoppel, and its validity cannot be questioned, in the hands of a holder for value. *Mechanics' Bank of Brooklyn* vs. *Townsend*, 17 How., 569; 29 Barb., 569; *Chamberlain* vs. *The Same*, 26 Barb., 611; 7 Abb., 31.

Representations of the payee, that an accommodation note is business paper, if relied on by a purchaser for value, and made to induce such purchase, will, in the absence of knowledge, or grounds of suspicion by him of its real character, have the same effect. *Truscott* vs. *Davis*, 4 Barb., 495; *Burrall* vs. *DeGroot*, 5 Duer, 379; *Robbins* vs. *Richardson*, 2 Bosw., 248; *Benedict* vs. *Caffe*, 5 Duer, 226 (237). See also, *Bank of Genesee* vs. *Patchin Bank*, 3 Kern., 309 (316); *Ferguson* vs. *Hamilton*, 35 Barb., 427.

To warrant the application of this doctrine, there must, however, be an actual representation, or at the least an inquiry on the part of the purchaser; a mere omission to disclose the true character of the bill will not have that effect. *Clark* vs. *Sisson*, 4 Duer, 408; *Same case*, 22 N. Y., 312; affirming 5 Duer, 468.

In the same manner as the right to a full recovery may exist against one, and not against another of the parties, so also as to the measure of a recovery, if had. As against an accommodation indorser, the holder, purchasing from that indorser, was held to be entitled to recover

only the amount actually paid, with interest and protest fees. As against prior parties, makers or indorsers for value, his right to recover as holder would, on the contrary, be perfect. *Taylor* vs. *Beavers*, 4 E. D. Smith, 213. See also, as to an accommodation note deposited as security for an antecedent debt, *Robbins* vs. *Richardson*, 2 Bosw., 248. See likewise, *Benedict* vs. *Caffe*, 5 Duer, 226 (237).

The following decisions bear upon the question as to what will or will not be considered as value given by a plaintiff, sufficient to constitute him a holder in good faith.

It may be remarked that, in all that class of cases, perfect good faith on the part of such holder is an essential condition precedent to his enjoyment of the privilege in question. Where that condition is absent, he will stand in no better position than the original parties, with regard to the exclusion of any defences, if existent.

In *Farrington* vs. *Frankfort Bank*, 24 Barb., 554, the rule, as to value sufficient for that purpose, is generally stated thus:

"The valuable consideration must either be a new advance made at the time, or some prior security must be parted with, or an existing indebtedness actually discharged to complete the title of the holder." See *same case*, 31 Barb., 183.

The taking of such paper, in satisfaction of an antecedent debt, is sufficient to clothe the holder with this character. *New York Marbled Iron Works* vs. *Smith*, 4 Duer, 362; *White* vs. *Springfield Bank*, 3 Sandf., 222; *Inglis* vs. *Kennedy*, 6 Abb., 32. Nor is it any answer to the action that such debt has not yet become due. *Robbins* vs. *Richardson*, 2 Bosw., 248.

Not so, however, where the transaction is tainted with fraud, or want of consideration. See *Duncan* vs. *Gosche*, 21 How., 344; or with *Clark* vs. *Gallagher*, 20 How., 308.

That taking of a note in payment of an antecedent debt, is a valuable consideration, within the meaning of the rule, must be deemed the settled law of the state, is laid down in *Gould* vs. *Segee*, 5 Duer, 260, above cited; *Purchase* vs. *Mattison*, 3 Bosw., 310; *Same case*, 6 Duer, 587. See, however, this doctrine questioned in *Cardwell* vs. *Hicks*, 23 How., 281.

Where the makers of a note, indorsed for their accommodation for another specific purpose, handed it over to another party in exchange for their note, not yet due, but surrendered up to be cancelled, it was held that such party was entitled to the privileges of a holder for value, and to recover for the amount of the note surrendered. *Youngs* vs. *Lee*, 2 Kern., 551; affirming *same case*, 18 Barb., 187. See also *Stettheimer* vs. *Meyer*, 33 Barb., 215.

But, to have the above effect, the note of a third party taken by a

creditor, on account of his debt, must be intended to work an extinguishment. See *Noel* vs. *Murray*, 3 Kern., 67.

The transfer of a note by a debtor to his creditor, in order that he might collect and apply it to the payment of his debt, was held to constitute the latter a holder for value, so as to entitle him to repudiate a subsequent compromise by the debtor, in fraud of his rights. *Grant* vs. *Holden*, 1 E. D. Smith, 545.

When a parting with value in the above manner is proved, the amount of the consideration so paid is not otherwise important, than as bearing upon the question of actual or constructive notice. *Gould* vs. *Segee*, 5 Duer, 260, above cited.

Where a delivery of the above nature is made, in diversion from the purposes for which the note was originally given, and is merely by way of collateral security for, and not in payment or extinction of an indebtedness, the holder will not be a holder for value, in the full force of the term. See *White* vs. *Springfield Bank*, and other cases above cited. See, however, *Lysaght* vs. *Phillips*, 5 Duer, 106; and *Moore* vs. *Ward*, 1 Hilt., 337. But, where the note has not been so diverted, but was made for the general accommodation of the party who deposits it, the rule will not apply, and a deposit of this nature will be a transfer for value, in the full import of the term. *De Zeng* vs. *Fyfe*; and *Lathrop* vs. *Morris*, above cited.

The delivery of an accommodation note to a judgment creditor of the maker, in consideration of his discontinuing supplementary proceedings, was held sufficient to constitute him a holder for value, as against the accommodation indorser. *Boyd* vs. *Cummings*, 17 N. Y., 101.

Where an indorser of an accommodation bill, intrusted with it for negotiation, for the benefit of the drawer, delivered it over, in bad faith, as security for his own performance of a contract, it was held, that a further indorsee could not recover, without proof of its having been passed for some unsatisfied claim, or of value given by himself, in good faith, before maturity. *Woodruff* vs. *Wicker*, 2 Bosw., 613.

An executory contract, made in good faith, may avail to constitute value. Thus where an accommodation note, made payable to a cashier of a bank, and delivered without restriction, was pledged, by way of continuing guaranty for future loans by such bank to the principal makers, the pledgees were held entitled to recover for the amount then due, notwithstanding a prior payment of the amount originally loaned, the sureties not having terminated their responsibility by notice. *Agawam Bank* vs. *Strever*, 18 N. Y., 502. An executory agreement, whether subsequently performed or not, was held to be sufficient consideration for a note, in *Houghtaling* vs. *Randen*, 25 Barb., 21.

So also, indorsers of notes for the accommodation of the makers, were

held liable, on a deposit of them as collateral security for a credit granted to such makers, and that in their character of indorsees, and not as sureties. *Zellinger* vs. *Caffe*, 5 Duer, 87.

Exchange notes are valid, and each constitutes sufficient consideration to support the other in the hands of a holder, for value; nor is the transaction altered, by a promise by one of the makers to protect the other on maturity. *Odell* vs. *Greenly*, 4 Duer, 358; *Coburn* vs. *Baker*, 6 Duer, 532; *Bacon* vs. *Holloway*, 2 E. D. Smith, 159; *Cobb* vs. *Titus*, 6 Seld., 198; *Nantucket Pacific Bank* vs. *Stebbins*, 6 Duer, 341; *Elwell* vs. *Chamberlain*, 2 Bosw., 230; *Wiltsie* vs. *Northam*, 5 Bosw., 421.

A subscription for preferred stock, was held a valid consideration for the subscriber's note for the amount, in *Magee* vs. *Badger*, 30 Barb., 246.

An accommodation indorser, who had paid a note, in the hands of *bonâ fide* holders for value, was held subrogated to their rights, and entitled to the full protection of the rule as against the prior parties, in *Flint* vs. *Schomberg*, 1 Hilt., 532.

To entitle a holder to that protection, the value claimed by him must be satisfied before the liability sought to be enforced has accrued. Thus, the purchaser of a bill, before acceptance, was held not entitled to claim that benefit, as against a subsequent acceptor. *Farmers' and Mechanics' Bank* vs. *Empire Stone Dressing Company*, 10 Abb., 47.

The maker of a note wrongfully taken from him, and negotiated for value to a *bonâ fide* holder, may recover of the wrongdoer the value of that note, though still outstanding when the action is brought. *Decker* vs. *Mathews*, 5 Sandf., 439; affirmed, 2 Kern., 313.

In *Spencer* vs. *Ballou*, 18 N. Y., 327, it was held that a subsisting liability on the part of the holder, as indorser on previous notes of the same maker, was sufficient consideration to support his interest as such holder of paper, intended to be substituted for them, as against an accommodation indorser of such paper.

Liabilities of Parties, Indorsement, Guaranty, &c.

To enter into a detailed, or even into a professedly complete dissertation on the nature of these contracts, and the extent of the liabilities which they create, would of course be trenching far beyond the appropriate limits of a work of the nature of the present. A notice of a few of the more recent cases may, however, be of assistance, with a view to direct attention to some of the principal points, which, on the framing a complaint of this description, force themselves upon the attention of the student, or even of the pleader.

(*f.*) Indorser's Liability.

Although it is in the power of a plaintiff to enforce his rights, as against all the other parties to a note or bill of exchange, by means of a single action, the result of that action is confined to his remedy alone, and has no effect upon the promises of those parties, or their rights or responsibilities as between each other, which remain enforceable as before, by means of other proceedings, irrespective of any judgment or decision in that particular suit. *Kelsey* vs. *Bradbury*, 21 Barb., 531; *Corey* vs. *White*, 3 Barb., 12; *Barker* vs. *Cassidy*, 16 Barb., 177.

Such rights may, however, be waived, as, where an indorser, after judgment against all parties, and actual execution, and sufficient levy thereon against the goods of the maker, took upon himself to pay the note, it was held that he had lost his recourse against the others, although he had taken an assignment of the judgment, on the understanding that it was to be enforced for his benefit. *Perlee* vs. *Onderdonk*, 19 Barb., 562.

As to the contract of the maker of a note, payable to his own order, and indorsed over, being absolute, as regards a subsequent holder for value, whosoever and wheresoever he may be, see *Smith* vs. *Gardner*, 4 Bosw., 54.

The rule that the parties to a bill or note are liable in the order of their signatures, and that each of those parties can only hold those who precede, and not those who follow him in that order, remains of general and almost universal acceptance. In one respect, however, it has been trenched upon by recent decisions, and that is, in the case of an accommodation indorser, who, before delivery by the maker to the payee, at the former's request, and to induce the latter to take it, has affixed his indorsement to a note. It has been held that such a state of things may be shown by extrinsic evidence, and that, when shown, the indorser was liable to the payee, who had taken up the note, and this, in his character as indorser and not as guarantor. The payee would have been entitled, on the note first coming to his hands, to pass it without indorsement, or to indorse it without recourse, and, this last being a mere matter of form, might, it was held, be done at any time, or might be reckoned as done at any stage of the action. *Moore* vs. *Cross*, 19 N. Y., 227; 17 How., 385; affirming *same case*, 23 Barb., 534. See also, *Spies* vs. *Gilmore*, 1 Comst., 321; *Cottrell* vs. *Conklin*, 4 Duer, 45; *Waterbury* vs. *Sinclair*, 26 Barb., 455; 6 Abb., 20; 16 How., 332. The reversal of this last decision, *Waterbury* vs. *Sinclair*, 16 How., 329 (339); 7 Abb., 399; the cases of *Young* vs. *Knapp*, 7 Abb., 399, note, and *Hanck* vs. *Hund*, 1 Bosw., 431, and the doubts entertained

upon the subject in *Murphy* vs. *Merchant*, 14 How., 189; 6 Duer, 679, and *Hahn* vs. *Hull*, 4 E. D. Smith, 664; 2 Abb., 352, seem, by the above cited decision of the Court of Appeals, to be overruled or deprived of their foundation.

See generally, as to the rule that the parties to a bill of exchange are liable to the holder in the manner and order, and to such extent as is *primâ facie* the legal import of their several positions on the bill, and as to such holder's right to release or discharge one of such parties, without prejudice to his remedies against another, *Howard Banking Company* vs. *Welchman*, 6 Bosw., 280. As to what will constitute a sufficient consideration for a discharge of this nature, see *Eccleston* vs. *Ogden*, 34 Barb., 444.

But, as a general principle, the character of an indorsement, or the nature of the liability thereon, cannot be explained. The undertaking of the indorser may be either limited or enlarged at the time it is entered into, by express terms, at his pleasure. But, if no such terms are expressed, the law fixes the character of the undertaking, and it cannot be varied by parol. So held as to an indorsement in blank. *Bank of Albion* vs. *Smith*, 27 Barb., 489. See also cases of *Spies* vs. *Gilmore*; *Cottrell* vs. *Conklin*; *Hanck* vs. *Hund*, and *Murphy* vs. *Merchants' Bank*, above cited. See likewise, as to a parol promise being merged in the contract of indorsement, *Montgomery County Bank* vs. *Albany City Bank*, 8 Barb., 396; affirmed, 3 Seld., 459.

The principle that, at the time of his signature, any party to a note or bill of exchange has the power of restricting or qualifying his liability, has been carried out in numerous recent decisions.

Thus in *Hicks* vs. *Hinde*, 9 Barb., 528; 6 How., 1, the drawer, having signed as agent, was held not to be personally bound, and that the draft was that of his principal. So also as to the case of the indorsement of a bank cashier. *Bank of Genesee* vs. *Patchin Bank*, 19 N. Y., 312. A note, payable to a party as executive agent of a company, was held to be the property of the company itself, and not of the nominated payee, in *Considérant* vs. *Brisbane*, 2 Bosw., 471. The drawer or acceptor of a draft on behalf of a corporation, under a name adopted by it, is not liable, but the company is bound. *Conro* vs. *The Port Henry Iron Company*, 12 Barb., 27. Affirmed by Court of Appeals, see Selden's Notes, April 18th, 1854. See, however, as to the nullity, so far as regards the corporation itself, of an acceptance of this nature, made without proper authority. *Walker* vs. *The Bank of the State of New York*, 5 Seld., 582; affirming *same case*, 13 Barb., 636; also, *Nixon* vs. *Palmer*, 4 Seld., 398; *Moss* vs. *Livingston*, 4 Comst., 208; and, as to the proof of such authority, *Knight* vs. *Lang*, 2 Abb., 227.

See, likewise, as to the freedom from personal responsibility, and the

validity of the indorsement of the treasurer of a corporation, indorsing over and passing a note, payable to his order as such, *Babcock* vs. *Beman*, 1 Kern., 200; affirming *same case*, 1 E. D. Smith, 593; and, as to the making a promissory note under special authority, as by the trustees of a school district for a teacher's wages, *Horton* vs. *Garrison*, 23 Barb., 176. A mere acceptance, as treasurer, on a draft drawn personally, does not, *primâ facie*, absolve the acceptor from personal responsibility, but he may discharge himself by proof of the fact, and knowledge of it on the part of the plaintiff. Such proof, however, must be sufficient to establish the liability of the principal. *Bruce* vs. *Lord*, 1 Hilt., 247.

A stricter view was taken in *Bolles* vs. *Walton*, 2 E. D. Smith, 164, where it was held that a defendant, who, in fact, was the proprietor of a paper, could not be charged upon a promissory note signed by his agent, as chairman of an executive committee, for conducting such paper, but wherein his name did not appear, and nothing indicated upon the face of such note, that it was made on his behalf, or by his authority. See to the same effect, in the same controversy, *De Witt* vs. *Walton*, 5 Seld., 571.

A party, taking a note, signed by an agent as such, takes it at the risk of being obliged to show affirmatively, in a suit against the principal, that the authority of the agent was not merely apparent but real, and was exercised for such principal's benefit. *Exchange Bank* vs. *Monteath*, 24 Barb., 371.

Under certain circumstances, the signature of the holder of a note may have the effect of binding him as a principal debtor. So held, where, on a note payable to him, or bearer, the payee added his signature to that of the maker, in passing it to a third party. *Patridge* vs. *Colby*, 19 Barb., 248. So also, in the case of a party intending to become surety, but signing as principal. *Casey* vs. *Brabason*, 10 Abb., 368.

An administrator, professedly indorsing as such, but in fact for the private debt of the widow of the deceased, was held to be personally liable as indorser. *Sieckman* vs. *Allen*, 3 E. D. Smith, 561.

The indorsement of a party having no title, is a nullity, and does not avail as a transfer. So held, as to that of the widow, upon a note payable to an indebted intestate, without administration granted. *Lounsbury* vs. *Depew*, 28 Barb., 44.

The indorsement of paper by a wrong person, but bearing the same name, is a nullity, and may, as regards the indorser, constitute a forgery. *Graves* vs. *The American Exchange Bank*, 17 N. Y., 205. A note payable to the order of a fictitious payee, is transferable by delivery, and not by indorsement. *Maniort* vs. *Roberts*, 4 E. D. Smith, 83. A bill put in circulation by the drawer, with a forged indorsement upon it, is, in

judgment of law, payable to bearer, and a *bonâ fide* holder may so treat it. *Coggill* vs. *American Exchange Bank*, 1 Comst., 113.

The delivery over of a note to order, by the payee, without indorsement, but for valuable consideration, transfers the title, and makes it the same in legal effect, as if payable to bearer. *Central Bank of Brooklyn* vs. *Lang*, 1 Bosw., 202. See as to this, and the two preceding cases, 1 R. S., 768, section 5.

A person advancing money, with consent of an indorser, on security of, and in order to take up a note lying in bank under protest, was held entitled to hold it as a subsisting obligation against all parties, and that the validity of the transfer to him could not be questioned, in *Hartshorne* vs. *Brace*, 25 Barb., 126.

By affixing his name, an indorser guarantees the genuineness of the signature, and the capacity to contract, of the prior parties, and will be estopped from denying either. *Erwin* vs. *Downs*, 15 N. Y., 575; *Troy City Bank* vs. *Lanman*, 19 N. Y., 477; *Ogden* vs. *Blydenburgh*, 1 Hilt., 182.

The indorsement of non-negotiable paper, though insufficient to constitute the signer legally liable, operates as an equitable assignment. *Lenx* vs. *Jansen*, 18 How., 265.

Indorsers for a commission, to enable the holders of a note to discount it, were, on their subsequently taking it up, held subrogated to all the rights of the holder, and entitled to the position of *bonâ fide* owners against all parties. *Flint* vs. *Schomberg*, 1 Hilt., 532.

Where two parties had successively indorsed a bill as sureties, both were held to be liable, to acceptors who had paid without funds; and that the second of such indorsers was entitled to recover against the first, a sum paid by him to such acceptors. *Wright* vs. *Garlinghouse*, 27 Barb., 474.

A mere auction sale of a note, without reference to the indorsements at the time of sale, was held to be a transfer of the liability of the maker only, and not to entitle the purchaser to any remedy against indorsers, in *St. John* vs. *Roberts*, 6 Bosw., 593.

A party, securing the payment of a promissory note by a collateral bond of indemnity, is not entitled to the privileges of an indorser. His liability accrues immediately, upon its maturity and non-payment. *Bacon* vs. *Hickok*, 21 How., 440.

(*g.*) Guarantor's Liability.

The point, that an indorser in blank contracts as such, and not as guarantor, has been already adverted to, and the cases of *Cottrell* vs. *Conklin*, 4 Duer, 45, and *Bank of Albion* vs. *Smith*, 27 Barb., 489, cited, as laying down that principle. The effect of a voluntary signature

by the payee, or of a signature by a surety as principal, having, in either case, the effect of rendering the signer liable as principal debtor, as laid down in *Patridge* vs. *Colby*, 19 Barb., 248, and *Casey* vs. *Brabason*, 10 How., 368, has been likewise considered.

A signature by a party expressly signing as guarantor is, however, subject to different rules from a mere indorsement, or an indorsement as surety. It falls within the statute of frauds, and, whether affixed to the paper itself, or on a separate instrument, consideration must be expressed upon its face, or it will be void. The words, "for value received," will, however, form a sufficient expression of that consideration. See this rule, as established by *Miller* vs. *Cook*, 23 N. Y., 495; 22 How., 66; and *Brewster* vs. *Silence*, 4 Seld., 207; affirming *same case*, 11 Barb., 144. See also *Glen Cove Mutual Insurance Company* vs. *Harrold*, 20 Barb., 298; *Wood* vs. *Wheelock*, 25 Barb., 625; *Allen* vs. *Fosgate*, 11 How., 218. See likewise the indecisive case of *Hall* vs. *Farmer*, 2 Comst., 553. By the decision in *Brewster* vs. *Silence*, those of *Brown* vs. *Curtiss*, 2 Comst., 225, and *Durham* vs. *Manrow*, 2 Comst., 533, are clearly overruled, so far as they hold to the contrary, and the dissenting opinion sustained. See, however, as to a guaranty upon future consideration not falling within this rule, *Union Bank* vs. *Coster's Executors*, 3 Comst., 203, and other cases below cited.

A parol promise of the above nature was also held to be void, in *Underhill* vs. *Crawford*, 18 How., 112; 29 Barb., 664.

The benefit of a valid guaranty, indorsed upon a note, passes with the note itself by delivery, and the holder may enforce it, even though given after maturity. *Smith* vs. *Schanck*, 18 Barb., 344; *Cooper* vs. *Dedrick*, 22 Barb., 516. See, however, as to the power of the court to entertain and adjudicate upon evidence, showing that the contrary was intended, *Gallagher* vs. *White*, 31 Barb., 92.

An instrument, purporting to be a guaranty in terms, but founded on a consideration proceeding to the guarantor, constitutes him a principal debtor, and he may be sued independently. So held as to a guaranty that a note was good, on sale thereof by the holder. *Cooke* vs. *Nathan*, 16 Barb., 342. See also, *Fowler* vs. *Clearwater*, 35 Barb., 143, and *Brown* vs. *Curtiss*, 2 Comst., 225, and *Cardell* vs. *McNiel*, 21 N. Y., 336, there referred to. The decision to the contrary effect in *Sawyer* vs. *Haskell*, 18 How., 282, seems clearly overruled by the above.

An open letter of credit, acts as a continuing guaranty until the power is withdrawn, and extends to all bills, drawn and negotiated against it before actual withdrawal. *Monroe* vs. *Pilkington*, 14 How., 250. So also, where the letter, though limited in amount, is general in its terms. *Union Bank* vs. *Coster's Executors*, 3 Comst., 203.

But, where a letter of credit is given, on a counter-agreement to cover

the drafts drawn, the contracts are mutual and dependent, and, on breach by one party, the other is at liberty to decline further performance, and will not be liable for any damages occasioned by his revocation. *Duncan* vs. *Edgerton*, 6 Bosw., 36.

If the contract of a surety imports any thing more than a collateral or accessory liability, he becomes a principal debtor. A guarantor of future drafts may be sued accordingly, on mere proof of their non-payment. *Grant* vs. *Hotchkiss*, 15 How., 292; affirmed, 26 Barb., 63. See also, *Union Bank* vs. *Coster's Executors*, 3 Comst., 203. So likewise, where the guarantor obtains property by means of giving it. *Cailleux* vs. *Hall*, 1 E. D. Smith, 5. See generally, as to the question of a guarantor's liability, *Burton* vs. *Baker*, 31 Barb., 241.

The above citations are entirely confined to the question of the liability of a guarantor of mercantile paper. The contract of guaranty, as applicable to other cases, and in its other aspects, will be further considered in the succeeding section.

Where a party has signed a note as surety, the fact should be specially averred. *Vide Balcom* vs. *Woodruff*, 7 Barb., 13.

(*h.*) Discharge of Liability.

The liability of an indorser or guarantor, to the holder of commercial paper, is, however, capable of being lost or discharged by *laches*, or by indulgence to the principal debtor, amounting to a variation of the contract.

Before a party standing in the position of a mere surety can be sued, the creditor must exhaust his remedy against the principal. If, at the time the indebtedness matures, that principal is solvent, and the creditor neglects to proceed against him with due diligence, he takes upon himself the risk, and discharges the surety. *Hart* vs. *Hudson*, 6 Duer, 294. See also, *Gallagher* vs. *White*, 31 Barb., 92. It has been held, however, that if, at such time, the principal is insolvent, the creditor is not bound so to pursue him, and may proceed against the surety. *Merritt* vs. *Lincoln*, 21 Barb., 249.

The granting of an extension of credit, of whatever nature, to the principal debtor, without the assent of the surety, will have the effect of discharging the latter, be he either guarantor or indorser, and this, even though such extension be granted on a payment on account, or the giving of collateral security for such principal, in actual diminution or relief of the sureties' liability. *Platt* vs. *Stark*, 2 Hilt., 399; *Newsam* vs. *Finch*, 25 Barb., 175; *Hart* vs. *Hudson*, 6 Duer, 294; *Bangs* vs. *Mosher*, 23 Barb., 478; *Kelty* vs. *Jenkins*, 1 Hilt., 73. Any alteration of the terms of the engagement, or diminution of the value of the evidence of it without the surety's consent, even though without fraud, will

have the same effect. *Mc Williams* vs. *Mason*, 6 Duer, 276. So likewise, as to an extension of time granted in an award, on submission between the principal and the creditor. *Coleman* vs. *Wade*, 2 Seld., 44.

But an extension of time, with consent of the surety, does not operate to discharge his liability. *Wright* vs. *Storrs*, 6 Bosw., 600.

And the mere taking of collateral security will not have such an effect, unless accompanied by a positive and binding extension of the credit. *Williams* vs. *Townsend*, 1 Bosw., 411. It is also there laid down, that mere delay to sue the principal, however long continued, does not, *per se*, discharge the surety. See, however, as to the obligation to prosecute within a reasonable time, and what will be so considered, *Gallagher* vs. *White*, 31 Barb., 92, *supra*.

A mere gratuitous promise to extend does not have this effect, unless it be made in a form which imports a legal obligation, and can be enforced. *Draper* vs. *Romeyn*, 18 Barb., 166.

The mere suffering collateral securities to be taken away, on a mistaken supposition that a loan was discharged, and which, on discovery of that mistake, were immediately returned, was held not to operate as discharging an indorser, in *Williamson* vs. *Mills*, 2 Hilt., 84.

The receipt of a dividend from the estate of an insolvent acceptor, in discharge of his liability, was held to exonerate the drawer, in *Gardner* vs. *Oliver Lee's Bank*, 11 Barb., 558. But where, in an English composition deed, executed by the acceptors, there was an express reservation of the rights of creditors coming in, as against all other parties, it was held that this reservation was operative, and saved the rights of an executing creditor as against the drawer, who, if he has to pay the bill, might still recover over against the acceptance. *Lysaght* vs. *Phillips*, 5 Duer, 106.

The giving of time, as between indorsers, does not affect the liability of the maker, even though he have paid the amount to one of them. *Carr* vs. *Lewis*, 20 N. Y., 138.

A note obtained from the principal by duress, is equally void as against the surety. *Strong* vs. *Grannis*, 26 Barb., 122.

The cases in which a party to commercial paper has been held discharged, by reason of the neglect or omission of the holder to present or protest it, or give due notice of its dishonor, will be considered below, in the next subdivision.

The drawers and indorsers of a bill of exchange, addressed to the drawee, merely at a city named, will not be discharged by his making his acceptance payable at a particular place within that city. *Troy City Bank* vs. *Lauman*, 19 N. Y., 477.

But, if the acceptance be made payable at a different place, it will be a departure from the tenor of the bill, and presentation at that place

will not be sufficient to charge the drawers. *Niagara District Bank* vs. *Fairman, &c., Tool Manufacturing Company*, 31 Barb., 403.

(*i.*) Presentment and Protest.

In order to charge any parties to commercial paper, other than the maker of a promissory note, or the acceptor of a bill of exchange, its presentment in due course, and notice of its dishonor, if unpaid, are essential. In an action for that purpose, an omission to make a proper averment to this effect, will constitute a demurrable defect. *Turner* vs. *Comstock*, 1 C. R., 102; 7 L. O., 23; *Ferner* vs. *Williams*, 14 Abb., 215.

If any place of payment is mentioned on the face of the instrument, presentation must be made at that place. If none, presentation must be made to the maker or acceptor, at his place of business, if he has one, if not, at his place of residence, at the time. See as to the holder's duty in this respect, where a bill, addressed to parties at one place, is, by their acceptance, made payable at another. *Niagara District Bank* vs. *Fairman and Willard Tool Manufacturing Company*, 31 Barb., 403, cited at the close of last subdivision.

The proper date of presentation, as to paper payable at a future day, is at the expiration of the usual three days of grace, *i. e.*, on the third day after that on which, by its terms, the paper would be due. If the last day of grace fall on a Sunday, it must be made on the day before. The same is the case as regards New Year's Day, the Fourth of July, Christmas day, and Thanksgiving day, which are established as permanent holidays, by chapter 261 of 1849, p. 392. As to presentation in time of public pestilence, see 1 R. S., 769, 770, §§ 12 to 17.

But days of grace are not now allowed on the following, which are payable at once, viz.: Bills or drafts payable at sight, checks, bills or drafts upon any banking association, or banker, payable on any specific day, or in any number of days after date, or sight thereof. See chapter 416 of 1857, volume I., p. 838.

Presentation of a bill of exchange for acceptance is discretionary, though advisable, but presentation for payment is essential, and must be made the day the bill is due, or all parties, not primarily liable, will be discharged. *Montgomery County Bank* vs. *Albany City Bank*, 8 Barb., 396; affirmed, *pro tanto*, 3 Seld., 459.

If, on presentation for acceptance, a bill is not properly accepted, according to its form and tenor, it should be treated as a refusal to accept, and the bill should be protested for non-acceptance, and notice given accordingly. If neglected, and the acceptance treated as sufficient, the indorsees will be discharged, and agents for presentation

liable. *Walker* vs. *The Bank of the State of New York*, 13 Barb., 636; affirmed, 5 Seld., 582.

Presentation of paper payable at a bank, ought to be made within ordinary business hours. *Vide Bank of Syracuse* vs. *Hollister*, *infra*. If delayed till after such hours, the presenter may be held as taking the risk of his omission. But, if the bank be open after the regular time, presentation then will be sufficient. *Newark India Rubber Manufacturing Company* vs. *Bishop*, 3 E. D. Smith, 48.

And in *The Bank of Syracuse* vs. *Hollister*, 17 N. Y., 46, where, after the bank was shut, a note payable there was delivered to the teller, also a notary, at his dwelling-house, and such teller went back to the bank, and, being unable to get in, demanded payment of himself at the back door, the presentation was held sufficient.

Presentation at the place of business of the maker, or of a person designated on the note to be such, will be, *primâ facie*, sufficient. *Hunt* vs. *Maybee*, 3 Seld., 266. And an address stated on the note of a firm, will be presumed to be its place of business. *Otsego County Bank* vs. *Warren*, 18 Barb., 290.

Presentation to one copartner, at the firm place of business, will avail to charge all parties liable. *Erwin* vs. *Downs*, 15 N. Y., 575. Or, if made at the residence of either partner. *Otsego County Bank* vs. *Warren*, *supra*.

On presentment, the drawee is bound to ascertain that the party presenting, is the genuine payee, or authorized by him to receive it, or he may be held liable for his omission, even though the payment, and its receipt by the actual holder, be in perfect good faith. *Graves* vs. *American Exchange Bank*, 17 N. Y., 205.

Presentment and demand of an accepted bill, as well as due notice of nonpayment, are conditions precedent to the liability of the drawer and indorser. The acceptor has a right to see the bill, before he determines whether he will pay it or not, and, if he pays it, he has a right to have it delivered to him, as a voucher in his settlement with the drawer. *Bank of Vergennes* vs. *Cameron*, 7 Barb., 143.

As regards non-negotiable paper, however, neither presentment nor demand is necessary. *Fairchild* vs. *Ogdensburgh, Clayton, and Rome Railroad Company*, 15 N. Y., 357.

The holder is bound to exercise his utmost diligence, and to make inquiries in all proper quarters, to ascertain the residence of the maker, in order to a due presentment. If he omits to do so, indorsers will be discharged. *Packard* vs. *Lyon*, 5 Duer, 82.

Where, between the making and maturity of a note, the maker has ceased to have a regular place of business, presentment must be made to him personally, or at his residence, and due diligence must be

exerted to find the latter. Presentation to his assignee, winding up the estate, at the former place of business, will not avail. *Benedict* vs. *Coffe*, 5 Duer, 226. When the maker has abandoned his residence and place of business, and cannot be found after diligent inquiry, the note may be protested. But, in such a case, it is proper, yet not indispensable, that presentment should be made at such former residence or office. *Paton* vs. *Lent*, 4 Duer, 231 (233); *Spies* vs. *Gillmore*, 1 Comst., 321 (326).

As to what will or will not be considered as sufficient diligence, in attempting to find out the residence of indorsers, who have left their place of business, for the purpose of attempting to serve them with notice in due course, see *Libby* vs. *Adams*, 32 Barb., 542; *Adams* vs. *Leland*, 5 Bosw., 411; *Randall* vs. *Smith*, 34 Barb., 452.

The mere leaving of notice at a place, originally designated by the indorser as his place of business, will not be sufficient; unless it be proved that it was his place of business at the time, and that it was either left with him, or with some proper person in charge, or else that no such delivery could be made. *Davenport* vs. *Gilbert*, 4 Bosw., 532.

When a bill of exchange is payable on demand, presentment for payment must be made within a reasonable time; or, if the drawer sustain injury by the delay, he will be discharged. *Vantrot* vs. *McCulloch*, 2 Hilt., 272.

But a note payable on demand with interest, is a continuing security, and the holder will not be chargeable with *laches*, in not making demand within any particular time. *Merritt* vs. *Todd*, 23 N. Y., 28.

On non-payment of a bill or note on presentation, if the same be drawn on any person non-resident in this state, a formal notarial protest for non-payment will be necessary, in order to the recovery of the damages allowed by statute. *Vide* 1 R. S., 770, 771, sections 18 to 23. See, as to the form, effect, and authentication of such a protest, *Ross* vs. *Bedell*, 5 Duer, 462. See also, as to the certificate of a foreign notary, being only available as regards a bill of exchange, and not as to a promissory note, payable in a foreign place, *Kirtland* vs. *Warner*, 2 Duer, 278.

The fact of presentment need not appear in the protest, *in verbo*, but the statement must, *ex vi termini*, import, that when the notary made the demand of payment, he had the draft with him, ready to be delivered up on payment. *Bank of Vergennes* vs. *Cameron*, 7 Barb., 143.

As regards domestic paper, a demand of payment from the maker or acceptor, and notice to the indorser and drawer of a bill, will be sufficient to charge them, without a technical and formal protest. *Vide Coddington* vs. *Davis*, 1 Comst., 186.

In all cases, whether the bill, note, or draft be foreign or domestic in

its nature, notice of its dishonor must be immediately given to all parties secondarily liable, viz., to the drawer and to all indorsers.

The maker of a note, or the accepter for value of a bill, being primarily liable, the giving of a notice to them is good as to the drawer, in certain cases, as in that of a mere accommodation acceptance, not drawn against value in the hands of the accepters. *Morely* vs. *Clark*, 28 Barb., 390; or where, in the case of two firms having a common partner, the drawers may also stand in the position of accepters. *Vide Woodbury* vs. *Sackrider*, 2 Abb., 402.

Such notice had better, when feasible, be given the day of dishonor, or of receipt of notice of dishonor, when given by one indorser to another, and, at furthest, it should be given the day next succeeding. If, however, that day be a legal holiday, a further delay of one day will be excusable. *Vide Troy City Bank* vs. *Lauman*, 19 N. Y., 477; *Farmers' Bank of Bridgeport* vs. *Vail*, 21 N. Y., 485. See also the effect of *laches* in this respect, *Clarke* vs. *Ward*, 4 Duer, 206.

Although a notary is usually employed for that purpose, his employment is not essential. Any person authorized by the holder, is competent to demand payment, and to give the notice so required. *Cole* vs. *Jessup*, 6 Seld., 96; 10 How., 515. The employment of a notary will, however, be, in almost all instances, the more convenient course, on account of the facility of proof, incident to the production of his official certificate. See below.

Nor, though the practice is almost universal, is it essential that such notice should be in writing. If sufficiently explicit, a verbal communication will be sufficient. *Wooden* vs. *Foster*, 16 Barb., 146; *McButt* vs. *Hoge*, 2 Hilt., 81. See also *Cayuga County Bank* vs. *Warden*, 1 Comst., 413 (417). But, to be available, such notice must be given by the holder, or by some person representing him. *Savage* vs. *Bevier*, 12 How., 166. Verbal information by the indorser himself, of the maker's inability to pay, will, also, avail to dispense with the obligation to serve any notice at all. It would be an idle ceremony to give it, to a party already in possession of the information, which it is its object to communicate. *Taylor* vs. *French*, 4 E. D. Smith, 458.

The notice must give all necessary particulars, so as fully to apprize the person addressed, what bill or note is referred to. A material omission or misdescription will be fatal to its validity, and will discharge the party. So held as to the omission of the name of the maker, *Home Insurance Company* vs. *Green*, 19 N. Y., 518; as to a mistake in dating the notice one day before maturity, *De La Hunt* vs. *Higgins*, 9 Abb., 422. See however, cases below cited, as to a notice, where the requisite information is substantially given.

The indorser was also held, in *Kingsley* vs. *Vernon*, 4 Sandf., 361, to

be discharged, by false information given to him by the holder of the bill, as to its having been paid, though such information proved to be erroneous, and was honestly given.

Mere notice of nonpayment will not be sufficient; the fact that the note was presented, or demand made, must also appear upon the notice, or it will be insufficient. *Pahquioque Bank* vs. *Martin*, 11 Abb., 291.

If all necessary information be given in substance, mere formal omissions in the notice will not vitiate it. The test will be, whether that notice contains all necessary information, to enable the indorser to ascertain the identity of the note referred to, and to communicate the fact of dishonor. *Vide Cook* vs. *Litchfield*, below cited.

Thus, a statement in such notice, that a note was "duly protested for nonpayment," necessarily implies the fact of a demand and refusal of payment, and is so far sufficient. *Cook* vs. *Litchfield*, 5 Seld., 279 (291); *Same case*, 5 Sandf., 330; 10 L. O., 330; *Coddington* vs. *Davis*, 1 Comst., 186 (190); *Cayuga Bank* vs. *Warden*, 1 Comst., 413; *Youngs* vs. *Lee*, 2 Kern., 551; affirming *same case*, 18 Barb., 187; *Beals* vs. *Peck*, 12 Barb., 245.

Even a misdescription of the note will not avail to vitiate the notice, provided it be shown that there was no other in existence, to which the description contained in it could be applied. So held, as to a misstatement of the amount, in the body of the document, the right figures appearing on the margin. *Cayuga Bank* vs. *Warden*, 1 Comst., 413; *Same case*, 2 Seld., 19. So also, when the notice, though otherwise given correctly and at the proper time, misdescribed the note, as to the number of months after date at which it was made payable. *Knoppel* vs. *Senfert*, 11 L. O., 184; *Davenport* vs. *Gilbert*, 4 Bosw., 532; *The Same* vs. *The Same*, 6 Bosw., 179.

In *Cook* vs. *Litchfield*, above cited, the same principle was specially applied, where notice of non-payment of four different notes, payable at different dates, but otherwise precisely similar, had been given in the same form, omitting any statement as to the times for which they ran, or at which they became due. The form of notice was held good as to the first of such notes, there being no other, payable at the time, to which it could refer. As to those payable subsequently, it was held, to be void for uncertainty, there being, at the time of each notice, more notes than one in existence, to which it could apply. The decision of the Superior Court that all were sufficient, was accordingly partly affirmed as to the first, and reversed as to the other notes in question. See 5 Seld., 379.

On a subsequent trial of the same case, as to the last three notes, extrinsic evidence was held admissible on the part of the plaintiff, in

rebuttal of that tendered by the defendant, and to show that the latter could not in fact have been misled, and the jury having found in favor of the plaintiff on this special question, judgment was awarded to him, on a verdict subject to the opinion of the court. *Cook* vs. *Litchfield*, 2 Bosw., 137. This decision is mainly based on the opinions in *The Cayuga County Bank* vs. *Warden*, and the principle is claimed to be substantially admitted in those in the report in 5 Seld., above cited.

The same principle was applied to a notice, given on the correct day, but merely stating the amount and the names of the drawers (so called), of a promissory note, and the fact of its being protested for non-payment. *Youngs* vs. *Lee*, 2 Kern., 551; affirming same case, 18 Barb., 187. See likewise, *Beals* vs. *Peck*, 12 Barb., 245. Also to one omitting the distinguishing number of a note, constituting one of a series in precisely the same form, all other particulars being correctly given, the number being held to be no part of the note. *Hodges* vs. *Shuler*, 22 N. Y., 114; affirming *same case*, 24 Barb., 68. See also, as to notice of dishonor, verbally given by producing to the indorser the bill itself, and a notary's certificate of protest, *McButt* vs. *Hoge*, 2 Hilt., 81. See likewise *Beals* vs. *Peck*, 12 Barb., 245 (253).

Notice directed to a deceased indorser, in ignorance of the fact of his decease, and proved to be actually received by his administrators, was held sufficient, in *Beals* vs. *Peck*, 12 Barb., 245 (252).

Notice to the agent of a corporation, authorized to draw drafts on its account, was held to be notice to the corporation itself, in *Conro* vs. *Fort Henry Iron Company*, 12 Barb., 27, before referred to.

A notice addressed to three joint indorsers collectively, but forwarded to each of them individually, was held sufficient, in *Troy City Bank* vs. *Lauman*, 19 N. Y., 477. So also, *e converso*, individual notices addressed to each (without mentioning the other) of two joint payees, but whose indorsements were several. *Cayuga County Bank* vs. *Warden*, above cited.

When a party to a bill or note, by the mode of his signature, indicates a particular manner or place of presentment or service, presentment and notice according to that indication, will be sufficient and proper, as regards his interest. *Troy City Bank* vs. *Lauman*, above cited. *Otsego County Bank* vs. *Warren*, 18 Barb., 290; *Morris* vs. *Husson*, 4 Sandf., 93; affirmed, 4 Seld., 204. And this, even although the mode of service thus indicated, be otherwise insufficient. *Baker* vs. *Morris*, 25 Barb., 138. See however, as to a subsequent change of the indorser's designated place of business, *Davenport* vs. *Gilbert*, above cited.

By statute, chapter 416 of 1857, vol. I., p. 838 (§ 3, p. 839), service

of notice of non-payment, or non-acceptance, may now be made by mail in all cases, even when the party to be notified resides, or has a place of business, in the same city or town in which presentation for payment or acceptance is legally made.

Service is to be so made by depositing the notice, with the postage thereon prepaid, in the post-office of such city or town, "directed to the indorser or drawer at such city or town." See previous general provision to this last effect, chapter 141 of 1835, section 1. N. B.—The giving of this facility can, however, hardly be construed to exclude a more detailed direction, where the specific address of the party addressed is indicated or known.

This provision has, of course, the effect of abrogating the former rule, that where the party addressed and the party addressing reside in the same place, service on the latter can only be made by a personal delivery, or leaving at the place of residence or business, and not by a mere mailing, as always admissible where the residences were different. See *Van Vechten* vs. *Pruyn*, 3 Kern., 549; *Eddy* vs. *Jump*, 6 Duer, 492; *Clarke* vs. *Ward*, 4 Duer, 206. The principle carried out in the statute had been before expressly recognized, in a case where the residence of the indorser, though in the same town, was several miles distant, and there was a post-office in that part where he resided. *Paton* vs. *Lent*, 4 Duer, 231; and also in general terms, in *Eddy* vs. *Jump*, above cited.

The provisions of this act will not, however, avail to excuse want of diligence in endeavoring to find out the correct residence of the indorser. If omitted, the notice, though otherwise given according to the statute, will be insufficient. *Randall* vs. *Smith*, 34 Barb., 452. Nor has the statute any retrospective effect. *Davenport* vs. *Gilbert*, 4 Bosw., 532, *supra*.

Service at the office of the party addressed, within business hours, was held sufficient, when made to a person in possession of such office, and apparently representing the defendant, though proof was offered that he did not so represent him in fact, and that the notice had not been actually received. *Mechanics' Banking Association* vs. *Place*, 4 Duer, 212. And the mere leaving of such a notice in the office, in the absence of any person to receive it, would also, as conceded in the same case, have been sufficient.

The mailing of notice to an indorser, addressed to him at his place of business, where he was in the habit of receiving letters, was held sufficient, though his residence, where he also occasionally received letters, was in another town. *Montgomery County Bank* vs. *Marsh*, 3 Seld., 481. See also *Morris* vs. *Husson*, 4 Sandf., 93; affirmed, 4 Seld., 204. But this rule does not apply, where such indorser has specified in his indorsement the place to which such notice is to be addressed. Laws

of 1835, chapter 141. (See report, p. 484.) See also *Baker* vs. *Morris*, above cited.

Where the residence of the indorser is unknown, due diligence must be used to discover it, and service at a presumed, but not actual, place of business, will be ineffective, and, if the holder possess information on the subject, he is bound to communicate it to his agent, or the omission to make service in due course will be fatal. *Lawrence* vs. *Miller*, 16 N. Y., 235.

Where a note was payable in another state, but the maker and indorser both resided in New York, and the maker, on transmitting it for collection, did not instruct his agents to give notice of dishonor, if protested, it was held that he took upon himself the risk of transmission, and notice, though mailed by such agents, not having been actually received, the indorsers were held discharged, and that a subsequent notice, given by the holder a long time after, on making inquiry and receiving information, was too late. *Clarke* vs. *Ward*, 4 Duer, 206.

The fact that an indorser has taken security from the maker, does not alter the conditions of his liability, or relieve the holder from his obligation to notify him in due course. *Secord* vs. *Miller*, 3 Kern., 55. And this, even although such security be taken after dishonor, on supposition of a liability to pay. *Otsego County Bank* vs. *Warren*, 18 Barb., 290. See also, *Taylor* vs. *French*, 4 E. D. Smith, 458.

The order of notice is thus: the holder is bound to give notice to the drawers or indorsers, against whom he proposes to make any claim, immediately upon dishonor, or, at the latest, on the day succeeding. Each party receiving notice, is similarly bound to notify in due course all parties whom he claims to hold liable to him, in case of his taking up or being compelled to pay the paper in question. The duty of each party towards each is, however, several, and not general, as regards any others, although when given by the holder, such notice inures to the benefit of all other parties. See *Beale* vs. *Parrish*, 20 N. Y., 407. The omission to give notice to an indorser was held therefore to be no defence, in an action by the holder against another. It belongs to each indorser to see that the others are charged, and the holder owes no duty to them in that respect. *Spencer* vs. *Ballou*, 18 N. Y., 327; *Baker* vs. *Morris*, 25 Barb., 138.

And ignorance of the residence of one indorser, though available to the holder, as an excuse for the giving of an imperfect notice, was held to be no defence, in an action by one indorser against another, where, with knowledge of such residence, he had omitted to give notice on his own behalf. *Beale* vs. *Parrish*, 20 N. Y., 407; reversing *same case*, 24 Barb., 243. But, where undeniably established, ignorance of the indorser's address, will, after due inquiry made, be a sufficient excuse, and re-

lieve the holder from the burden of giving notice. *Hunt* vs. *Maybee*, 3 Seld., 266.

The giving of notice may be waived, and a waiver of protest will have such effect. *Vide Coddington* vs. *Davis*, 1 Comst., 186. But, to be binding, such waiver must be made a person competent to contract. A paper to this effect, signed by an habitual drunkard, after inquisition found, though sober at the time, and though before a committee had been appointed, was accordingly held to be a nullity. *Wadsworth* vs. *Sharpsteen*, 4 Seld., 388.

As to what will be considered a sufficient waiver on the part of an indorser, to excuse the giving him formal notice of presentment and non-payment, see *Russell* vs. *Cronkhite*, 32 Barb., 282. See however as to the necessity of a formal presentment, in order to satisfy the condition in a composition deed, notwithstanding notice that a note would not be paid, *Green* vs. *McArthur*, 34 Barb., 450.

Where a bill payable in New York, was sent by a country bank, to its correspondents in Albany, for collection, it was held that the latter were alone liable to the former, for the omission of its own correspondents in New York, by which the indorsers had been discharged, and that the sub-agents could not be jointly charged, though responsible to their immediate principals. *Montgomery County Bank* vs. *Albany City Bank*, 3 Seld., 459; reversing, *pro tanto*, *same case*, 8 Barb., 396.

In some few cases, notice need not be given. Thus where the indorser had himself informed the holder that the maker could not pay, and had made an assignment and preferred him, the latter was held excused from giving him a formal notification. *Taylor* vs. *French*, 4 E. D. Smith, 458.

Where payment of a draft has been stopped by the drawer, notice to him of its dishonor is not requisite. *Jacks* vs. *Darrin*, 3 E. D. Smith, 557; *Purchase* vs. *Mattison*, 6 Duer., 587. So also, where the drawer had not sufficient funds at the bank. *Coyle* vs. *Smith*, 1 E. D. Smith, 400.

Where the drawer of a bill had no funds in the hands of the drawee, even at the time when the bill was drawn, it was held that neither presentment, protest, nor notice, was requisite in order to charge him. *Morley* vs. *Clark*, 28 Barb., 390.

Presentment or demand is unnecessary, where the paper is non-negotiable. *Fairchild* vs. *Ogdensburgh, Clayton, and Rome Railroad Company*, 15 N. Y., 337.

Nor is it requisite, where the defendant's liability is not that of a party to the note only, but arises under a special contract, as in the case of a guarantor. *Sterns* vs. *Marks*, 35 Barb., 565. Or an indemnitor by bond. *Bacon* vs. *Hickok*, 21 How., 440.

It may be convenient to notice at this point, the provision of law,

chapter 271, of 1833, section 8 (2 R. S. 382, 3d edition), that the certificate of a notary, under his hand and seal of office, is presumptive evidence of presentation, and of the giving of notice, unless the defendant shall annex to his plea an affidavit denying its receipt.

As to the reasonable presumptions which will be indulged in support of such a certificate, when tendered in evidence, see *Burbank* vs. *Beach*, 15 Barb., 326; *Bank of Vergennes* vs. *Cameron*, 7 Barb., 143; *Young* vs. *Catlett*, 6 Duer, 437; *Ross* vs. *Bedell*, 5 Duer, 462. The service must be performed by the notary himself, or his certificate will not avail. If performed by his deputy, the facts must be proved in the ordinary manner. *Hunt* vs. *Maybee*, 3 Seld., 267. The same must be done as respects the presentation of a promissory note in a foreign state, the certificate of a foreign notary not being evidence. *Kirtland* vs. *Warner*, 2 Duer, 278. See, however, as to a bill of exchange, *Bank of Vergennes* vs. *Cameron*, 7 Barb., 143 (148).

With regard to the provision (2 R. S., 283, 284, §§ 46, 47) that in the case of the death, insanity, absence, or removal of a notary, his original certificate of protest may be read, as presumptive evidence of demand, and any note or memorandum in his own handwriting, or signed by him at the foot of any protest, or in a regular register of official acts kept by him, may be also offered as presumptive evidence of the giving of notice, it has been held that these provisions must be strictly construed, that a memorandum in his register is not evidence of either presentment or demand, and that, to be available, the demand must be fully stated on the face of his certificate, and, if the certificate specifies a demand which is not sufficient in law, it will not avail as evidence. A certificate of a demand made upon one of a firm, without specifying which member, was therefore held to be inadmissible. *Otsego County Bank* vs. *Warren*, 18 Barb., 290. See also, as to an insufficient memorandum, *Taylor* vs. *Stringer*, 1 Hilt., 377.

A memorandum made at the foot of the draft itself, by the notary, and signed with his initials, stating the protest, and mailing of notices, was held to constitute no part of his official certificate, and not to be legal evidence, in *The Bank of Vergennes* vs. *Cameron*, 7 Barb., 143.

It has been held that a verified answer is not an affidavit within the meaning of the statute, so as to exclude a notary's certificate as presumptive evidence according to the statute. *Young* vs. *Catlett*, 6 Duer, 437; *Arnold* vs. *Rock River Valley Union Railroad Company*, 5 Duer, 207; *Pierson* vs. *Boyd*, 2 Duer, 33.

And, in the last case, it was held that, even taking the answer as an affidavit, the defendant's denial was insufficient, being merely "of the want of sufficient knowledge to form a belief whether or not he received due notice of such protest."

A separate affidavit by indorsers, denying, according to knowledge, information, recollection, and belief, the receipt of any notice, was, however, held to be sufficient under the statute, and to exclude the certificate, in *Barker* vs. *Cassidy*, 16 Barb., 177.

(*j.*) Premium Notes.

Before passing on to the subject of averments in general, one class of promissory notes seems to require a special notice, *i. e.*, notes given for their premiums, by subscribers to a mutual insurance company.

As regards this peculiar class of paper, the liability of the maker is not absolute, or for the sum named on the face of the note, but is dependent, and conditional upon the amount of losses incurred by the company from time to time, and, upon an assessment imposed on account of such losses, his due proportion upon which, and no more, is, from time to time, the measure of his liability.

An assessment and demand, after due notice, are conditions precedent to any suit upon a note of this description, and the averments in the complaint must be framed accordingly. *Savage* vs. *Medbury*, 19 N. Y., 32; *Devendorf* vs. *Beardsley*, 23 Barb., 656; *Williams* vs. *Babcock*, 25 Barb., 109; *Williams* vs. *Lakey*, 15 How., 206; *Toll* vs. *Whitney*, 18 How., 161; *Shaughnessy* vs. *The Rensselaer Insurance Company*, 21 Barb., 605. See likewise, generally, as to the liability upon notes belonging to this class, *Bell* vs. *Shibley*, 33 Barb., 610; *Lawrence* vs. *McCready*, 6 Bosw., 329; *Elwell* vs. *Crocker*, 4 Bosw., 22; *Dana* vs. *Munson*, 23 N. Y., 564. The liability of a party under such a note continues, notwithstanding the destruction of the subject-matter of his insurance. *Bangs* vs. *Skidmore*, 21 N. Y., 136. Nor can he set off against his indebtedness, claims due to him from the company; he unites the characters both of debtor and of creditor, and can only claim a *pro rata* dividend. *Lawrence* vs. *Nelson*, 21 N. Y., 158; affirming *same case*, 4 Bosw., 240. And, as regards the statute of limitations, it has been held that such a note is a continuing security, not payable until demand. *Howland* vs. *Edmonds*, 33 Barb., 433. See, however, *per contra*, *Bell* vs. *Yates*, 33 Barb., 627.

And such assessment, to be binding, must be complete, and carried out in all respects, and notice of it, if published before, will be premature and not binding. *Bangs* vs. *McIntosh*, 23 Barb., 591.

A receiver of such a company, duly appointed, pursuant to statute, has the same powers in respect to the making and collection of such assessment, as the directors before insolvency. See the cases above cited in this subdivision, *passim*. As to the receiver's duty and compensation, see *Van Buren* vs. *Chenango County Mutual Insurance Company*, 12 Barb., 671. See also generally, as to his power in this

respect, and the constitutionality of the statute which confers it, *Hyatt* vs. *McMahon*, 25 Barb., 457; *Thomas* vs. *Whallon*, 31 Barb., 172.

Such power is, however, confined to a receiver appointed as above. An assignee for creditors, though lawfully invested with all the assets of the corporation, has no such power. *Hurlbut* vs. *Carter*, 21 Barb., 221; *Hurlbut* vs. *Root*, 12 How., 511.—N. B. This distinction does not appear to have been brought to the notice of the court, in *Toll* vs. *Whitney*, 18 How., 161, in which the complaints were held bad on the general ground of non-assessment.

In making such an assessment, a receiver acts as a mere delegate, and cannot go in any respect beyond the powers of the directors, in whose stead he acts; nor will a special order of the court confer upon him any additional authority. See *Williams* vs. *Lakey*, 15 How., 206; *Bell* vs. *Shibley*, 33 Barb., 610. He must, therefore, strictly comply with the exact letter of the statutes, or his assessment will be void. He cannot make any distinction between different classes of notes, where such distinction is not expressly authorized by the charter of the company; and, where the liabilities in respect of losses have accrued separately, he must make separate assessments. *Shaughnessy* vs. *The Rensselaer Insurance Company*, 21 Barb., 605. As to the similar duties of directors in these latter respects, see *Herkimer County Mutual Insurance Company* vs. *Fuller*, 14 Barb., 373. A member is liable to a further assessment, to meet a deficiency from the inability of his fellow-members to pay their proportions of one originally imposed. *Bangs* vs. *Gray*, 2 Kern., 477; reversing *same case*, 15 Barb., 264.

The power of a receiver to make separate assessments, against notes belonging to different classes of insurers, when such classification is expressly provided for by the charter of the company, is recognized and acted upon in *White* vs. *Coventry*, 29 Barb., 305. See also other decisions referred to—page 309, in text and note.

A receiver, on making such an assessment, acts like directors, ministerially and not judicially, and his action is not conclusive on the makers.

Where the notice is inoperative on its face, as by establishing a distinction between different classes of notes, without showing special authority to do so, the latter may impeach it as such. The notice is, however, sufficient, if it furnish them with data, from which they may compute the amount due from each. *Bangs* vs. *Duckinfield*, 18 N. Y., 592.

An assessment may be made after the expiration of a company's charter, for the purpose of winding up its affairs, and the fact of such expiration, pending a policy, will not avoid or discharge the insurer from his proportionate liability.

The maker of a premium note cannot, however, be charged, after alienation by him of the subject-matter of the insurance, with consent of the directors, either express, or implied from a resolution passed by them. Otherwise, if such alienation be without notice or assent. *Huntley* vs. *Beecher*, 30 Barb., 580. See also *Hyde* vs. *Lynde*, 4 Comst., 387.

But when the vote is void, *ab initio*, as when made in respect of an insurance, effected before the inception of the company's charter, the fact of a formal assessment being made upon it, does not tend to give it any validity, or render it enforceable. *Williams* vs. *Babcock*, 25 Barb., 109, before cited. A company of this description, cannot combine two systems of business, and accept premium notes from a portion of its customers, and cash from the remainder, and then assess the premium notes to pay losses occurring in either department. *Hart* vs. *Achilles*, 28 Barb., 576.

In the *Union Insurance Co.* vs. *Hoge*, however (17 How., 127), it is decided by the Supreme Court of the United States, that policies issued by a company of this description, for cash premiums, are valid, and that such premiums represent, equally with premium notes, an interest in a common fund, which common fund is devoted to the payment of losses that may occur. And it has been decided by the Court of Appeals, that premium notes are liable to pay losses under cash policies, issued by the company. *White* vs. *Havens*, 20 How., 177; *Mygatt* vs. *National Protection Insurance Company*, 21 N. Y., 52; 19 How., 61.

Although a mutual insurance company is authorized to take notes for premiums due from those who deal with it, it cannot take, in respect of such premiums, the notes of third parties. If taken, such a note will not be enforceable in its hands. *Mutual Benefit Life Insurance Company* vs. *Davis*, 2 Kern., 569.

Notes given on a subscription, taken up by a mutual insurance company for premiums in advance, were held to be negotiable, and valid in the hands of a *bonâ fide* holder, although delivery of such notes could not have been required by the company, from the makers, until the subscription-list was full. *Holbrook* vs. *Bassett*, 5 Bosw., 147. See also, generally, as to the right of such a holder, of notes of this or of a similar description, *Scott* vs. *Johnson*, 5 Bosw., 213; *Nelson* vs. *Wellington*, 5 Bosw., 178; *Brookman* vs. *Metcalf*, 5 Bosw., 429; *Holbrook* vs. *Wilson*, 4 Bosw., 64; *New York Exchange Company* vs. *De Wolf*, 5 Bosw., 593; *Ogden* vs. *Andre*, 4 Bosw., 583.

There is, however, another class of notes, competent to be taken by a mutual insurance company, to which the above conditions do not apply, and the liability on which is absolute, for the amount due upon their face. This class consists of stock notes, given upon the organization of the company, and forming part of its capital, pursuant to the provisions of section 5 of the statute, chapter 308 of 1849, p. 441; or ordinary

premium notes, when, by their charter, the company is especially authorized to negotiate them, for the purpose of paying claims in the course of its business. No assessment is necessary on a note of either description, and it may be indorsed or transferred by the company, and sued for in the ordinary manner, either by the company itself, or its receiver, or by a third party as holder. *White* vs. *Haight*, 16 N. Y., 310; *Brouwer* vs. *Appleby*, 1 Sandf., 158; *Hone* vs. *Allen*, 1 Sandf., 171, note; *Hone* vs. *Folger*, 1 Sandf., 177; *Brouwer* vs. *Hill*, 1 Sandf., 629; *Caryl* vs. *McElrath*, 3 Sandf., 176; *Devraismes* vs. *Merchants' Mutual Insurance Company*, 1 Comst., 371; *Howland* vs. *Myer*, 3 Comst., 290; *Brown* vs. *Crooke*, 4 Comst., 51; *Bell* vs. *McElwain*, 18 How., 150; *White* vs. *Foster*, 18 How., 151; *Hart* vs. *Achiles*, 28 Barb., 576; *Tuckerman* vs. *Brown*, 11 Abb., 389. See also same principle, as to a note of this description, actually satisfied by the maker, by the procurement of insurance on his own account, and that of others, *Emmet* vs. *Reed*, 4 Seld., 312.

In relation to averments, in an action of this description, the following decisions have been made.

A receiver suing, must aver, in the complaint, that he has been duly appointed. If controverted, he must establish the validity of such allegation by strict proof in detail; and, the proceeding being statutory, the courts have no power of amendment. *Bangs* vs. *McIntosh*, 23 Barb., 591.

And, where any doubt can be raised as to the title of the company which he represents, to the note sued upon, he must show that title, by proper averments. *Hyatt* vs. *McMahon*, 25 Barb., 457.

(*k.*) Averments, Generally Considered.

It remains to notice, in the last place, a few decisions, in relation to averments in a complaint of this nature, treated of in the different subdivisions of this section, considered in a general point of view, and irrespective of any of the peculiar branches of the subject previously adverted to.

The doctrine of averments by implication, and of the presumptions, to the benefit of which the party pleading is entitled, has been already dealt with in the present section, and that of sufficiency of averment, in the previous book, section 122.

It will also be needless to draw attention, a second time, to the peculiar mode of framing a complaint, as authorized by section 162—that subject having been already dwelt upon at the commencement of this section.

Where the pleader does not avail himself of its provisions, a complaint, in its essentials, will be closely analogous to a declaration under

the former practice. The interests of all the parties sought to be charged must be carefully considered, and every allegation, essential to the due charging of every party, whether conjunctively or individually, must be inserted. *Cottrell* vs. *Conklin*, 4 Duer, 45. See also *Price* vs. *McClave*, 6 Duer, 544. And, where maker and indorser are included in one action, the statement of facts must be sufficient to show the liability of both. *Spellman* vs. *Weider*, 5 How., 5. If omitted, demurrer will, of course, lie by the party whose liability is insufficiently averred. The question, however, must be separately raised by such party, and cannot be so by joint demurrer. *Woodbury* vs. *Sackrider*, 2 Abb., 402.

In a note, payable to order, indorsement or assignment by the payee should be averred; otherwise the presumption may lie that he is still the owner. *White* vs. *Brown*, 14 How., 282.

In an action by the assignee of non-negotiable paper, assignment to the plaintiff, and consideration for that assignment, ought to be formally alleged. *Brown* vs. *Richardson*, 20 N. Y., 472; *Landau* vs. *Levy*, 1 Abb., 376.

In an action upon a foreign bill of exchange, drawn or negotiated within this state, care must be taken, in framing the complaint, to bring it within the letter of the statute, as regards the supplementary claim for damages, upon protest for non-payment. See 1 R. S., 770, 771, §§ 18–23. The following essentials must be attended to, in addition to the ordinary averments on domestic paper of that description.

It must be averred that such bill was drawn, or was negotiated, as the case may be, within the State of New York. Section 10.

The place of residence, and the state, territory, or country of the drawee, must be stated, in conformity with the address in the bill, attention being paid to framing such averment according to the wording of the statute. Section 18. Demand and protest for non-payment or non-acceptance, as the case may be, should be averred specifically. Sections 19–22.

Interest should be demanded, not merely on the face of the note, but upon the aggregate of the note and statutory damages, running from the time of protest and demand, or protest for non-acceptance. Section 19–22.

If the contents of the bill be expressed in foreign currency, an averment should be made of its rate of exchange or value, at the time of demand of payment, and a demand of judgment made accordingly. Section 21.

It must be specifically averred, that the plaintiff purchased the bill, or some interest therein, for a valuable consideration (§ 23), and, if an interest, such interest should be shown.

Considerable discussion has arisen upon the point, as to whether the

details of presentation and demand of payment are necessary to be set forth, in order to charge an indorser.

In the following cases, it has been decided that presentment and notice are conditions precedent, within the scope of section 162, and all that is necessary to be stated, is, that a note was "duly" presented and payment "duly" demanded, and that notice of protest was "duly" given to the indorsers or other parties sought to be charged. *Gay* vs. *Paine*, 5 How., 107; 3 C. R., 162; *Woodbury* vs. *Sackrider*, 2 Abb., 402 (referring to *Coddington* vs. *Davis*); *Adams* vs. *Sherill*, 14 How., 297; *Ferner* vs. *Williams*, 14 Abb., 215.

A similar implication is attributed to the word "protested" in the following cases: *Coddington* vs. *Davis*, 1 Comst., 186. The word must be construed in its popular sense, and, in that sense, it includes all the steps necessary to charge an indorser. See also *Cook* vs. *Litchfield*, 5 Seld., 279 (291); *Beals* vs. *Peck*, 12 Barb., 245 (249).

A stricter rule was laid down, and an averment in the above form decided to be bad, in *Graham* vs. *Machado*, 5 Duer, 514: the view taken is, that, to fall within the purview of section 162, a condition precedent must be one expressed on the face of the contract sued upon, and not of an extraneous nature. See also this view indicated in *Adams* vs. *Sherill*, *supra*. The decisions in *Gay* vs. *Paine* and *Woodbury* vs. *Sackrider*, are expressly dissented from, and *Coddington* vs. *Davis* maintained not to be in point, as claimed in *Woodbury* vs. *Sackrider*. It was therefore held, that all facts as to presentment, demand, and notice, must be averred in detail, and an order overruling the demurrer of the defendants to the complaint was reversed. See also decision of the same court in *Price* vs. *McClave*, 6 Duer, 544 (549); affirming same case, 5 Duer, 670; 3 Abb., 253.

But in view of the general principles laid down in the different decisions above referred to, under the heads of averments under section 162, and implications and presumptions, this rule seems too strict, and will probably not be maintainable in the other tribunals. In a prior decision, *Alder* vs. *Bloomingdale*, 1 Duer, 601 (603), the authority of *Gay* vs. *Paine*, seems to be admitted by Duer, J., and that generally, and not specially with reference to 162, which it in fact preceded.

In *Garvey* vs. *Fowler*, 4 Sandf., 665; 10 L. O., 16, it was held that an averment in a complaint, of due notice being given to an indorser, will be construed to mean notice in fact, and not notice by construction of law. When the plaintiff relies upon facts excusing notice in fact, he must set forth those facts in his complaint.

The same rule is laid down in *Graham* vs. *Machado*, above cited. See also *Shultz* vs. *Depuy*, 3 Abb., 252, a decision in the same court. In *Purchase* vs. *Mattison*, however, 6 Duer, 587, the same tribunal

somewhat departed from the above principle, and where facts excusing notice appeared in the answer, and were proved on the trial without objection, refused, on appeal, to entertain the objection, that they were inadmissible, under an averment of actual notice, as contained in the complaint. It seems questionable, too, whether the rule, in this respect, may not also be considered in other tribunals, as too strictly laid down.

The usual averment of presentation and demand, was held proper by the Superior Court itself, in a case where such presentation was merely made at the last place of business of the maker, who could not be found. *Paton* vs. *Lent*, 4 Duer, 231.

An averment of the giving notice of non-payment, without stating the fact of presentation, was held insufficient, on demurrer: *vide Pahquioque Bank* vs. *Martin*, 11 Abb., 291.

A very bald form of complaint, not stating the fact of indorsement by the payee, but resting simply on the averment, that the plaintiff was lawful owner and holder, was sustained in *Genet* vs. *Sayre*, 12 Abb., 347.

See, however, objection stated to the employment of those terms, in *Chadwick* vs. *Booth*, 22 How., 23; 13 Abb., 249.

(*l.*) Checks or Drafts.

Actions on instruments of this nature, present a close analogy to those upon a bill or promissory note, and present themselves, in the last instance, for consideration.

That a direct action may be maintained by the holder against the drawee, when the latter has actually funds in hand applicable to its payment, though there is no direct promise passing between the parties to such action, is laid down in *Mittenbeyer* vs. *Atwood*, 18 How., 330. See also *Judson* vs. *Gray*, 17 How., 289, and other cases there referred to.

A bank is entitled to continue paying the notes of its customer, even after a general assignment by him, until it has received notice of such assignment. *Griffin* vs. *Rice*, 1 Hilt., 184.

But the drawee is bound, before payment, to ascertain the genuineness of the draft upon him. If he pays it to the wrong party, as in the case of a forged indorsement, he will not be protected, and the payment will not avail him, in a subsequent action by the depositor. *Morgan* vs. *The Bank of the State of New York*, 1 Kern., 404; affirming *same case*, 1 Duer, 484; *Coggill* vs. *American Exchange Bank*, 1 Comst., 113; *Weisser* vs. *Dennison*, 6 Seld., 68.

The payment of a post-dated check before its date, is, in like manner, a payment in the drawee's own wrong. The money remains in the hands of the drawee, and his assignee in good faith may recover it. *Godin* vs. *Bank of Commonwealth*, 6 Duer, 76.

A check drawn upon and paid by a bank is not, *per se*, evidence of indebtedness by the drawer. The legal presumption is that it was drawn against funds. *White* vs. *Ambler*, 4 Seld., 170. See also, *Healey* vs. *Gilman*, 1 Bosw., 235.

A draft or bill of exchange, before acceptance by the drawee, does not operate as an assignment of the funds in his hands, or give the holder any preferable lien; a check, in judgment of law, is a bill of exchange payable on demand. *Chapman* vs. *White*, 2 Seld., 412; *Cowperthwaite* vs. *Sheffield*, 3 Comst., 243; and *Winter* vs. *Drury*, 1 Seld., 525, there cited. See also *Willetts* vs. *Finlay*, 11 How., 468; *Butterworth* vs. *Peck*, 5 Bosw., 341; and *Ketchum* vs. *Bement*, 6 Duer, 463. See likewise the last case, as to the right of a drawee, to set off against a check upon him, when drawn and presented, the amount of a note of the drawer, then in his hands and payable on demand, though actual payment had not then been demanded.

By certifying to a check, the drawee creates a new obligation, binding upon himself, and which is thereafter enforceable by the holder, in his own time, and at his own discretion, without regard to any state of accounts between the drawer and drawee. When certified, a check stands on the same footing as an ordinary bank note, and *laches* in making the demand, will no longer be imputable. *Willetts* vs. *The Phœnix Bank*, 2 Duer, 121; 11 L. O., 211. And this, by a *bonâ fide* holder for value, even when certified by the teller without funds, in violation of his duty, and for the accommodation of the drawer. *Farmers' and Mechanics' Bank of Kent County* vs. *Butchers and Drovers' Bank*, 16 N. Y., 125, finally decided on re-argument. See prior opinion reported, 4 Kern., 623; and affirming *same case*, 4 Duer, 219. See, however, *East River Bank* vs. *Gedney*, 4 E. D. Smith, 582, as regards the liability of the drawer, on a case where actual damage was shown to have accrued, from not giving notice of non-payment of such a check.

In *Willetts* vs. *The Phœnix Bank*, above cited, it is also decided that a check to the order of bills payable, is, in judgment of law, payable to bearer. The production of a check payable to bearer, is sufficient *primâ facie* evidence of the right of the holder to recover. *Townsend* vs. *Billinge*, 1 Hilt., 353.

A lost check may be sued upon, the indemnity provided for by statute in the case of a bill of exchange being tendered upon the trial, and this, whether the loss has occurred, before or after action brought. *Jacks* vs. *Darrin*, 3 E. D. Smith, 548; 1 Abb., 148. *The Same* vs. *The Same*, 3 E. D. Smith, 557.

Although, as above shown, a bank paying a post-dated check before maturity, pays it in its own wrong, still an obligation of this nature is

valid. *Godin* vs. *Bank of Commonwealth*, above cited. It must be looked upon as intended by the maker, and any indorsers, to be either put into circulation, or retained until maturity, by a *bonâ fide* holder for value. *Middletown Bank* vs. *Morris*, 28 Barb., 616. And such an holder is entitled to recover against the drawer, irrespective of any equities between the original parties. *Jacks* vs. *Darrin*, 3 E. D. Smith, 557.

A check, payable on demand, given in consideration of an executory agreement, is valid, and can be collected by a *bonâ fide* transferee, without proof of performance of that agreement. *Purchase* vs. *Mattison*, 6 Duer, 587.

The stopping of a check by the drawee, relieves the holder from the burden of showing notice of non-payment. *Same case; Jacks* vs. *Darrin*, 3 E. D. Smith, 557.

Payment of a stopped check, when obtained by means of a fraud, cannot be enforced. *Elwell* vs. *Chamberlain*, 2 Bosw., 230. See, however, qualification as regards that particular case. *The Same* vs. *The Same*, 4 Bosw., 320.

The holder of an uncertified check must exercise due diligence in its presentation, or he may lose his right to recover. A defendant, on the ground of negligence, in this respect, must, however, raise the question by a distinct issue in his answer, and must also show that the delay has worked actual loss or injury to him. *Primâ facie*, delay is not unreasonable, and the rules on the subject are far less stringent than those which apply to the relation of a drawer and indorser. *Harbeck* vs. *Craft*, 4 Duer, 122 (129). See, however, *East River Bank* vs. *Gedney*, 4 E. D. Smith, 582. And, generally, as to *laches* in this respect, discharging the drawer. *Brady* vs. *Little Miami Railroad Company*, 34 Barb., 249. A draft, payable on a given day, must be presented on that day, in order to charge the drawer for non-payment, unless it be affirmatively shown that he had no funds to meet it. *Ransom* vs. *Wheeler*, 12 Abb., 139.

Where the holder of a post-dated check resides, or such check has been negotiated, at a different place from that where it is payable, he is entitled to a reasonable time for the purpose of its transmission for presentation; and a reasonable delay, equivalent to the regular course of the mail, after maturity, will not operate to discharge either drawer or indorsers, in case of intermediate insolvency of the drawee, or other failure in payment. See *Stephens* vs. *McNiel*, 26 Barb., 651; *Middletown Bank* vs. *Morris*, 28 Barb., 616.

A bank is entitled, as against its customer, to present a check paid in and credited to his account in the usual course of business, and a presentation of such a check on the succeeding day, according to that

course, will not be *laches*, or debar a recovery from him of the amount so credited, on the eventual dishonor or stoppage of such check. *Hooker* vs. *Franklin*, 2 Bosw., 500.

Where, however, a draft had been retained nine or ten days before being sent on for presentment, and the drawers failed in the mean time, the delay was held unreasonable, and that the drawers were discharged. *Vantrot* vs. *McCulloch*, 2 Hilt., 272. See also as to an omission to give notice of non-payment, *East River Bank* vs. *Gidney*, 4 E. D. Smith, 582.

The fact that the drawer of a check has no funds in the bank at the time, and has sustained no actual damage, discharges the holder from the necessity of showing presentment and refusal. *Healey* vs. *Gilman*, 1 Bosw., 235; *Coyle* vs. *Smith*, 1 E. D. Smith, 400. See also *Garvey* vs. *Fowler*, 4 Sandf., 665; *Shultz* vs. *Depuy*, 3 Abb., 252. See however, above, as to the restricted views, on the subject of averment as entertained in last two cases.

To constitute an indorsee of a check a holder for value, he must have taken it before dishonor. If after, and with knowledge of the fact, he takes it, subject to every defence, legal or equitable, which could have been made against his indorser. *Anderson* vs. *Busteed*, 5 Duer, 485.

And, in an action by the payee of a check against the drawer, the latter is entitled to go into evidence of the original transaction, with a view to show that the plaintiff has in fact no right to recover. *Bernhard* vs. *Brunner*, 4 Bosw., 528.

The fraudulent or unauthorized negotiation of a check may be restrained by injunction, even in the hands of a transferee. *Clark* vs. *Gallagher*, 20 How., 308.

But, where value has been given, transactions between the payee and drawer cannot be inquired into. *Fish* vs. *Jacobsohn*, 5 Bosw., 514.

Since 1st of July, 1857, no days of grace are allowed on drafts payable at sight, within the state, or upon those drawn upon a bank or banking association, payable upon any specified day, or number of days, after date or sight. See chapter 416 of 1857, vol. 1, p. 838, sections 1, 2.

Before that date it had been held that a bill, payable at sight, was not entitled to days of grace, but that, when payable after sight, after date, or at a future day, the privilege obtained. Bills payable in terms on demand, bills having no time of payment specified, and bank checks were, it was held well settled, to be payable immediately on presentment. Evidence of a local custom to the contrary, however, might, it was considered, be admissible. *Frask* vs. *Martin*, 1 E. D. Smith, 505.

It was also held that a check on a bank, payable at a day subsequent to its date, was entitled to days of grace. *Taylor* vs. *French*, 4 E. D. Smith, 458. This case, however, is expressly founded on the authority of *Bowen* vs. *Newell*, 4 Seld., 190, below adverted to. The statute now provides the contrary.

In *Bowen* vs. *Newell*, 5 Sandf., 326, it was held that a draft, dated in New York and drawn on a bank in Connecticut, payable on a day specified, was not a bill of exchange, but a check, and, as such, was not entitled to days of grace. In *Bowen* vs. *Newell*, 4 Seld., 490, this decision was reversed, and it was held that such a draft was a bill of exchange, and was so entitled. See also, 12 L. O., 230.

On a second trial, however, the Superior Court adhered to its former conclusion, that evidence of usage in the State of Connecticut was admissible, and that, by such usage, days of grace were not allowed. *Bowen* vs. *Newell*, 2 Duer, 584; 12 L. O., 231; and this decision was finally affirmed by the Court of Appeals. *Bowen* vs. *Newell*, 3 Kern., 290.

The point there in controversy is, however, now settled by the statute of 1857, as above referred to.

§ 147. *Express Contract.—Continued.*

Common-Law Actions.

(*a.*) General Observations.

Before passing on to consider the liability in, or the averments appropriate to other actions of this nature, a few remarks and citations, on the subject of express contracts in general, claim a preliminary place.

As to the general construction of a contract of this description, and the extent to which its terms may be supplied by necessary implication, where the wording is loose or general, see *Rowland* vs. *Phalen*, 1 Bosw., 43.

In the same case it is laid down that, in the complaint, upon an agreement, by which a party, though contracting upon behalf of others, assumes actual liability, it is not essential for him to make special averment of his authority. The personal obligation which he has assumed, is sufficient consideration to uphold his contract. See also, as to what will, under section 162, be a sufficient averment of performance of conditions precedent under such a contract, by himself and those for whom he has so contracted. Nor where several breaches of such an agreement, are subsequently alleged in separate clauses, will it necessitate, in each case, a repetition of the above general averment; and such separate breaches, when so assigned, do not, though so desig-

nated, constitute, in fact, further or separate causes of action, so as to render any one or more of them, standing alone, demurrable for insufficiency.

Where non-performance of a condition precedent was occasioned by the act of the defendant, it was held sufficient for the plaintiff to aver the facts constituting his excuse, instead of averring performance or readiness to perform. *Clarke* vs. *Crandall*, 27 Barb., 73.

Where a plaintiff sues for work and labor, performed under a written contract containing special conditions, the contract, and compliance with such conditions must be specially averred. *Adams* vs. *The Mayor of New York*, 4 Duer, 295.

See also, as to the necessity of alleging performance, or an offer of performance, in suing upon a written promise to pay money on a specific day, for specific stock to be then delivered, *Considérant* vs. *Brisbane*, 14 How., 487; 6 Duer, 686.

As to the mode of averment of breach of a covenant containing various specific terms, but entire, and not continuing in its nature; and as to when one single general averment will suffice to render the action one for an entire breach, *Vide Atwood* vs. *Norton*, 27 Barb., 638.

A recovery of this nature, will embrace all damages, prospective as well as actually incurred at the time. Upon an entire covenant, only one action can be brought, unless it be of a continuing nature, so as to take it out of the general rule. See *same case*.

On a contract of this description, such as, for instance, one for the erection of a house, to be paid for on completion, the contractor cannot abandon, and then recover upon a *quantum meruit*, for such work as he has already done. To enable him to maintain his action, performance on his part, or facts excusing and relieving him from such performance, must be averred. Nor will even occupation by the other party, constitute, *per se*, a waiver, the question of waiver being one of intention. *Smith* vs. *Brady*, 17 N. Y., 173; *Cunningham* vs. *Jones*, 20 N. Y., 486.

See also, as to a personal contract for services in relation to procuring a return of duty from the treasury, subsequently obtained, in fact, by means of an action, but not in consequence of the services of the plaintiff, which were discontinued upon a preliminary refusal by the secretary, *Satterlee* vs. *Jones*, 3 Duer, 102.

An entire contract void or illegal in part, is void *in toto*, and no recovery can be had upon it. *Rose* vs. *Truax*, 21 Barb., 361.

In *Coggins* vs. *Bullwinkle*, 1 E. D. Smith, 434, it was held that where a single covenant was broken in four particulars at the same time, only one single action was maintainable, and that, if severed, a recovery in one suit will bar all others. See also *Bendernagle* vs. *Cocks*, 19 Wend., 207, there referred to.

So also, as to a separate judgment, obtained against one of several joint debtors. *Benson* vs. *Paine*, 2 Hilt., 552; 17 How., 407; 9 Abb., 28.

This principle will not apply, where full performance by the plaintiff has been rendered impossible by the act or default of the defendant. Under such circumstances, the former may sue on a *quantum meruit*, for such portion as has been performed by him; but, if he elects to abandon this remedy, he will remain answerable for any consequences of the delay. *McConihe* vs. *The New York and Erie Railroad Company*, 20 N. Y., 495.

The fact that two separate agreements are carried into effect by the same instrument, will not necessarily constitute that instrument an entire contract. If distinct in their nature, several suits upon them are maintainable. So held as to a contract for sale and delivery of dressed hogs forthwith, and also of live hogs then *in transitu* upon their arrival, there being no stipulations as to credit. The plaintiff might, it was held, recover on the former, subject to recoupment by the defendant of damages occasioned by breach of the latter part of the agreement. *Tipton* vs. *Feitner*, 20 N. Y., 423.

Where two payments under a contract for services during a stipulated period, were due at different dates, it was held that the contract was divisible, and that, on disability to continue, owing to sickness of the party, his representative was entitled to recover on a *quantum meruit* for such as he had actually performed. *Wolfe* vs. *Howes*, 20 N. Y., 197.

So likewise, where performance of a contract of this description, though entire in its terms, was rendered impossible by act of the legislature, without default of the contracting parties, *Jones* vs. *Judd*, 4 Comst., 411: though the affirmance was one on equal division of the appellate court, that division of opinion arose upon another branch of the case, and not upon that above referred to.

Where non-completion of such a contract was occasioned by the act of the defendant in discharging the plaintiff, a prior recovery for salary was held no bar to a subsequent action by the latter, for damages occasioned by such breach; readiness and tender of performance being averred. *Thompson* vs. *Wood*, 1 Hilt., 93.

A chattel mortgage, though entire in its terms, might, it was held, stand good for part of the property included, and void as to the rest. *Gardner* vs. *McEwen*, 19 N. Y., 123. See also, *Van Heusen* vs. *Radcliff*, 17 N. Y., 580, there referred to.

An agreement for compromise, upon condition that all other creditors should come in, and an actual payment under such agreement, was held, on a subsequent failure to accomplish the arrangement, to be no satisfaction of the debt, and that a suit might still be entertained for the

balance, the payment made only effecting a discharge *pro tanto*. *Durgin* vs. *Ireland*, 4 Kern., 322. See also *Williams* vs. *Carrington*, 1 Hilt., 515.

As to a binding contract for sale of goods being effected, by means of a proposal and acceptance by letter, immediately on the posting of the acceptance, and that a mere inquiry as to mode of remittance did not avail as a qualification of such acceptance, *vide Clark* vs. *Dales*, 20 Barb., 42.

The mere acceptance of a parol proposition, according to its supposed terms, will not, however, have that effect, where, on the face of such acceptance, a reply is specifically demanded. It is not a contract, but a proposition. *Hough* vs. *Brown*, 19 N. Y., 111.

Where a written contract embodies the substance of previous or collateral negotiations, or a deed is executed in pursuance of the stipulations of a previous contract, such contract or deed extinguishes and supersedes, as a general rule, all such prior negotiations or stipulations, nor can parol evidence be admitted to contradict or explain the written instrument. *Renard* vs. *Sampson*, 2 Kern., 561; *Durgin* vs. *Ireland*, 4 Kern., 322; *Ward* vs. *Westfall*, 21 Barb., 177. So also a prior agreement is merged in one subsequent, relating to the same matter. *Hart* vs. *Lanman*, 29 Barb., 410.

A contract to execute a formal instrument containing specific terms, is enforceable from the first, whether such instrument be or be not executed, actual performance being shown. *Rowland* vs. *Phalen*, 1 Bosw., 43.

The recitals in a contract, made with express reference to another, or to the provisions of a statute, constitute part of it, and the recited instrument or law is to be taken as part of its substance. *Hunt* vs. *The City of Utica*, 23 Barb., 390.

An executory agreement, verbal or written, is not, however, necessarily merged in a subsequent written contract, in execution of part only of its provisions, without other evidence of an intention that the omitted portion should be extinguished. And this, even in the case of a deed executed under such circumstances. *Witbeck* vs. *Waine*, 16 N. Y., 532. See also, reservation in *Renard* vs. *Sampson*, above cited. See likewise, *Morris* vs. *Whitcher*, 20 N. Y., 41; *Atwood* vs. *Norton*, 27 Barb., 638.

To support an express parol promise, consideration must be shown. *Vide State Bank at New Brunswick* vs. *Mettler*, 2 Bosw., 392.

To constitute a sufficient consideration for an express promise, whether verbal or written, it is not essential that it should be pecuniary; if valuable in any shape, or as constituting any concession to the promisor, it will be sufficient to support it. When not *ipso facto* apparent, it ought, however, to be always specifically alleged. See *Fraser* vs. *Child*,

4 E. D. Smith, 243; *Warfield* vs. *Watkins*, 30 Barb., 395; *Jerome* vs. *Jerome*, 18 Barb., 24; *Ambler* vs. *Owen*, 19 Barb., 145; *Forward* vs. *Harris*, 30 Barb., 338; or if the promise sued on be mutual in its nature, *Billings* vs. *Vanderbeck*, 23 Barb., 546.

A moral obligation may also constitute sufficient consideration, *Houghton* vs. *Adams*, 18 Barb., 545; *Stearns* vs. *Tappin*, 5 Duer, 294. A promise of this last nature, is, however, in the nature of a new promise of payment, and it must be specifically alleged as such; nor does it extend to other parties interested, but only to the immediate promisee. *Stearns* vs. *Tappin*, *supra*.

A subsequent promise, in affirmance of a previous liability, must be shown to have been given, in full knowledge of the rights of the promisor sought to be barred by it, or it may not be available. *Savage* vs. *Bevier*, 12 How., 166.

The promise of a widow to pay a debt, incurred by her as a trader, during her coverture, in concealment of the fact, has been held to be void, and that a moral obligation does not constitute a sufficient consideration, unless founded on some previous legal liability. *Vide Goulding* vs. *Davison*, 28 Barb., 438; *Watkins* vs. *Halstead*, 2 Sandf., 311. Whether, under the recent amendment of the law, this doctrine would now be tenable, seems questionable.

No action can, as a general rule, be maintained upon an agreement, which is in its nature illegal, immoral, or contrary to public policy. Under such circumstances, the courts will not interfere. So held as to a contract to advertise, in a paper published upon Sunday. *Smith* vs. *Wilcox*, 25 Barb., 341; affirming *same case*, 19 Barb., 581. As to an agreement in the nature of a wager on a horse-race, *Hall* vs. *Bergen*, 19 Barb., 122. A party depositing the amount of his bet, may recover it back from the stakeholder, though he may have directed its payment, or even after it has actually been paid over to the winner. *Ruckman* vs. *Pitcher*, 1 Comst., 392; *Storey* vs. *Brennan*, 15 N. Y., 524.

An action has been held unsustainable upon a wager contract for the sale of pork deliverable *in futuro*, though valid upon its face, the intention of the parties being to pay only the difference in value. *Cassard* vs. *Hinman*, 14 How., 84; affirmed, 1 Bosw., 207.

A contract for lobby services is illegal, and contrary to public policy, and no action can be maintained upon it. *Rose* vs. *Truax*, 21 Barb., 361. Nor can such a contract be sifted, and a legal portion of it sustained. See also, as to a similar contract for the use of secret influence with directors. *Davison* vs. *Seymour*, 1 Bosw., 88. And as to services rendered by a custom-house clerk in order to procure a return of duties. *Satterlee* vs. *Jones*, 3 Duer, 102. See, however, as to an agreement to carry a claim to a pre-emption right through the office of the land com-

missioners, and to procure the necessary evidence, in consideration of a conveyance of one-half of the land, when obtained, which was held to be good, and that it could not be impeached for champerty. *Sedgwick* vs. *Stanton*, 4 Kern., 289; affirming *same case*, 18 Barb., 473.

A bank, discounting paper in violation of a statute, cannot recover upon it. The court will leave the parties to such a contract where it finds them, and will withhold its aid from both. *Seneca County Bank* vs. *Lamb*, 26 Barb., 595.

The repeal of a statute, invalidating a transaction, on grounds of public policy, takes away the defence of illegality, even on a contract made before its repeal. So held as to a stock-jobbing agreement, sued on after the repeal of the provisions of the Revised Statutes on the subject, by chapter 134 of 1858, page 251. *Washburn* vs. *Franklin*, 35 Barb., 599; 13 Abb., 140; reversing *same case*, 11 Abb., 93.

Prior to that repeal, neither party could sue another upon or in respect of matter arising out of such a contract. *Staples* vs. *Gould*, 5 Seld., 520; affirming *same case*, 5 Sandf., 411.

Nor will the court interfere on behalf of either party to an executory transaction, fraudulent or immoral in its nature, or of the assignee of such a party, in any manner or for any purpose. *Westfall* vs. *Jones*, 23 Barb., 9; *Morgan* vs. *Chamberlain*, 26 Barb., 163.

A contract made in assumed exercise of official duties, but beyond the authority of the official contracting, is void and incapable of enforcement. *Overseers of Norwich* vs. *Overseers of Pharsalia*, 15 N. Y., 341; *Brady* vs. *Mayor of New York*, 18 How., 343 (Court of Appeals); affirming *same case*, 16 How., 432; 7 Abb., 234.

Where, however, both parties to an illegal contract are not *in pari delicto*, the courts may sometimes interfere in behalf of the less culpable. Usury is a case of this description, for which express provision is indeed made by statute, nor will a party seeking relief in this respect be deprived of his remedy, because the transaction sought to have been impeached may also have been in violation of the banking laws. *Schermerhorn* vs. *Talman*, 4 Kern., 93. See also, as to extending relief to the less guilty party to a transaction prohibited by statute, but not *malum in se*, *Tracy* vs. *Tallmage*, 4 Kern., 162. Nor will mere knowledge on the part of a vendor that goods sold by him are intended to be used for an illegal purpose, falling short of an actual crime, or debar his recovery of the price, unless he himself does some act on his own part, tending to make him a participant in such purpose, and which forms a part of the contract of sale. In this latter case he cannot recover.

A contract in mere breach of a prohibitory law, but of which the consideration is morally good, may be enforced, after the repeal of the pro-

hibition, though made during its continuance. *Central Bank* vs. *Empire Stone Dressing Company*, 26 Barb., 23. See also, *Washburn* vs. *Franklin*, above cited. See likewise, *Leavitt* vs. *Curtis*, 15 N. Y., 9, establishing the converse of the proposition, as to a subsequent statute, rendering unavailable a defence sustainable at the time it was pleaded, and even established by proof, on a trial, before the passage of such statute.

Although, in the case of an illegal executory agreement, the courts will refuse any interference, they will not relieve against an executed contract of this nature. *Giles* vs. *Halbert*, 2 Kern., 32. See, however, *Seneca County Bank* vs. *Lamb*, 26 Barb., 595, above cited.

As to the right of a party who has prosecuted a general claim for the benefit of himself and others, to recover a compensation stipulated to be given by the latter in the event of success, and as to the measure of such compensation, when recoverable, see *Ogden* vs. *Des Arts*, 4 Duer, 275.

(*b.*) Bonds.

In framing a complaint on an ordinary money bond, in an action by obligee, against obligor, resort may be advantageously had to the facilities afforded by section 162. If that section be strictly followed, the complaint will be sufficient. *Lafayette Insurance Company of Brooklyn* vs. *Rogers*, 30 Barb., 491.

A resort to this section, is not however in any case obligatory, and where the condition of the bond is special, a special and distinct averment of the breach of that condition should be made. *Mayor of New York* vs. *Doody*, 4 Abb., 127. See also *Dimon* vs. *Dunn*, 15 N. Y., 498.

In an action upon a penal bond, the terms of the condition, and the breach sued upon, must in like manner, be distinctly averred, and such averment will not affect the plaintiff's right to a judgment in form for the penalty. In such an action, an equitable defence is however admissible, and the court may protect the obligee's rights by controlling the execution. *Western Bank* vs. *Sherwood*, 29 Barb., 383.

All or any of the parties to an instrument of this nature, may be included in the same action, under the power given by section 120. *Brainard* vs. *Jones*, 11 How., 569; *De Ridder* vs. *Schermerhorn*, 10 Barb., 638.

In an action against sureties, upon breach of a mere contract of indemnity, the complaint must aver actual damage. Not so however, upon a contract to indemnify from legal liability, which gives a right of action immediately upon the commencement of a suit upon that liability. *McGee* vs. *Roen*, 4 Abb., 8. See also *Gilbert* vs. *Wiman*, 1 Comst., 550, there referred to; as to the liability of indemnitors against the non-payment of negotiable paper, see *Bacon* vs. *Hickok*, 21 How., 440.

In an action upon the bond of a railroad company, issued prior to the statute of 1850, a general averment of the purpose for which it was issued, was held sufficient. But, in an action on a bond issued since that statute, it would seem that an averment of compliance with its terms will be essential. *Miller* vs. *New York and Erie Railroad Company*, 8 Abb., 431.

In suing upon a lost bond, no averment of such loss will be either necessary or appropriate. *Supervisors of Livingston* vs. *White*, 30 Barb., 72. The former doctrine of profert and oyer has no place under the provisions of the Code.

A bond without seal has the effect of a promissory note, and may be sued upon as such. *Woodward* vs. *Genet*, 2 Hilt., 526.

A bond, given in connection with a mortgage, may be enforced separately, either against the obligor or his heirs, nor is the holder under any obligation to exhaust his remedy against the bond in the first instance. *Roosevelt* vs. *Carpenter*, 28 Barb., 426.

Money payable under an instrument, which omits to make any mention of interest, or to specify any date, draws interest from its date. *Purdy* vs. *Philips*, 1 Kern., 406; affirming *same case*, 1 Duer, 369.

Where a specific sum has been fixed, by the parties to a contract, by way of liquidated damages, in respect of an indefinite liability for breach of stipulations, the provision will be enforced by the court, unless the amount be grossly disproportionate. *Cotheal* vs. *Talmage*, 5 Seld., 551. See also *Dunlop* vs. *Gregory*, 6 Seld., 241. And this, even although the damages for an actual breach of parts of such an agreement, may be ascertainable. *Bagley* vs. *Peddie*, 16 N. Y., 469; reversing *same case*, 5 Sandf., 192. See also *Clement* vs. *Cush*, 21 N. Y., 253; *Pettis* vs. *Bloomer*, 21 How., 317; *Brinckerhoff* vs. *Alp*, 35 Barb., 27.

Where, however, upon the face of the instrument sued upon, and without reference to extrinsic evidence, it appears, either that a sum named as liquidated damages, for breach of an entire agreement, will necessarily be inadequate as to breach of some provisions, and more than enough for others, or that the agreement has been partially performed, it will be construed as a penalty. *Lampman* vs. *Cochran*, 16 N. Y., 275.

A security for future advances, to a specific amount, though good in the first instance, will be satisfied by the making of the advances stipulated and their subsequent repayment, and cannot stand as a continuing security in respect of further transactions. *Truscott* vs. *King*, 2 Seld., 147.

The principal on a bond for indemnity against a money payment, was held liable for an amount exceeding the sum named in the condi-

tion, where the excess consisted of interest, accrued after breach committed. *Lyon* vs. *Clark*, 1 E. D. Smith, 250.

In that case, it was doubted whether a surety was liable beyond the penalty, even upon a money bond. In *Brainard* vs. *Jones*, however, 18 N. Y., 35, it is laid down, that a surety is also liable for such an excess, under the same circumstances. The penalty is the limit of the obligee's liability in respect of the original breach, but, from the time of that breach, he is in default, and liable for subsequent interest, the same as in any other case.

But, on a strictly penal bond, the recovery against a surety will be confined to the penalty, and cannot exceed it. *Raynor* vs. *Clark*, 7 Barb., 581; 3 C. R., 230.

The responsibility of a surety will be strictly confined to the terms of the bond itself. A surety for an officer, whose term of office is one year, cannot therefore be held for a default occurring after its expiration, though the principal be continued in office by a reappointment, without fresh security being required. *Kingston Mutual Insurance Company* vs. *Clark*, 33 Barb., 196.

And sureties for the payment of a sum, on completion of work, to be done according to a specific contract, will be discharged by a subsequent variation of that contract, without their assent. *Giles* vs. *Crosby*, 5 Bosw., 389.

The liability of the obligees for the penalty of a bond, for the appearance of a person, charged in a case of bastardy, is complete on default made by their principal to appear and continue in attendance, and, once incurred, it will not be discharged by his subsequent return, after order of filiation made. *People* vs. *Jayne*, 27 Barb., 58. See also, as to the duty of the principal, under an insolvency bond, to comply strictly with all the provisions of the statute, and the liability of the sureties in case of his omission, *Cobb* vs. *Harmon*, 23 N. Y., 148; affirming *same case*, 29 Barb., 472.

A bond for maintenance in the house of the obligor, is only enforceable according to its terms, and the obligee, seeking another home, without sufficient cause shown, cannot recover. *Hawley* vs. *Morton*, 23 Barb., 255.

A bond given to a foreign state, for the benefit of third parties, under the provisions of a statute, cannot be enforced, unless the statute has been strictly pursued. See *Commonwealth of Kentucky* vs. *Bassford*, 1 E. D. Smith, 218.

In case of the death of a sheriff, a bond given by an imprisoned debtor for the jail liberties, must be assigned within the statutory period of ten days. If omitted, the assignee's right of recovery upon it, will be forfeited. *Ridgway* vs. *Barnard*, 28 Barb., 613.

A deputy's bond to the sheriff, conditioned for faithful performance of his duty, and for general indemnity, is an agreement to indemnify against legal liability. If the deputy has notice of an action against the sheriff, in respect of his default, and an opportunity to defend, his surety, though not notified, will be liable for the amount of the judgment. *Westervelt* vs. *Smith*, 2 Duer, 449. When, however, the condition of such a bond merely ran that the deputy should so demean himself that the sheriff should not suffer damage or molestation by reason of his acts, or liability by or through him, it was held not to fall within the above rule, and that actual damage must be shown by the latter. *Gilbert* vs. *Wiman*, 1 Comst., 550.

As to the sheriff's power to require an indemnity bond, before seizing goods claimed by a third party, and as to his right of recovery thereon for the costs of a successful proceeding, see *Chamberlain* vs. *Beller*, 18 N. Y., 115. And a bond so given to him is not invalidated by the fact that it was given after levy and sale. *Westervelt* vs. *Frost*, 1 Abb., 74. As to the right of the sureties on the official bond of the sheriff, to be subrogated to the benefit of an indemnity so taken, *vide People* vs. *Schuyler*, 4 Comst., 173.

A surety on such a bond is liable as a trespasser, to the party whose goods are taken, without evidence of any other interference on his part. *Herring* vs. *Hoppock*, 3 Duer, 20; 12 L. O., 167.

The sureties of the sheriff himself are liable on his official bond, for his own illegal acts, or for the misconduct of his deputies. *People* vs. *Schuyler*, 4 Comst., 173. See similar liability of the sureties on a constable's official bond, *Mayor of New York* vs. *Doody*, 4 Abb., 127; *The Same* vs. *Brett*, 2 Hilt., 560; *Carpenter* vs. *Doody*, 1 Hilt., 465; *Brown* vs. *Jones*, 1 Hilt., 204; 3 Abb., 80. But see the last two cases, as to the bare neglect to return process within the required time, not being a default, rendering a constable positively liable for the amount of the judgment, as regards the city and county of New York, though, as to all other parts of the state, the provisions of the Revised Statutes to that effect are still in force.

A bond of the latter nature can only be prosecuted against the sureties of a constable of the city of New York, after judgment rendered against the latter, and leave of the Court of Common Pleas first obtained. *Davis* vs. *Kruger*, 4 E. D. Smith, 350. See, however, as to the latter objection, and the necessity of its being taken by motion, and not being deferred till the trial, *Mayor of New York* vs. *Brett*, 2 Hilt., 560.

As to the necessity of a suit upon an official bond being brought in the name of the actual obligee, as trustee of an express trust for the party damnified, see *Mayor of New York* vs. *Doody;* and *The Same* vs. *Brett*, above cited; also *People* vs. *Norton*, 5 Seld., 176.

As to the liability upon a canal contractor's bond to the state,

extending only to the payment of laborers employed by such contractor, and not to that of subcontractors or jobbers, or of laborers employed by them, see *Swift* vs. *Kingsley*, 24 Barb., 541; *McCluskey* vs. *Cromwell*, 1 Kern., 593.

The sureties of a county treasurer remain generally liable to the supervisors, on his official bond, for any defalcation, notwithstanding his imprisonment, at the suit of the state, so far as the state tax is concerned. *Supervisors of Livingston* vs. *White*, 30 Barb., 72.

Nor does the collateral remedy, by warrant, against the property of a town or village collector, affect the right to maintain an action against his sureties, whose liability attaches immediately on his default. *Looney* vs. *Hughes*, 30 Barb., 605; *Village of Warren* vs. *Philips*, 30 Barb., 646.

An administration bond is not a mere bond of indemnity, and a breach of duty on the part of the administrator, gives an immediate right of action against the sureties. *Baggott* vs. *Boulger*, 2 Duer, 160. And such an action is a personal action, and lies therefore, within the jurisdiction of a justice's court. *O'Neil* vs. *Martin*, 1 E. D. Smith, 404. See, however, case next cited. The complaint on such a bond must aver unconditionally that the surrogate taking it had jurisdiction. *Mahoney* vs. *Gunter*, 10 Abb., 431.

As to when it is or is not necessary that an action of this description should be brought in the name of the people, or in that of the party damnified, see heretofore, under the head of *Parties*, and *Baggott* vs. *Boulger*, 2 Duer, 160; and *People* vs. *Laws*, 4 Abb., 292; affirming *same case*, 3 Abb., 450, there cited.

As to the responsibility of sureties for an administrator *ad colligendum*, extending to moneys collected by him, as agent, before his appointment, see *Gottsberger* vs. *Smith*, 5 Duer, 566; affirmed, 19 N. Y., 150. See also, as to those for a general administrator, *People* vs. *Hascall*, 22 N. Y., 188.

As to the measure of liability, and also the nature of evidence admissible against a surety, in an action brought upon the official bond of a general guardian, see *Clark* vs. *Montgomery*, 23 Barb., 464.

A surety for the faithful discharge of his principal's duty to an employer, will be held generally responsible for all violations of that duty, though in matters not pertinent to the immediate scope of his employment. *Rochester City Bank* vs. *Elwood*, 21 N. Y., 88.

As to the measure of liability of the assignor of a mortgage, and his surety, covenanting to be answerable to the assignee, for any deficiency on a future foreclosure and sale, see *Goldsmith* vs. *Brown*, 35 Barb., 484.

(*c.*) Recognizances.

By chapter 301 of 1855, p. 305, the provisions of the Code are expressly extended to proceedings upon forfeited recognizances. As to the entry of judgment upon an instrument of this nature, and the discretion vested in the court, with respect to its remission or discharge, see *People* vs. *Petry*, 2 Hilt., 523.

(*d.*) Undertakings.

The next subject that presents itself for consideration is the liability of the obligees, in undertakings taken pursuant to the provisions of the Code itself, or of any other statute, and the averments necessary to establish that liability.

With reference to actions of this description, in general, it may be remarked, that it is not essential that the complaint should contain an averment, in direct terms, that the instrument sued upon was taken pursuant to the statute immediately in question. It is enough, if that instrument, as set forth, is in accordance with its provisions. *Shaw* vs. *Tobias*, 3 Comst., 188.

Nor is any averment of consideration necessary, though the instrument be, as usually the case, without seal. When given in pursuance of a statute requirement, in a form prescribed thereby, and in a case within the statute, these facts constitute of themselves sufficient consideration to support it. And, when the instrument is set forth in the complaint, and in form purports to be the undertaking required by the statute, it is sufficient to aver that it was taken in an action, without describing that action, or making specific allegations of compliance with the above requisites. The recitals in the instrument itself will suffice in lieu of such averments. *Slack* vs. *Heath*, 4 E. D. Smith, 95; 1 Abb., 331. See also *Loomis* vs. *Brown*, 16 Barb., 325; *Seacord* vs. *Morgan*, 17 How., 394; *Gibbons* vs. *Berhard*, 3 Bosw., 635; *Thompson* vs. *Blanchard*, 3 Comst., 335. But, in a case not provided for by statute, consideration must be expressed upon the face of the instrument, or it will be void. *Robert* vs. *Donnell*, 10 Abb., 454.

The fact that a statutory undertaking is taken in the form of a penal bond, or *vice versa*, will not affect the validity of the instrument so taken, provided, in all other respects, the statute under which it is taken be duly complied with. See above, section 69, last subdivision, and cases there cited.

As to the extent to which mere formal irregularities may, after trial, be disregarded, in order to support an instrument of this description, sought to be impeached upon appeal, *vide Teall* vs. *Van Wyck*, 10 Barb., 376.

And the sureties, in such an instrument, will be estopped from contradicting its recitals, in order to defeat it. See *Coleman* vs. *Bean*, 14 Abb., 38.

The better form of averment, in actions upon instruments of this class, would seem to be as follows:

Allege, first, the pendency of the action in which, and the purposes for which, the security was given.

Aver the making and delivery of the instrument itself, and its terms, either by way of copy, or distinct and sufficient allegation.

Aver the breach committed or occurred.

N. B.—In framing all these averments, the statute should be consulted, and the closer its wording and requirements be followed, the less likelihood will there be of the pleading being impeachable.

And the plaintiff must be connected with the instrument sued upon by him, as the aggrieved party thereon, by all necessary averments. See *Raynor* vs. *Clark*, 7 Barb., 581; 3 C. R., 230.

It now remains to notice some decisions, bearing upon the liability or form of averment in specific cases.

(*e.*) On Appeal.

In actions of this nature, on undertakings given on appeal from a judgment to the general term, the recent amendment in section 348 (1862), must be borne in mind. Ten days' notice of the order or judgment of affirmance, must be given to the adverse party, before commencing the action, and, if an ulterior appeal be taken to the court of appeals, and full security given, so as to stay execution, such an action cannot then be commenced or a recovery had, until after the final determination of such appeal.

This change has not yet been made the subject of judicial interpretation. Till then, it may be prudent, in an action of this nature, to insert a specific averment of notice given, or final determination had, as the case may require.

Subject to the above qualifications, the right of action of the respondent on an undertaking of this nature, becomes absolute, on affirmance of the judgment appealed from, and nothing short of payment will discharge it. The issuing of execution against the principal debtor is not a prerequisite, nor will the fact that he has sufficient property, or even an actual levy on that property, avail as a defence. Nor, before the amendment, would the giving of security on an ulterior appeal so avail, though it might possibly form ground for a stay of proceedings. See *Burrall* vs. *Vanderbilt*, 1 Bosw., 637; 6 Abb., 70; *Heebner* vs. *Townsend*, 8 Abb., 234.

The liability of the sureties is fixed immediately on affirmance, and

default in payment by the judgment-debtor, and the plaintiff is not bound to exhaust his other remedies. *Wood* vs. *Derrickson*, 1 Hilt., 410; *Hubner* vs. *Townsend*, *supra*. Nor is any preliminary application for leave to sue, necessary for the maintenance of the action. *New York Central Insurance Company* vs. *Safford*, 10 How., 344.

And, where the undertaking is on behalf of several defendants, affirmance as to any one of them is sufficient to charge the sureties. A reversal as to other defendants, or an abandonment of the appeal on their part, will be wholly unavailing as a defence. Nor will the discharge of the real estate of the debtor, by entry of the words "secured on appeal" on the docket, pursuant to section 282, though made without their consent, or notice to them, have any effect in diminishing their liability. *Burrall* vs. *Vanderbilt*, *supra*; *Seacord* vs. *Morgan*, 17 How., 394.

In order to maintain an action on such a security, on appeal to the court of appeals, the mere filing of the *remittitur* and adjustment of the costs is not sufficient. There must be an actual and formal entry of judgment, before the court will take notice of it, so as to render the action maintainable. *Seacord* vs. *Morgan*, *supra*.

If a positive undertaking be given, on an appeal by executors, without a special application to the court to limit the amount or nature of the security, it will be regarded, on demurrer, as an admission of assets, and the liability of the sureties, primarily considered, will be immediate and absolute, though the judgment rendered, be only against the assets of the testator in due course of administration. See *Mills* vs. *Thursby*, 12 How., 385. It was considered, however, that, on a hearing on the merits, a compliance with the judgment, in manner and form expressed, if averred and proved, might avail to discharge the sureties from their obligation. *Mills* vs. *Forbes*, 12 How., 466.

The liability of the sureties under an undertaking, given on appeal from a justice's decision, under section 356, extends, not merely to payment of the judgment and costs of the primary appeal to the county court, but, also, to those of the ultimate appeal to the general term, in case the original respondent shall finally prevail. *Smith* vs. *Crouse*, 24 Barb., 433.

But, under the special security provided for by section 354, as amended in 1858, with reference to New York cases only, the liability of the sureties is confined to costs, and does not extend to the principal amount originally recovered. That amount does not constitute "damages" within the meaning of the section, as there amended. *Onderdonk* vs. *Emmons*, 2 Hilt., 504; 9 Abb., 187; 17 How., 545.

The sureties on an appeal to the Court of Appeals, are not liable, on a dismissal of that appeal for want of prosecution. Such a dismissal is

not in law an affirmance of the judgment. *Watson* vs. *Husson*, 1 Duer, 242; *Drummond* vs. *Husson* (*same case*), 4 Kern., 60.

As to the sufficiency of an averment of such an undertaking in general terms, without detail in minute particulars of regularity, and of the presumption which will exist in its favor, see *Gibbons* vs. *Berhard*, 3 Bosw., 635.

As to the right of a surety on a primary appeal, who has paid the amount of the judgment, to recover back the amount so paid, on an ultimate reversal, see *Garr* vs. *Martin*, 1 Hilt., 358.

(*f.*) On Arrest.

As to the measure of the sheriff's liability, in a case where the original sureties have failed to justify, and he has, in consequence, become liable as bail, see *Metcalf* vs. *Stryker*, 31 Barb., 62; 10 Abb., 12.

As to the right of an attorney to bring an action against bail in the name of his client, in order to enforce his lien for costs, accrued upon recovery of judgment, see *Shackleton* vs. *Hart*, 20 How., 39; 12 Abb., 325, note.

(*g.*) In Replevin.

As to the averments in a suit on a replevin bond, under the former practice, and the extent to which mere formal points of regularity will be held implied within the scope of a general averment, see *Shaw* vs. *Tobias*, 3 Comst., 188.

The liability of the obligors, on an undertaking, given by a defendant, seeking a return of the property under section 211, is immediate and absolute, on the render of judgment in favor of the plaintiff, nor is the latter bound to issue execution, or exhaust his remedies against the defendant. No allegation need be made that the property was in fact returned, nor is the plaintiff required to aver, or to prove the regularity of the proceedings in the action. *Slack* vs. *Heath*, 4 E. D. Smith, 95; 1 Abb., 331.

In *Morange* vs. *Mudge*, 6 Abb., 243, a complaint, containing an averment of the execution of the undertaking, giving a copy, alleging the recovery of judgment for costs, the issuing and return of execution, and an assignment of the undertaking to the plaintiff, was held sufficient on an action on a plaintiff's security, without further statements in detail. It was also decided that the liability of the sureties on such an instrument was several, and that a separate action might be maintained against either; and, likewise, that an assignment of the judgment itself was not necessary, to enable the plaintiff to sue as assignee.

On the other hand, an assignment of a judgment, and of all moneys to be recovered under it, has been held sufficient to pass the right to an

undertaking of this description, and to enable assignees, holders of the document itself, to maintain an action in their own names. *Bowdoin* vs. *Coleman*, 6 Duer, 182; 3 Abb., 431. But, if such an undertaking be given to several promisees, all must be represented, or the objection, if taken in due time, will be fatal.

A sheriff is bound to prosecute an undertaking given to him, on taking property out of his possession by way of replevin, on breach of the condition, nor can he claim an indemnity from the execution plaintiff. *Swezey* vs. *Lott*, 21 N. Y., 481.

See long discussion, as to the liability of the plaintiff's sureties, on property being successfully claimed by a third person, not a party to the action, in *Holbrook* vs. *Vose*, 6 Bosw., 76.

(*h.*) In Injunction.

The questions which have arisen as to the nature and extent of the liability of sureties on an undertaking of this description, have been already entered upon, the decisions in point referred to, and the consideration of this branch of the subject anticipated, in section 106, chapter III., book V., of the present work. See that section and the cases there cited.

In *Loomis* vs. *Brown*, 16 Barb., 325, a general form of allegation, averring the granting of an injunction in a suit, by a justice of the court; service on the defendants; the execution of the undertaking sued upon; that issues were joined in that suit, and that a judgment had been rendered therein, was held sufficient, on demurrer, in an action on that undertaking, without entering into any fuller detail.

An undertaking of this nature, in the form of a penal bond, is good. If a party to such an undertaking being, in fact, an official trustee, sign it in that character only, he will not be personally bound. *Episcopal Church of St. Peter* vs. *Varian*, 28 Barb., 644.

If an injunction be dissolved, and the suit be subsequently discontinued, the liability of the sureties attaches immediately on discontinuance. The order becomes, thereupon, a final decision, that the plaintiff was not entitled to the injunction. *Carpenter* vs. *Wright*, 4 Bosw., 655.

(*i.*) On Attachment.

In an action upon an undertaking of this nature, the only averment necessary in relation to the regularity of the attachment, will be, that it was issued in a then pending action. If in a court of limited jurisdiction, an allegation of jurisdiction in that court must in such case be added, but not otherwise. *Cruyt* vs. *Phillips*, 16 How., 120; 7 Abb., 205.

Where work had been done upon a vessel, by two connected firms, at different periods, and a maritime attachment had been levied in respect

of a separate portion of such work, it was held that the accounts, even assuming they would have formed a single demand, were severed, and that a separate action was maintainable in respect of part of such work, on a bond given for discharge of such attachment, notwithstanding the obtaining and satisfaction of judgment in respect of the other portion. *Secor* vs. *Sturgis*, 16 N. Y., 548.

But a security of this nature is not available to a party, himself a part owner of the vessel. He cannot acquire the necessary lien. *Atkins* vs. *Stanton*, 6 Bosw., 648.

As to the averments proper to be made, in an action on a bond of this description, and as to the necessity of distinctly alleging all facts necessary to confer jurisdiction, and to show a duty on the part of the officer applied to, to grant a discharge of the warrant, and also as to the extent to which, when such averment is distinctly made, the further regularity of the proceedings may be implied, see *Clark* vs. *Thorp*, 2 Bosw., 680. The bond sued upon in that case, was, however, sustained upon another ground, viz.: that the instrument constituted of itself a valid security, the seal importing consideration, and was, as such, enforceable, notwithstanding that a strict compliance with the statute was not shown.

As to the validity of the proceedings on an attachment issued under the Revised Statutes, and the extent of the liability of the sureties upon a bond of this nature, see *Renard* vs. *Hargous*, 2 Duer, 540; affirmed, 3 Kern., 259.

As to the extent of liability of the sureties on a bond, given on attachment for contempt of court, see *Davis* vs. *Sturtevant*, 4 Duer, 148.

As to the necessity of the plaintiff, on an attachment bond, showing by specific averment, his connection with the attachment proceedings, and how he has been aggrieved by the acts of the defendant, see *Rayner* vs. *Clark*, 7 Barb., 581; 3 C. R., 230.

Sureties on a bond given for discharge of an attachment, are not exonerated from their liability, by a failure on the part of their principal to furnish further security when ordered. Their liability still continues. *Jewett* vs. *Crane*, 35 Barb., 208; 13 Abb., 97. See same case, as to the power of allowing sureties to defend in place of their principal, on a suitable application

The following decisions relate to bonds given on attachments, issued by a justice's court:

Such a bond, once given, creates a subsisting liability, though afterwards destroyed on a mistaken supposition of its being unnecessary, and the liability upon it will include the costs of a *certiorari*, upon which an originally favorable judgment has been reversed. *Bennett* vs. *Brown*, 20 N. Y., 99.

A bond to obtain the discharge of such an attachment, must be given in strict accordance with the statute, and if, instead of providing for the appearance of the defendant, and for the production of the attached property to answer an execution, it provides instead, for payment of any judgment to be recovered, it will be void, as unauthorized by law. *Morange* vs. *Edwards*, 1 E. D. Smith, 414.

In like manner, such a bond must be given for double the value of the property attached, whatever that value may be. If only given for double the amount of the plaintiff's claim, it will be insufficient. *Kamena* vs. *Wamer*, 6 Abb., 193, 196; 6 Duer, 698; reversing *same case*, 15 How., 5; 6 Abb., 193.

In an action upon a bond, given for the appearance of a judgment debtor, under attachment in supplementary proceedings, a general averment of the recovery of judgment, and consequent issuing of attachment on supplementary proceedings had, was held sufficient, without going on to specify the issuing and return of execution, or the order for such attachment, in *Kelly* vs. *McCormick*, 2 E. D. Smith, 503. It was also held, that in such an action, the defendant could not go behind the instrument, and impeach the attachment, in respect of any matter of irregularity, merely tending to render it voidable, but not absolutely void. Likewise, that though the instrument, being without seal, might be irregular, as respected the sheriff, under the statute as to contempts, the objection was not available, as against the party for whose benefit it was taken, suing as assignee. Being taken in good faith, it is not an instrument taken *colore officii*, within the meaning of the statute. See also, *Winter* vs. *Kinney*, 1 Comst., 365.

Actions upon other Specialties.

(*j.*) *Awards.*

Where the submission to arbitration, merely provided that judgment upon the award might be entered in the county court, it was held that an action might be brought upon such award immediately, without entering any such judgment, or waiting for a term of the court to be held. *Burnside* vs. *Whitney*, 21 N. Y., 148; affirming *same case*, 24 Barb., 632.

The authority of the arbitrator or umpire must however be strictly pursued, or no action will lie. If exceeded, even unconsciously, or through mistake, the award will be equally void. *Borrowe* vs. *Milbank*, 5 Abb., 28; 6 Duer, 680.

And, even where a stipulated time for extension had been transcended, and counsel heard for one party after its expiration, it was held that the award, however just in principle, must be set aside. *Cole* vs. *Blunt*, 2 Bosw., 116.

Where, too, the award prescribes the execution and delivery of releases on payment of the amount awarded, the complaint upon it must aver, and the plaintiff must prove, delivery or tender of such a release, by the party suing, in addition to demand of payment and refusal, or it will be insufficient. *Same case.*

(*k.*) Special Agreements.

An action was held maintainable for a specific sum of money, promised to be paid by the beneficiary under a will, to next of kin of the testator, in consideration of their admitting service of a citation, and promising not to contest its validity. *Palmer* vs. *North*, 35 Barb., 282.

Where the price of property was, by agreement, to be fixed by valuation, and such valuation was perfected in form, an action was sustained for the amount so fixed. *Haff* vs. *Blossom*, 5 Bosw., 559.

(*l.*) Judgment.

In an action upon an assigned judgment, proof of demand of payment by the plaintiff, as assignee, is not necessary. *Moss* vs. *Shannon*, 1 Hilt., 175.

As to the right of an executor or administrator, to sue upon final judgment, where the plaintiff dies before the issuing of execution, see *Ireland* vs. *Litchfield*, 22 How., 178.

A complaint upon the judgment of a foreign court, of inferior jurisdiction, must state facts, showing that such court had jurisdiction, both of the person and of the subject-matter, or it will be demurrable. *McLaughlin* vs. *Nichols*, 13 Abb., 244.

(*m.*) Policies of Insurance.

Analogous to the foregoing, are actions upon a policy of insurance.

The precise form of complaint in these cases has not been made the subject of much controversy. A few cases, bearing upon this specific point, will, however, be noticed below, and the appropriate mode of averment may be easily deduced from general principles.

The making and delivery of the policy, and payment of the premium, should, in the first place, be averred.

The substance of the policy itself should then be clearly and succinctly stated; and, if the question be one in which the proper construction of the general terms of the instrument, or of any particular clauses in it, are likely to be drawn into question, a copy of the whole document, or of the particular clauses in it, in respect of which the controversy arises, should be given; or, which will often be found a very convenient mode of averment, a copy of the policy may be annexed to the complaint, and referred to as forming part of it, the substance of it being shortly

averred in the body. If the policy have been renewed, payment of the renewal premiums should be averred; and, in all cases, a general averment that the plaintiff has performed all conditions and agreements on his part, is usual and appropriate. If the plaintiff claims as assignee, assignment to him must be regularly alleged, so as to tender an issue on his title.

In marine cases, the facts of the voyage insured upon being in actual progress at the time of the loss, and, where the policy is an open policy, those necessary to show that the goods claimed upon were covered by the risk, must appear. If abandonment has been made, that abandonment should be alleged; and all other averments necessary to show the exact nature and extent of the plaintiff's claim should be inserted.

In every instance, the occurrence and natnre of the loss must be distinctly and clearly, though succinctly, alleged.

If it be ambiguously stated, and unless that loss be shown to have accrued to the plaintiff, in respect of the very subject-matter of the insurance, the complaint will be demurrable. *Rodi* vs. *President, &c., of Rutger's Fire Insurance Company*, 6 Bosw., 23.

The giving due notice of claim, and due proof of such loss, and of the plaintiff's interest, and the date of such proof, so as to show distinctly that the time allowed to the company for the payment of the risk has fully elapsed, must, in the last instance, be clearly pleaded, the exact wording of the provisions of the policy, or conditions, being in these and all other respects strictly followed, in framing the necessary averments.

In *White* vs. *The Hudson River Insurance Company*, 7 How., 341, it was held that, though a policy of insurance must state correctly what is insured, it is not necessary that the particular interest in the property, or the reason why the party insures, should also be expressed. See also *Fowler* vs. *New York Indemnity Insurance Company*, 23 Barb., 143.

This rule, however, only applies to those cases, in which the fact that the plaintiff is himself entitled to the benefit of the policy, appears upon the face of that document. If left in doubt by its wording, a specific averment of the interest of the plaintiff and its nature must be inserted, and this, even though the policy itself provides that it shall be proof of interest. *Williams* vs. *Insurance Company of North America*, 9 How., 365.

And the averment must correspond with the actual facts, in relation to such interest and its nature, or the pleading will be defective for variance. *Burgher* vs. *The Columbian Insurance Company of Philadelphia*, 17 Barb., 274.

If, on the face of the policy, the insurance be payable to a third

party, that party should either sue in his own name, or should, at the least, be joined as co-plaintiff, or as defendant, in case of his refusal. The insurer cannot sue in his own name only, unless he show by specific allegation that the interest of such third party has ceased, and that he is now solely entitled. *Ennis* vs. *The Harmony Fire Insurance Company*, 3 Bosw., 516.

It is not necessary for the plaintiff to negative on the face of his complaint, the breach by him, of conditions inserted in the policy. Such breach, if it have occurred, is matter of defence, to be set up in the answer. *Hunt* vs. *Hudson River Fire Insurance Company*, 2 Duer, 481.

An averment, in general terms, of the right of a plaintiff, suing as assignee, both as regards assignment to him and the title of his assignee, will be sufficient, without stating details as to either. *Fowler* vs. *New York Indemnity Insurance Company*, 23 Barb., 143.

If reformation of the policy, be part of the relief sought by the plaintiff, a hypothetical prayer to that effect must be supported by specific averments, and be specifically framed, or it will be defective. *Lamoreux* vs. *Atlantic Mutual Insurance Company*, 3 Duer, 680. And the reformation asked for, must be within the scope of the original agreement of the parties. Unless this clearly appear, the court will not interfere to make, what, in fact, would be a new contract. *New York Ice Company* vs. *Northwestern Insurance Company*, 31 Barb., 72; 20 How., 424; 10 Abb., 34.

Money becomes due on a policy, on the claims being allowed, though it may be payable thereafter, according to the terms, and reckoning from the date of such allowance. An action may, therefore, be brought at once, on the expiration of the time so fixed for payment, nor does the general incorporation act of 10th of April, 1849, section 16, authorizing such action, if payment be withheld more than two months after a loss becomes due, operate to give any extension of credit. *Utica Insurance Company* vs. *American Mutual Insurance Company*, 16 Barb., 171. The only effect of that statute is, to fix a time for payment, where parties have omitted to make special provision. *Allen* vs. *Hudson River Mutual Insurance Company*, 19 Barb., 442.

The following may be noticed, as some of the recent decisions in relation to the question of liability in actions of this description, useful to be borne in mind in framing the complaint, though, as on previous occasions, it is not professed to give any thing in the nature of a complete digest or analysis of all cases bearing upon the subject.

The written portions of a policy control those which are printed, and it will be construed accordingly. *Harper* vs. *Albany Mutual Insurance Company*, 17 N. Y., 194; *Leeds* vs. *Mechanics' Insurance Com-*

pany, 4 Seld., 351; *Bargett* vs. *Orient Mutual Insurance Company*, 3 Bosw., 385; *Woodruff* vs. *Commercial Mutual Insurance Company*, 2 Hilt., 122.

Conditions inserted in the policy itself, will control any statements in a prospectus issued by the company, however inconsistent with that prospectus in their terms. *Ruse* vs. *Mutual Benefit Life Insurance Company*, 23 N. Y., 516; reversing *same case*, 26 Barb., 556.

As to the effect of payment of the premium on a life policy, after the day when it was actually due, but according to the usual course of dealing between the parties, see *Buckbee* vs. *United States Insurance and Trust Company*, 18 Barb., 541.

See also, as to the tender of the premium after the regular day of payment, being sufficient to hold the company to their contract, when made in accordance with the terms of a special notice given to the insurer. *Campbell* vs. *International Life Assurance Society of London*, 4 Bosw., 298.

An insurance of stock in trade, operates as a written license to the party insured, to use and keep on hand all such articles as are necessarily and ordinarily employed in the trade or manufacture carried on by him, notwithstanding a prohibition of use and keeping of the same articles, contained in the printed terms, which portion will be controlled by it. *Bryant* vs. *Poughkeepsie Mutual Insurance Company*, 17 N. Y., 200; affirming *same case*, 21 Barb., 154; *Harper* vs. *Albany Mutual Insurance Company*, 17 N. Y., 194; *Harper* vs. *City Insurance Company*, 1 Bosw., 520; affirmed, 22 N. Y., 441.

To sustain an insurance, of whatever nature, there must be some interest of the party insured, in the subject-matter of insurance, existent at the time of the contract. If otherwise, the policy will be a wager policy, and void under the prohibitory statute, 1 R. S., 662, sections 8–10. See *Williams* vs. *Insurance Company of North America*, 9 How., 365. And, if a policy do not show interest upon its face, interest in the plaintiff must be specifically alleged and shown (*ibid.*, p. 373, where the rule of pleading, in relation to statutes of this description, is stated and explained). See also *Ruse* vs. *Mutual Benefit Life Insurance Company*, 23 N. Y., 516, above cited.

But the prohibition does not apply to the case of an insurance, effected by a party upon his own life. Such a policy is always good, and, once valid in its inception, is enforceable in the hands of an assignee. *St. John* vs. *American Mutual Life Insurance Company*, 3 Kern., 31; affirming *same case*, 2 Duer, 419; 12 L. O., 265; *Valton* vs. *National Loan Fund Life Assurance Society*, 22 Barb., 9; so far approved, though reversed on another ground, *same case*, 20 N. Y., 32. Where, however, an insurance of this description is obtained formally in the name of the

party assured, but in fact for the actual benefit of the assignee only, it seems the policy would be clearly void under the statute. See *Valton* vs. *National Loan Fund Life Assurance Society*, 20 N. Y., 32 (38), overruling *same case*, 22 Barb., 9, above cited.

But, when the assured has any original interest at the time of making the contract, it will be sufficient to sustain the policy, however slight that interest may be.

An equity of redemption is sufficient for that purpose, whether the subject of the mortgage be real or personal property. *Allen* vs. *Franklin Insurance Company*, 9 How., 501. So also, as to an equitable interest in property, contracted to be sold and paid for, but not conveyed to the assured. *Chase* vs. *Hamilton Mutual Insurance Company*, 22 Barb., 527; *Shotwell* vs. *Jefferson Insurance Company*, 5 Bosw., 247.

A purchaser of goods, at a sheriff's sale, who had, subsequently, taken an assignment of a policy upon them, with consent of the insurers, was held entitled to recover, in *Hooper* vs. *Hudson River Fire Insurance Company*, 17 N. Y., 424.

A free policy upon goods, the property of the insured, or held by him in trust, covers goods in his possession as bailee, and the bailor may recover against him. Where, however, such insurance is effected by him as a mere volunteer, he may modify or abandon it at his pleasure, until his principal has ratified or adopted it. *Stillwell* vs. *Staples*, 19 N. Y., 401; reversing *same case*, 6 Duer, 63.

An equitable interest in goods will sustain a policy upon them, as, where a partner in a firm insures firm property in his own name only. *Irving* vs. *Excelsior Fire Insurance Company*, 1 Bosw., 507; *Sharp* vs. *Whipple*, 1 Bosw., 557. See also *Burgher* vs. *Columbian Insurance Company of Philadelphia*, 17 Barb., 274.

To sustain a policy on the life of another, it is not essential that the party obtaining it should be a creditor of the person whose life is insured. It is enough that, according to the ordinary course of events, pecuniary loss or disadvantage will naturally and probably result to him from the death of that person. Parties who had advanced money to another as an outfit for California, upon agreement that they were to receive a share of the profits of his employments there, were held to have an insurable interest, and the sum fixed in the policy was held to be, *primâ facie*, the measure of recovery. *Miller* vs. *Eagle Life and Health Insurance Company*, 2 E. D. Smith, 268; *Hoyt* vs. *New York Life Insurance Company*, 3 Bosw., 440.

A wife has, in like manner, an insurable interest in the life of her husband, and a trustee for her stands in the same position. *St. John* vs. *American Mutual Life Insurance Company*, 2 Duer, 419 (429);

12 L. O., 265; affirmed, 3 Kern., 31. See also special statute, empowering such an insurance, chapter 187 of 1853, p. 306.

A policy assigned by way of collateral security only (the property in the goods assured remaining in the mortgagor), should be sued upon by the latter; the assignee has no sufficient interest in it to enable him to maintain an action. *Peabody* vs. *Washington County Mutual Insurance Company*, 20 Barb., 339.

But, where the property itself is mortgaged, and the loss, if any, is made payable to the mortgagee, or where, upon the face of a policy of whatever nature, the loss is made payable to another party; the latter is the only person who, whilst the mortgage remains unsatisfied, or the contract unchanged, is competent to recover. Nor can the original insurer assign, so as to give any right of action to his assignee. *Ripley* vs. *Astor Insurance Company*, 17 How., 444; *The Same* vs. *Ætna Insurance Company*, 29 Barb., 552; (*same case*), *Ennis* vs. *Harmony Fire Insurance Company*, 3 Bosw., 516. So also, where the property is insured in the name of the mortgagee, he is the proper party to recover to the full extent of his debt. *Kernochan* vs. *New York Bowery Fire Insurance Company*, 17 N. Y., 428. See also previous decision in *same case*, 5 Duer, 1.

Although, as above stated, the right of recovery passes to the mortgagee in the cases above mentioned, still it does not affect the original contract between the parties, and any default or breach of condition on the part of the mortgagor, as original insurer, will have the effect of avoiding the policy. And this, whether the mortgagee's rights be acquired, by a direction as to payment of the loss, or by way of assignment of the policy by way of collateral security. See, as to a direction to pay, *Grosvenor* vs. *Atlantic Fire Insurance Company of Brooklyn*, 17 N. Y., 391; reversing *same case*, 5 Duer, 517; and overruling, *Robert* vs. *Traders' Insurance Company*, 9 Wend., 404; 17 Wend., 631; and *Tillou* vs. *Kingston Mutual Insurance Company*, 1 Seld., 405, there cited and followed: the decision in the *same case*, 1 Bosw., 469, so far as it follows the case in 5 Duer, is also necessarily overruled. See likewise, as to a policy assigned as above, *Buffalo Steam Engine Works* vs. *Sun Mutual Insurance Company*, 17 N. Y., 401. This case similarly overrules *Allen* vs. *Hudson River Mutual Insurance Company*.

Where an insurance is made in the name of the mortgagee, it seems doubtful whether, after payment of the debt secured, it is enforceable. *Bradford* vs. *Greenwich Insurance Company*, 8 Abb., 261. But if, at the time of loss, the amount due to the mortgagee exceed the sum insured, he recovers the whole; the mortgagor being entitled to a proportional credit. *Kernochan* vs. *New York Bowery Fire Insurance*

Company, 5 Duer, 1; *same case*, 17 N. Y., 428. See also, as to an assigned policy, under similar circumstances, *Beach* vs. *Bowery Fire Insurance Company*, 8 Abb., 261, note.

Life policies are valued policies, and the whole amount named on the face is recoverable, without regard to the value of the interest of the party insuring, provided sufficient interest to sustain the policy be established. *Vide Miller* vs. *Eagle Life and Health Insurance Company*, 2 E. D. Smith, 268 (305); *Hoyt* vs. *New York Life Insurance Company*, 3 Bosw., 440; and *St. John* vs. *American Mutual Life Insurance Company*, 2 Duer, 419; 12 L. O., 265; affirmed, 3 Kern., 31, above cited.

A *bonâ fide* assignee, for value, of a policy of this nature, may recover the amount insured, without regard to the nature of his interest, or the amount of consideration paid by him. *St. John* vs. *American Mutual Life Insurance Company*, *supra*; *Valton* vs. *National Loan Fund Life Assurance Company*, 20 N. Y., 32; *Same case*, 22 Barb., 9.

As to the power of a domestic incorporation to take foreign risks, and as to the liability thereon, when taken, being governed by the laws of the state of New York, see *Western* vs. *Genesee Mutual Insurance Company*, 2 Kern., 258; *Huntley* vs. *Merrill*, 32 Barb., 626.

As to the right, *per contra*, to recover in this state, upon a policy issued by the resident agent of a foreign company, see *Burns* vs. *Provincial Insurance Company*, 35 Barb., 525; 13 Abb., 425.

Contracts for insurance with an intended mutual insurance company, though lawful, and in fact necessary with a view to its organization, are contingent only, until that organization is regularly effected. *Williams* vs. *Babcock*, 25 Barb., 109.

Such a company has power to issue policies, on payment of a fixed premium, without provision for any contingent liability of the assured. *Mygatt* vs. *National Protection Insurance Company*, 21 N. Y., 52; 19 How., 61.

And, even if a policy granted by it exceed the term limited by its charter, it may be held valid. *Huntley* vs. *Merrill*, 32 Barb., 626.

An agreement to insure, perfected by acceptance of the risk and payment of the premium to the agent of the company, is binding from the time of such payment, and the company is responsible, even though a loss occurs before the actual delivery of a policy. So held in a suit for specific performance and damages. *Whitaker* vs. *Farmers' Union Insurance Company*, 29 Barb., 312; *Chase* vs. *Hamilton Mutual Insurance Company*, 22 Barb., 527. N. B.—The reversal of this case at 20 N. Y., 52, does not affect this part of the decision. So held also collaterally in an action brought directly for recovery of the amount insured, without

any prayer for previous delivery of the policy. *Rockwell* vs. *Hartford Fire Insurance Company*, 4 Abb., 179.

The making of necessary repairs, when executed without unnecessary delay, does not avail to impair the insurer's liability, even although the policy contain an express condition that the premises shall not be occupied in such a manner as to increase the risk, and the effect of the works whilst in progress has that tendency. Making of repairs is not a way of occupying. *Townsend* vs. *North Western Insurance Company*, 18 N. Y., 168.

Reinsurers are not liable, in a suit by the owner of the property, nor has he any lien, notwithstanding the insolvency of the original insurers. Their contract is not with him, but with them, and they alone can enforce it. *Carrington* vs. *Commercial Fire and Marine Insurance Company of Jersey City*, 1 Bosw., 152. As to the measure of liability on such a contract, see *New York Central Insurance Company* vs. *National Protection Insurance Company*, 20 Barb., 468 (478). The judgment in this case is, however, reversed, but upon a different point. 4 Kern., 85.

See likewise, generally, on the subject of reinsurance, and as to the liability for premiums being governed by the actual terms of the policy, without regard to any collateral verbal stipulations or custom in such cases. *St. Nicholas Insurance Company* vs. *Mercantile Mutual Insurance Company*, 5 Bosw., 238.

In *White* vs. *Hudson River Insurance Company*, 15 How., 288, it is laid down, in strong general terms, that instruments of this nature should be construed liberally, alike for the interest of both parties.

Statements contained in an application for insurance, where material to the risk or any portion of it, constitute a warranty; and, if untrue, the policy issued upon them will be wholly void. *Smith* vs. *Empire Insurance Company*, 25 Barb., 497; *Chaffee* vs. *Cattaraugus County Mutual Insurance Company*, 18 N. Y., 376; *Brown* vs. *The Same*, 18 N. Y., 384; *Murdock* vs. *Chenango County Mutual Insurance Company*, 2 Comst., 210; *Wilson* vs. *Herkimer County Mutual Insurance Company*, 2 Seld., 53.

So also, any statement or description in the policy itself, which relates to the risk, is a warranty, and, if untrue, will have the same effect. *Wall* vs. *East River Mutual Insurance Company*, 3 Seld., 370. See subsequent decision in *same case*, 3 Duer, 264.

Though storage of prohibited articles will be a breach of a condition, a temporary or casual deposit of them within the insured building, will not have that effect. *Hynds* vs. *Schenectady County Mutual Insurance Company*, 1 Kern., 554.

Where the loss fell within an exception created by a special condition,

restricting the liability of the insurer, it was held that no recovery could be had. *St. John* vs. *American Mutual Fire and Marine Insurance Company*, 1 Kern., 516. See, as to a case where the insurers had not received all the protection which, by the contract, it was stipulated they should have, *McComber* vs. *Granite Insurance Company*, 15 N. Y., 495.

Conditions annexed to a policy are part of the contract, and have the same effect, as if written in the body of it. *Jube* vs. *Brooklyn Fire Insurance Company*, 28 Barb., 412.

The use of camphene for the purpose of lighting, without a compliance with a special provision upon the subject, contained in the policy sued upon, was held to avoid it. *Westfall* vs. *Hudson River Fire Insurance Company*, 2 Kern., 289; reversing *same case*, 2 Duer, 490.

In *Mead* vs. *The North Western Insurance Company*, 3 Seld., 530, the same conclusion was come to, and it was also held, that, if a warranty is violated, whether the breach of warranty affected the risk or not, the policy is avoided, and it is immaterial whether the subject of the breach continues up to the time of loss or not. A subsequent removal of the articles in question, could not, therefore, without the consent of the insurers, restore its validity. See also *Murdock* vs. *Chenango County Mutual Insurance Company*, 2 Comst., 210; above referred to. See likewise, as to the use of camphene or spirit-gas, in violation of a condition, effecting an avoidance, *Stettiner* vs. *Granite Insurance Company*, 5 Duer, 594; though in that case, the jury found that the particular article in question, *i. e.*, burning-fluid, did not fall within the letter of the condition, and their verdict on the question of fact was sustained. As to the use of camphene for trade purposes, and not for lighting, not constituting a violation of a condition of this description, see heretofore, and decisions above cited.

A forfeited policy is wholly void, and cannot be revived by parol. This can only be effected by a written instrument, regularly executed. *Spitzer* vs. *St. Mark's Insurance Company*, 6 Duer, 6.

A clause involving a forfeiture, will, however, be strictly construed, and slight evidence of waiver, will, as in other cases, be sufficient to defeat its application. *Ripley* vs. *Ætna Fire Insurance Company*, 29 Barb., 552; *Ripley* vs. *Astor Insurance Company*, 17 How, 444 (*same case*). An assessment upon a premium note of the assured, subsequent to, and with knowledge of a forfeiture committed by him, was held to have this effect in *Viall* vs. *Genesee Mutual Insurance Company*, 19 Barb., 440. So also as to the acceptance of a renewal premium, after a verbal notice of matters increasing the risk insured against. *Liddle* vs. *Market Fire Insurance Company*, 4 Bosw., 179. Where, too, the secretary of the defendants had, by a parol promise that the loss should

be paid on a specific day, induced the plaintiff to defer proceedings, it was held that they could not avail themselves of the objection that his suit had not been commenced within six months (the day named being the last day of that period), and that an action, subsequently commenced, was maintainable. *Ames* vs. *New York Union Insurance Company*, 4 Kern., 253.

Where certain bounds were prescribed in a life policy, but license was given to the assured to travel beyond them, for a limited period, and, during that license, he was disabled from returning by fatal illness, it was held that strict performance of the condition was excused, and that his representative could recover. *Baldwin* vs. *New York Life Insurance and Trust Company*, 3 Bosw., 530.

As to the extent of the terms, "settled limits of the United States," when inserted in a condition of this nature, and that they refer to the geographical boundaries of the Union, including the territories, and not merely to the region of actual settlements, see *Casler* vs. *The Connecticut Mutual Life Insurance Company*, 22 N. Y., 427.

In like manner, suicide by the assured, whilst insane, has been held not to be an act of "dying by his own hand," within a condition of avoidance in that event. That condition has reference to an act of criminal, not of irrational self-destruction. *Breasted* vs. *Farmers' Loan and Trust Company*, 4 Seld., 299.

Misrepresentations, of whatever description, if material to the nature or extent of the risk, will render a policy impeachable. *Kernochan* vs. *New York Bowery Fire Insurance Company*, 5 Duer, 1.

As to the nature of a promissory representation, as importing an engagement to perform or omit the act promised, and its effect, if violated, see *Bilbrough* vs. *Metropolis Insurance Company*, 5 Duer, 587. See *Murdock* vs. *Chenango Mutual Insurance Company*, 2 Comst., 210, there referred to (p. 592).

And a fraudulent representation, even if upon a fact not material to the risk, may, if relied upon by the insurer, and tending to his acceptance of the proposal, have the effect of invalidating the policy. *Valton* vs. *National Loan Fund Life Assurance Company*, 20 N. Y., 32; reversing *same case*, 22 Barb., 9.

The mere suppression of information not material to the risk, will not necessarily invalidate the contract. *Gates* vs. *Madison County Mutual Insurance Company*, 2 Comst., 43; *Same case*, 1 Seld., 469.

It is, however, also laid down, in the first of these decisions, that if any statement made amounts to a warranty, and such warranty be falsified, it avoids the policy, whether the fact stated be material to the risk or not.

The suppression of a material fact, will invalidate the contract. *Chase*

vs. *Hamilton Mutual Insurance Company*, 20 N. Y., 52; reversing *same case*, 22 Barb., 527.

A statement of good health of the assured, upon renewal of a life policy, was held to have relation to the declarations, as to his condition, contained in the original application, and to be construed by the standard then existent. *Peacock* vs. *New York Life Insurance Company*, 20 N. Y., 293; affirming *same case*, 1 Bosw., 338.

Where, after default in payment of the premium on a life policy, the insurers accepted subsequent payment, without objection or inquiry as to the state of health of the insured party, it was held that the benefit of a condition, that such policy should be void, unless satisfactory evidence was produced of his health at the time of renewal, was waived, and that the loss was recoverable, though the insured was sick at the time, and soon after died of the disease under which he was then laboring. *Buckbee* vs. *The United States Insurance, Annuity, and Trust Company*, 18 Barb., 541.

An insurance company is bound by the acts of its regular officers, and a parol agreement on their part, to continue an insurance upon credit, will be a waiver of a general stipulation to the contrary. *Trustees of First Baptist Church* vs. *Brooklyn Fire Insurance Company*, 19 N. Y., 305; *same case*, 18 Barb., 69. A general agent, empowered to make contracts, was held to possess a similar power, and that his receipt for the premium, after a loss actually incurred, bound his principal. *Goit* vs. *National Protection Insurance Company*, 25 Barb., 189. See also *Whitaker* vs. *Farmers' Union Insurance Company*, 29 Barb., 312. And verbal statements made to such an agent, will bind the company, and will prevent them from setting up the defence of misstatement or concealment, notwithstanding they may vary from the written application for insurance. *Hodgkins* vs. *Montgomery County Mutual Insurance Company*, 34 Barb., 213.

In *Bentley* vs. *Columbia Insurance Company*, 17 N. Y., 421, it was held however, that the authority of an agent of this description did not extend to insuring property, which had been actually consumed, before the receipt by him, from the owner, of a written application for insurance upon it.

Where an application was prepared by the authorized agent of the insurers, and merely signed by the applicant, the former were held bound by the statements on such application, and precluded from controverting them. *Plumb* vs. *Cattaraugus County Mutual Insurance Company*, 18 N. Y., 392.

But, where the agent has no such authority, his mere knowledge of fact, not stated in the application, is immaterial, in the absence of fraud, or of his having prevented their statement by the applicant. *Chase* vs.

Hamilton Mutual Insurance Company, 20 N. Y., 52; reversing *same case*, 22 Barb., 527. As to the non-liability of a company, for acts of an agent beyond the scope of his authority, *Vide Jellinghaus* vs. *New York Insurance Company*, 6 Duer, 1.

The applicant will, on the contrary, be bound by any erroneous statements, inserted in the application by the agent of the insurers, if he employ him as his own agent to prepare it. *Smith* vs. *Empire Insurance Company*, 25 Barb., 497. And such misstatement was, in that case, held to avoid the whole insurance, though the misrepresentation only extended to part of the property covered by the risk.

The same person cannot act as agent for both parties in the making of a policy. If he do so, the contract will be voidable by either. *New York Central Insurance Company* vs. *National Protection Insurance Company*, 4 Kern., 85; reversing *same case*, 20 Barb., 468, on other points, but not on the above principle.

A general agent, having power to receive and accept applications until disapproved, has power to extend a policy, in a similar manner; and his action, if not disapproved, will be binding. *Leeds* vs. *Mechanics' Insurance Company*, 4 Seld., 351.

But the action of an agent, merely empowered to receive and transmit applications, does not extend so as to bind the company to accept them, and to issue a policy. Any assent by them, such as fixing the rate to be paid, will, however, validate the arrangement, and payment of the premium to the agent will then bind the company, without regard to the fact of its not being subsequently accounted for, or the disregard of any private directions to the agent, upon the subject of its remittance, not known to the applicant. *Chase* vs. *Hamilton Mutual Insurance Company*, 22 Barb., 527; the reversal at 20 N. Y., 52, does not affect this part of the decision.

An agent, authorized to take applications for insurance, is not empowered to approve of a subsequent insurance in another company. His authority is limited to that conferred by his appointment. *Wilson* vs. *Genesee Mutual Insurance Company*, 4 Kern., 418; reversing *same case*, 16 Barb., 511, and overruling *Sexton* vs. *Montgomery County Mutual Insurance Company*, 9 Barb., 191.

Nor does knowledge, on the part of a broker, not regularly employed by the insurers, but merely acting on both occasions for a commission, avail to charge prior insurers with notice of a subsequent policy. *Mellen* vs. *Hamilton Fire Insurance Company*, 17 N. Y., 609; affirming *same case*, 5 Duer, 101.

As to the validity of an insurance, made or renewed on credit given for the premium by the company, or its authorized officers, see *Trustees of First Baptist Church* vs. *Brooklyn Fire Insurance Company*;

Whitaker vs. *Farmers' Insurance Company*, and *Goit* vs. *National Protection Insurance Company*, above cited. See, likewise, as to waiver of a condition, by acceptance of a premium, when overdue, *Buckbee* vs. *United States Insurance, Annuity, and Trust Company*, 18 Barb., 541.

Consent to the continuance of a risk in the name of original owners, for the benefit of a mortgagee, after foreclosure, with notice of an intended further sale, is equivalent to issuing a new policy in the name of such original mortgagee as owner, and the insurers, on the subsequent payment of a loss to him, pay it in respect of his interest, and have no right of subrogation to any security he may have, or may afterwards take from his vendee, for unpaid purchase-money. *Benjamin* vs. *Saratoga County Mutual Fire Insurance Company*, 17 N. Y., 415.

As to the obligation of the insured party, to give notice of loss to the insurers forthwith, and what will be a sufficient compliance with this condition, see *Hovey* vs. *American Mutual Insurance Company*, 2 Duer, 554; *Savage* vs. *Corn Exchange Fire and Inland Navigation Insurance Company*, 4 Bosw., 1.

On the occurrence of a loss, the delivery of a just and true account of the loss, as part of the preliminary proof of the party insured, is a condition precedent to the maintenance of an action. *Irving* vs. *Excelsior Fire Insurance Company*, 1 Bosw., 507. And if, on a condition requiring him to exhibit his books and vouchers, he decline or evade its performance, he cannot recover. *Jube* vs. *Brooklyn Fire Insurance Company*, 28 Barb., 412.

Where, however, specific performance of a condition of this latter nature is impossible, and the party has given as full and fair a statement as, under the circumstances, he is able to furnish, a literal compliance will be excused. *Bumstead* vs. *The Dividend Mutual Insurance Company*, 2 Kern., 81.

Where a specific mode of furnishing proofs of loss is prescribed by the policy, the assured will be held to strict performance, and any variation from that mode, even though in accordance with collateral stipulations, as to ordinary notices and communications, will be ineffectual. *Hodgkins* vs. *Montgomery County Mutual Insurance Company*, 34 Barb., 213.

Objections to the proofs furnished by the insured, must be made at the time, so as to give him an opportunity of supplying the defect complained of. If omitted to be done, or if a refusal to pay be placed upon another ground, it will be a waiver, and the formal objection cannot afterward be taken. See last case. See also *O'Niel* vs. *Buffalo Fire Insurance Company*, 3 Comst., 122; *Bodle* vs. *Chenango Mutual Insurance Company*, 2 Comst., 53; *Bilbrough* vs. *Metropolis Insurance Company*, 5 Duer, 587; *Peacock* vs. *New York Life Insurance*

Company, 1 Bosw., 338; affirmed, 20 N. Y., 293; *Miller* vs. *Eagle Life and Health Insurance Company*, 2 E. D. Smith, 268; *Savage* vs. *Corn Exchange Fire and Inland Navigation Insurance Company*, 4 Bosw., 1.

A condition prohibiting assignment of a policy, without leave of the company, is only binding during the continuance of the risk. After loss incurred, the claim becomes an ordinary chose in action, and may be assigned as such, without license or consent. *Mellen* vs. *Hamilton Fire Insurance Company*, 17 N. Y., 609; affirming *same case*, 5 Duer, 101; *Goit* vs. *National Protection Insurance Company*, 25 Barb., 189; *Courtney* vs. *New York City Insurance Company*, 28 Barb., 116. These decisions seem to overrule the contrary conclusion, that the courts will recognize and execute a condition of this description, as come to in *Dey* vs. *Poughkeepsie Mutual Insurance Company*, 23 Barb., 623.

An omission to notify insurers of a subsequent insurance upon the same property, in violation of a condition to that effect, is a fatal breach, and will avoid the policy; nor will actual notice to an unauthorized agent avail. *Wilson* vs. *Genesee Mutual Insurance Company*, 4 Kern., 418; reversing *same case*, 16 Barb., 511; and overruling *Sexton* vs. *Montgomery County Mutual Insurance Company*, 9 Barb., 191.

And the obligation to give this notice remains the same, though the subsequent policy be voidable by the insurers, at their election. *Bigler* vs. *New York Central Insurance Company*, 20 Barb., 635; affirmed, 22 N. Y., 402.

An unexplained delay in notifying a further insurance, may have the same effect as a total neglect, nor will knowledge of the fact by a broker effecting both insurances, but not in the regular employment of the insurers, avail to waive the default. *Mellen* vs. *Hamilton Fire Insurance Company*, 17 N. Y., 609; affirming *same case*, 5 Duer, 101.

A mere renewal of a policy, previously mentioned, is not, however, another insurance, within the meaning of a condition of this nature. *Brown* vs. *Cattaraugus County Mutual Insurance Company*, 18 N. Y., 384.

Nor, if the amount of other insurances be correctly stated, will an error in giving the names of the companies, in which they are effected, constitute a breach of the condition. *Benjamin* vs. *Saratoga County Mutual Fire Insurance Company*, 17 N. Y., 415.

In *Mussey* vs. *The Atlas Insurance Company*, 4 Kern., 79, it was held that a condition in a marine policy, avoiding it, "if any other insurance be made," exceeding a specified amount, was not broken by the existence of a prior policy, containing a similar condition, the clause referring only to subsequent insurance; and that, under these circum-

stances, the second policy was good, but the first forfeited. See also, as to an over-insurance being a fatal defect on a policy of this nature, even in the hands of a mortgagee, *Buffalo Steam Engine Works* vs. *Sun Mutual Insurance Company*, 17 N. Y., 401.

Where the insurers received the premium, and issued a policy, upon an unsigned application, filled in by their own agent, it was held that, notwithstanding the terms of a condition to the contrary, they could not object that other insurances were not noticed on that paper, such insurances being, in fact, stated on the face of the policy itself, or that an incumbrance was not disclosed, of which they had verbal notice. *Ames* vs. *New York Union Insurance Company*, 4 Kern., 253.

The description in a policy is explainable in respect of a latent ambiguity; and if, in rejecting an error or falsity in it, sufficient particulars remain, to designate with certainty the object intended to be described, the insurance will stand good. *Burr* vs. *Broadway Insurance Company*, 16 N. Y., 267.

A policy on a "steam saw-mill" was held to cover not merely the building itself, but all the machinery necessary to make it perfect in all its parts, in *Bigler* vs. *The New York Central Insurance Company*, 20 Barb., 635.

A policy upon goods in a public store, according to their cash value at the time of loss, was held to cover the whole of such value, notwithstanding the non-payment, or giving security for payment, of the duties upon them. *Wolfe* vs. *The Howard Insurance Company*, 3 Seld., 583.

The claim on a fire policy includes the value of goods stolen during the fire. The loss is consequential, and is included in the risk. *Tilton* vs. *Hamilton Fire Insurance Company*, 1 Bosw., 367; 14 How., 363.

A policy upon a ship upon the stocks in course of building, covers the structure from time to time, but not timbers, not actually united to that structure, though prepared and lying ready for use, and valueless for any other vessel. *Hood* vs. *Manhattan Fire Insurance Company*, 1 Kern., 532; reversing *same case*, 2 Duer, 191.

The following recent decisions relative to the subject of marine insurance, may also be shortly noticed:

As to the right of the insured to abandon, on receiving information of the probability of a constructive total loss. *McConochie* vs. *Sun Mutual Insurance Company*, 3 Bosw., 99. But a common carrier cannot, it seems, abandon goods, insured by him for the general benefit of himself and the owners. *Savage* vs. *Corn Exchange Fire and Inland Navigation Insurance Company*, 4 Bosw., 1.

As to what will or will not be a loss of this description, entitling the assured to abandon, see *Ruckman* vs. *Merchants' Louisville Insurance Company*, 5 Duer, 342; *Fiedler* vs. *New York Insurance Company*,

6 Duer, 282. See also, as to when abandonment will or will not be necessary, *Crosby* vs. *New York Mutual Insurance Company*, 19 How., 312. Likewise as to the period at which the interest of the assured attaches, so as not to be affected by a subsequent transfer of his interest. *Crosby* vs. *New York Mutual Insurance Company*, 5 Bosw., 369.

Perishable memorandum articles, included in a maritime policy, are to be deemed totally lost, when, though not actually destroyed, but existing *in specie*, they are so injured, in the course of the voyage, as to be incapable of transportation to the port of destination. *De Peyster* vs. *Sun Mutual Insurance Company*, 19 N. Y., 272. This decision overrules that in the *same case*, reported 17 Barb., 306.

As to what will or will not constitute a deviation, exonerating the insurers, see *De Peyster* vs. *Sun Mutual Insurance Company*, 19 N. Y., 272, above cited; *Stevens* vs. *Commercial Mutual Insurance Company*, 6 Duer, 594; *Mallory* vs. *The Same*, 18 How., 395.

As to the principles of general average, and their application, see *Nelson* vs. *Belmont*, 5 Duer, 310; *Lee* vs. *Grinnell*, 5 Duer, 400; *Rogers* vs. *Murray*, 3 Bosw., 357. See also *Bargett* vs. *Orient Mutual Insurance Company*, 3 Bosw., 385, as to the exemption of underwriters in this respect, by the terms of the policy. See likewise the converse of this proposition, as to the written contract controlling any printed conditions, *Woodruff* vs. *Commercial Mutual Insurance Company*, 2 Hilt., 122.

As to unseaworthiness, and the consequent exemption of the underwriters from liability, see *Van Valkenburgh* vs. *Astor Mutual Insurance Company*, 1 Bosw., 61; *Wright* vs. *Orient Mutual Insurance Company*, 6 Bosw., 269. See, however, as to the technical appointment of an incompetent master not constituting unseaworthiness, where there is a competent person in actual command, *Draper* vs. *Commercial Insurance Company;* reversing *same case*, 4 Duer, 234.

As to the rule of *causa proxima*, and its application, see *Mathews* vs. *Howard Insurance Company*, 1 Kern., 9; *Neilson* vs. *Commercial Mutual Insurance Company*, 3 Duer, 455; *Woodruff* vs. *The Same*, 2 Hilt., 122. But the operation of that rule may be ousted by special contract between the parties. *Savage* vs. *Corn Exchange Fire and Inland Navigation Insurance Company*, 4 Bosw., 1.

In relation to barratry, and the extent of a qualifying clause, fixing the risk upon the assurers, "unless the assured be owners, or part owners, of the vessel," see *Harris* vs. *Mercantile Insurance Company of Philadelphia*, 17 How., 188.

As to underwriters being, as a general rule, liable for such a loss of soluble articles, as would exempt the shippers from freight, *vide*

De Wolf vs. *State Mutual Fire and Marine Insurance Company*, 6 Duer, 191.

As to the effect of a limitation of risk on reinsurance, when couched in general terms, see *Mercantile Mutual Insurance Company* vs. *State Mutual Fire and Marine Insurance Company of Pennsylvania*, 25 Barb., 319.

As to the rights or liabilities of underwriters, in respect of the subject-matter of the insurance, after abandonment, see *Taylor* vs. *Atlantic Mutual Insurance Company*, 2 Bosw., 106; *Atlantic Mutual Insurance Company* vs. *Bird*, 2 Bosw., 195.

Although the assured, on a policy of this description, may put an end to the contract, and entitle himself to a return of the premium, by electing not to commence the risk at all; yet, when once commenced, he cannot afterwards withdraw, and the underwriters are then entitled to retain or recover the premium. *New York Fire and Marine Insurance Company* vs. *Roberts*, 4 Duer, 141.

As to the liability of assurers, under certificates, issued from time to time, under a general cargo policy, see *Hartshorne* vs. *Union Mutual Insurance Company*, 5 Bosw., 538. See also, as to general insurance by a common carrier, on goods carried, and the distinction between the liability under it, on goods insured by him, merely for his own protection, and others insured on account of himself and the owners, *Savage* vs. *Corn Exchange Fire and Inland Navigation Insurance Company*, 4 Bosw., 1.

As to the liability of the underwriters on an insurance of passage-money, and the proof necessary to establish it, see *Ogden* vs. *New York Mutual Insurance Company*, 4 Bosw., 447; *Howard* vs. *Astor Mutual Insurance Company*, 5 Bosw., 38.

(*n.*) Rent.

In an action of this description, the ordinary and most expedient form of averment is, to state the nature and contents of the lease or agreement sued upon, so far as the demise and reservation of rent are concerned, and then to allege, in terms, the specific default made by the tenant, praying judgment for the amount due, with interest from the day of payment.

In *Ten Eyck* vs. *Houghtaling*, 12 How., 523, it was held that a plaintiff may, if he chooses, bring his action for rent due on a lease under seal, in the nature of an action in debt, for use and occupation, tendering the lease to show the amount, instead of suing directly upon the covenant for payment.

In *Peckham* vs. *Leary*, 6 Duer, 494, this form of action was adopted, as applicable to a case where the ownership had changed, and the

tenants had continued to occupy, with notice of that change. It was held that a claim for use and occupation was sufficient, but that only the amount mentioned in the lease, under which the defendants entered, could be recovered.

In an action of this description for rent, the recovery can only be for the amount due upon the lease, up to its termination. Damages for holding over, after forfeiture, cannot be recovered. They form a different cause of action, and must be separately asserted. Where, therefore, the landlords, on the 28th of December, dispossessed their tenants for non-payment of rent due on the first of that month, it was held that, although the intermediate holding was wrongful, yet the tenancy was determined by the issuing of the dispossession warrant; and that no recovery could be had, in respect of rent for the intermediate period. *Crane* vs. *Hardman*, 4 E. D. Smith, 339.

The enforcement of a forfeiture does not, however, invalidate the claim of the landord for the rent, by non-payment of which that forfeiture is incurred, the claim for which is assertable still by action. *Mattice* vs. *Lord*, 30 Barb., 382. See also *Academy of Music* vs. *Hackett*, 2 Hilt., 217.

A subsequent contract for surrender of a lease, and payment of the consideration under that contract, does not, *per se*, extinguish the claim of the lessor for rent then previously due, or create a presumption of payment. *Sperry* vs. *Miller*, 16 N. Y., 407.

A covenant to pay rent, runs with the land, and, if broken after the acceptance of an assignment and entry into possession, the assignee is liable, precisely as the lessee would have been, for the quarter's rent then falling due, though his entry may have been in the middle of the quarter. *Holsman* vs. *De Gray*, 6 Abb., 79.

And, where a lease was made to the agent of an association, which subsequently transferred all its property to a corporation, as its successor, it was held that the lessor could recover rent against the latter, for the whole term. *Van Schaick* vs. *Third Avenue Railroad Company*, 30 Barb., 189; 8 Abb., 380.

But, on a claim of this description against any person other than the original lessee, possession is the basis of the liability, and each successive assignee is only liable for rent accrued due, on breach of covenant, occurring during the period of his assignment. A subsequent assignment discharges him from further liability, but, whilst he remains assignee, the possession of his under-tenants is his possession. *Carter* vs. *Hammett*, 18 Barb., 608.

And an equitable assignee, entering into actual possession, will be liable for rent, accruing during the period of such possession. *Astor* vs. *Lent*, 6 Bosw., 612

To have this effect, however, the assignment relied on must be specific, and for the whole term; a general assignee for creditors does not, *per se*, become assignee of a lease, and he may even rebut the presumption arising from his use of the premises, by proving his refusal to take such an assignment. *Bagley* vs. *Freeman*, 1 Hilt., 196. But if such an assignee enters into possession, he will be liable, until his occupancy ceases. *Astor* vs. *Lent*, *supra*.

An action of this kind cannot be maintained, by the superior landlord against an under-tenant, not standing in the position of assignee. *Jennings* vs. *Alexander*, 1 Hilt., 154.

As to the general doctrine that a covenant for payment of rent, runs with the land, and is enforceable accordingly, see *Van Rensselaer* vs. *Bonesteel*, 24 Barb., 365; *Van Rensselaer* vs. *Hays*, 19 N. Y., 68.

In *Hay* vs. *Cumberland*, 25 Barb., 594, it was held that lessees, who had been unable to obtain possession of the whole of premises leased to them, were justified in abandoning the holding, and that, after such abandonment, rent could not be recovered of them. In *Mechanics' and Traders' Fire Insurance Company* vs. *Scott*, however, 2 Hilt., 550, the contrary was held, and that inability to obtain possession was no defence. The latter decision is one of the special, the former of the general term. Where lessees have never entered into possession at all, by reason of the failures of the lessor to perform repairs agreed upon, their liability is then only upon an executory contract, and the landlord cannot recover, without showing performance on his part. *La Farge* vs. *Mansfield*, 31 Barb., 345. If they had taken possession, the rule would be reversed, and their only right would be to a recoupment of damages. See, as to the right to maintain a counter-claim, in respect of damages of this nature, *Myers* vs. *Burns*, 33 Barb., 401.

Rent cannot, of course, be recovered, upon a lease void for illegality. Mere knowledge, however, that premises are likely to be used illegally, does not, *per se*, have that effect; the lease itself, to be void, must be made with express reference to, or in furtherance of, the contemplated illegal purpose, or with express intention that the premises should be so occupied. *Updike* vs. *Campbell*, 4 E. D. Smith, 570; *Gibson* vs. *Pearsall*, 1 E. D. Smith, 90.

An action is maintainable for rent payable in advance, immediately on breach of the covenant for its payment. *Healy* vs. *McManus*, 23 How., 238.

The effect of an eviction, as working a total or partial suspension of rent, according to the circumstances, and the question, as to what will or will not be considered a sufficient interference with the possession of the tenant, to have that effect, will be considered hereafter, in the chapter

relative to answer. See book VII., chapter III., section 178, under the subdivisional head of *Rent*.

An executor cannot recover, for rent which becomes due after the death of his testator. It goes to the heir, as incident to the reversion. *Fay* vs. *Halloran*, 35 Barb., 295. See also *Marshall* vs. *Moseley*, 21 N. Y., 280.

An action of forfeiture for non-payment of rent is not favored, and to maintain one, a demand of such rent must be shown, with strict legal particularity. *Academy of Music* vs. *Hackett*, *supra*.

(*o.*) GUARANTY.

The next and the last that presents itself for consideration, as falling under the class of expressed contracts, is that of guaranty of the debt of another.

An instrument of this nature falls, especially, within the purview of the provision of the Revised Statutes, in substitution for the ancient statute of frauds. See 2 R. S., part II., chapter VII., title II., section 2; 2 R. S., 135.

Being under subdivision 2, a "special promise to answer for the debt, default, or miscarriage of another person," the instrument will be void,

"Unless such agreement, or some note, or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged therewith."

Consideration must be so expressed upon the face of the guaranty, and not left to implication, however unavoidable. Thus, a written guaranty, though indorsed upon, or subjoined to a note or agreement, and expressly referring to it, cannot be aided by that instrument, or by the consideration there apparent, but will be void under the statute, unless consideration be expressed upon the face of the guaranty itself. *Brewster* vs. *Silence*, 4 Seld., 207; affirming *same case*, 11 Barb., 144; *De Ridder* vs. *Schermerhorn*, 10 Barb., 638; *Glen Cove Mutual Insurance Company* vs. *Harrold*, 20 Barb., 298; *Wood* vs. *Wheelock*, 25 Barb., 625; *Spicer* vs. *Norton*, 13 Barb., 542, said to be affirmed by the Court of Appeals, 25 Barb., 626; *Gould* vs. *Moring*, 28 Barb., 444; *Wilson* vs. *Roberts*, 5 Bosw., 100; *Baker* vs. *Dillman*, 21 How., 444; 12 Abb., 313; *Clarke* vs. *Richardson*, 4 E. D. Smith, 173. See also indecisive case of *Hall* vs. *Farmer*, 2 Comst., 553. See, likewise, collaterally, on the question of joinder, *Allen* vs. *Fosgate*, 11 How., 218; and, lastly, *Draper* vs. *Snow*, 20 N. Y., 331; affirming *same case*, 6 Duer, 662. See also, as to the invalidity of an undertaking of this description, when not made in writing, and therefore falling, in that respect, within the prohibitions of the statute, *Mallory* vs. *Gillett*, 21

N. Y., 412; affirming *same case*, 23 Barb., 618; *Loonie* vs. *Hogan*, 5 Seld., 435.

By this series of decisions, the following are clearly overruled: *Enos* vs. *Thomas*, 4 How., 48; *Hanford* vs. *Rogers*, 11 Barb., 18. They support the views expressed by Jewett, Gardiner, and Hoyt, J. J., against the opinions of Strong, Ruggles, Cady, and Shankland, J. J., in the indecisive case of *Durham* vs. *Manrow*, 2 Comst., 533.

And, where a party, having a chattel in his possession on which he had a lien, delivered over that chattel to the owner, on the promise of the defendant to pay the amount due, the promise was held void under the statute, there being no consideration moving to the defendant. *Mallory* vs. *Gillett*, 21 N. Y., 412; affirming *same case*, 23 Barb., 618.

The doctrine as laid down in *Brewster* vs. *Silence*, and the other decisions which follow it, is, however, *strictissimi juris;* and, where any distinction can be drawn, the courts will incline to support the validity of a paper, if consideration exists in fact, and the very doctrine itself is, to a certain extent, drawn into question, by Comstock, J., in *Church* vs. *Brown*, 21 N. Y., 315.

The whole subject is most elaborately examined, and the following classification made, of cases not within the operation of the statute, though the promise relates to the existing debt of a third party, by the same learned judge, in *Mallory* vs. *Gillett*, 21 N. Y., 412.

1. Where there is no original debt, to which the promise is collateral.
2. Where the original debt is extinguished, and the creditor has no remedy but on the new promise.
3. Where, though the original debt remains, the new promise is founded on a consideration which moves to the promisor.

The third principle laid down in this classification is fully carried out in the following decisions: *Brown* vs. *Curtiss*, 2 Comst., 225; *Cooke* vs. *Nathan*, 16 Barb., 342; *Fowler* vs. *Clearwater*, 35 Barb., 143; *Talman* vs. *Rochester City Bank*, 18 Barb., 123. And even a parol promise, falling within this class, does not fall within the statute, and will be enforced. *Cardell* vs. *McNiel*, 21 N. Y., 336; *Pennell* vs. *Pentz*, 4 E. D. Smith, 639.

And the statute does not apply to cases, in which the responsibility incurred on behalf of another, is in respect of a future, and not of an existent debt. A guaranty of drafts to be thereafter drawn, has been held to fall within this principle, and that the instrument, and the drafts drawn under it, being taken together, consideration was sufficiently expressed. *Union Bank* vs. *Coster's Executors*, 3 Comst., 203; *Grant* vs. *Hotchkiss*, 15 How., 292; affirmed, 26 Barb., 63. So also, where the guaranty is for goods, to be delivered to a third party, on the credit of the guarantors. *Gates* vs. *McKee*, 3 Kern., 232; *Church* vs. *Brown*.

21 N. Y., 315; reversing *same case*, 29 Barb., 486; *Dunning* vs. *Roberts*, 35 Barb., 463.

So likewise, as to a guaranty to purchase a telegraph bond on a future day, and at a price specified. *Howard* vs. *Holbrook*, 23 How., 64. Or one of a specific future salary. *Douglass* vs. *Jones*, 3 E. D. Smith, 551. See also generally, *Hosmer* vs. *True*, 19 Barb., 106.

It is not necessary, in order to satisfy the requirements of the statute, that the consideration should be expressed in detail; the mere insertion of the words "for value received," are sufficient to support the instrument. *Cooper* vs. *Dedrich*, 22 Barb., 516; *Smith* vs. *Schanck*, 18 Barb., 344; *Miller* vs. *Cook*, 23 N. Y., 495; 22 How., 66; *Howard* vs. *Holbrook*, 23 How., 64. See also *Brewster* vs. *Silence*, 4 Seld., 207 (215).

And, where the instrument is under seal, the seal imports consideration. *Rosenbaum* vs. *Gunter*, 2 E. D. Smith, 415; *McKensie* vs. *Farrell*, 4 Bosw., 192.

For a guaranty to be effectual, the party must be competent to contract in that form. The guaranty of a *feme covert* is accordingly void. *Sexton* vs. *Fleet*, 2 Hilt., 477; 15 How., 106; 6 Abb., 8; *Yale* vs. *Dederer*, 18 N. Y., 265; 17 How., 165; reversing *same case*, 21 Barb., 286. This principle is solemnly reaffirmed in *Yale* vs. *Dederer*, 22 N. Y., 450; 20 How., 242; reversing decision on retrial, reported 31 Barb., 525; 19 How., 146, seeking to establish the contract, on the ground of intention to effect a charge.

A guarantor for the debt of another, and not upon an independent undertaking on his own part, has the ordinary privileges of a surety, and the creditor must, in the first place, exhaust his remedies against the principal, before he can be held liable. *Baxter* vs. *Smack*, 17 How., 183; *Sawyer* vs. *Haskell*, 18 How., 282. So also, in the case of a guaranty of collection, *Newell* vs. *Fowler*, 23 Barb., 628; *Hart* vs. *Hudson*, 6 Duer, 294. But, before bringing suit, it is not requisite that he should give notice to the guarantor of his failure to collect. *Sterns* vs. *Marks*, 35 Barb., 565. As in other cases, any extension of time to the principal debtor, or any alteration of the contract, without the guarantor's express assent, will discharge him. *Coleman* vs. *Wade*, 2 Seld., 44. In *Mc Williams* vs. *Mason*, 6 Duer, 276; *Hart* vs. *Hudson*, 6 Duer, 294; *Leeds* vs. *Dunn*, 6 Seld., 469; *Henderson* vs. *Marvin*, 31 Barb., 297; 11 Abb., 142; *Bigelow* vs. *Benton*, 14 Barb., 123. See, however, as to notes given for an average of purchases guaranteed, *Stewart* vs. *Ranney*, 23 How., 205, below cited.

In *Mains* vs. *Haight*, 14 Barb., 76, it was, in like manner, decided, with reference to a guaranty of a judgment being collectable, that due diligence in the attempt to collect it, was a condition precedent to the

guarantor's liability. As to what is or is not due diligence, see *Gallagher* vs. *White*, 31 Barb., 92.

The holder of a guaranty of collection, is not, however, bound to follow an absconding principal, out of the state, before enforcing the guarantor's liability. *Cooke* vs. *Nathan*, 16 Barb., 342. As to the distinction between a guarantor of collection, and a guarantor of payment, and the mode of enforcement of their respective liabilities, see *Cardell* vs. *McNeil*, 21 N. Y., 336.

A guarantor of payment of a certificate of deposit, transferred by him for value, was held responsible upon his guaranty, notwithstanding the invalidity of the certificate so transferred, for matters *dehors* it face. *Purdy* vs. *Peters*, 35 Barb., 239. So also, if at the time of giving his guaranty, he has himself notice of any matter of invalidity. *Sterns* vs. *Marks*, 35 Barb., 565.

And it has been held, that a surety for quarterly payments of rent, is not discharged by an arrangement between his principal and the lessor, for payment of the same rent monthly; the change is in ease of his obligation. *Ogden* vs. *Rowe*, 3 E. D. Smith, 312. Nor is he or his principal, discharged from their responsibility, by the landlord's acceptance of prior rent from an assignee. *Damb* vs. *Hoffman*, 3 E. D. Smith, 361.

As to the nature and extent of the liability of a guarantor for the payment of rent, see *McLaughlin* vs. *McGovern*, 34 Barb., 208; *Carman* vs. *Plass*, 23 N. Y., 286; *McKenzie* vs. *Farrell*, 4 Bosw., 192; *Baker* vs. *Dillman*, 21 How., 444; 12 Abb., 313.

A mere ineffectual levy, afterwards abandoned, will not avail to satisfy the debt of the principal, or discharge a surety of this description. *Radde* vs. *Whitney*, 4 E. D. Smith, 378. See also, as to what will be held sufficient diligence in attempting to collect, *Pollock* vs. *Hoag*, 4 E. D. Smith, 473.

In framing the complaint upon a liability upon a guaranty, express attention should be paid to the requirements of the statute, and, where the instrument is in writing, it is better that such fact, and the specific terms of the instrument should be averred. *Le Roy* vs. *Shaw*, 2 Duer, 626. See also *Thurman* vs. *Stevens*, 2 Duer, 609.

If the guaranty be of the performance of an executory agreement, the breach of that agreement must be specifically alleged, and, if it be mutual, the facts, showing a readiness to perform, and offer of performance on the part of the plaintiff, must be averred as facts, and not by way of mere general statement. *Van Schaick* vs. *Winne*, 16 Barb., 89.

A valid guaranty, indorsed upon a promissory note, passes by delivery with the note itself, and possession is *primâ facie* evidence of ownership, though it appear by the date of such guaranty, that the

note was not received till after it was due.' *Smith* vs. *Schanck*, 18 Barb., 344; *Cooper* vs. *Dedrick*, 22 Barb., 516.

As to the liability of a guarantor for payment of goods upon a six months credit, for notes given on an average of different purchases, extending the specified credit as to some, and diminishing it as to others, see *Stewart* vs. *Ranney*, 23 How., 205.

§ 148. *Implied Promises.*

(*a.*) Assumpsit; or, Parol Promise.

The theory of this numerous and important class of proceedings, resting under the ancient classification of *assumpsit*, is, that wherever the facts of the case create a duty to pay, the law will imply a promise of payment according to that duty, on which implied promise an action is maintainable.

In pleadings under the new system, it is no longer necessary to aver such promise in express terms. A statement of the facts creating the duty, is all that is sufficient; the law itself supplies the consequent implication, without the necessity of any express averment. See *Farron* vs. *Sherwood*, 17 N. Y., 227 (230); *Allen* vs. *Patterson*, 3 Seld., 476; *Glenny* vs. *Hitchings*, 4 How., 98; 2 C. R., 56; *Tucker* vs. *Rushton*, 2 C. R., 59; 7 L. O., 315; *Buffalo and New York City Railroad Company* vs. *Dudley*, 4 Kern., 336 (343); *Jordan and Skaneateles Plank Road Company* vs. *Morley*, 23 N.Y., 552; *Neas* vs. *Mercer*, 15 Barb., 318. But, to sustain the action, facts sufficient to warrant the implication must be alleged. *Cropsey* vs. *Sweeny*, 27 Barb., 310; 7 Abb., 129.

As a general rule, *assumpsit* is not maintainable, when there exists an actual contract. Where there is an express promise, the law will not create one by implication, in respect of the same transaction. *Underhill* vs. *Crawford*, 29 Barb., 664; 18 How., 112; *Adams* vs. *The Mayor of New York*, 4 Duer, 295. See likewise *Buffalo and New York City Railroad Company* vs. *Dudley*, 4 Kern., 336 (343); *Scranton* vs. *Booth*, 29 Barb., 171 (174).

But, where a special contract has been rescinded, or abandoned, or put an end to by the wrongful act of the defendant, *assumpsit* may be maintained. *Adams* vs. *Mayor of New York*, *supra* (p. 305).

Or, where work has been completely executed (*same case*, p. 205), the plaintiff may then exercise his election. The law raises a duty upon the part of the defendant to pay the price agreed upon, and the plaintiff may count, either upon the implied *assumpsit*, or on the express agreement. *Farron* vs. *Sherwood*, 17 N. Y., 227. See likewise *Atkinson* vs. *Collins*, 18 How., 235; 9 Abb., 353; 30 Barb., 430.

Before consideration of the subject, in connection with the principal classes into which actions of this nature may be divided, a few isolated instances of application of the rule in particular cases, may be considered.

The duty, in respect of which a promise will be implied, must be one legally enforceable, at the time of action. A person, accepting office under a chartered corporation, cannot, accordingly, claim payment for his services, otherwise than in the manner prescribed by its charter. If the expense of such service is to be included in an assessment, he must wait until such assessment is collected, or until the corporation is in default for not proceeding to do so with due diligence, before he can maintain an action. *Baker* vs. *City of Utica*, 19 N. Y., 326.

Assumpsit lies on the part of a plank road company, as against one who, under claim of right, has passed without payment of tolls. The remedy of closing the gate is cumulative. *Jordan and Skaneateles Plank Road Company* vs. *Morley*, 23 N. Y., 552.

Where there is no legal duty to pay, but the remedy of the plaintiff lies in equity, or by means of a suit under a special statute, as in the case of the claim by a legatee for payment out of real estate devised, no action will lie as against the devisee in such a case, on ordinary *assumpsit*, express or implied. *Gridley* vs. *Gridley*, 33 Barb., 250.

Assumpsit is not maintainable, where the plaintiff himself is guilty of violation of duty. Where, therefore, a broker, employed to purchase in his own name, had subsequently sold the stock of his customer, without warrant, or demand and offer of transfer to the principal, it was held that he could not maintain an action for its price. *Merwin* vs. *Hamilton*, 6 Duer, 244. See also cases cited p. 250.

Assumpsit will lie, on a promise to be responsible for expenses occasioned by a delay in payment for goods purchased. *Orguerre* vs. *Luling*, 1 Hilt., 383. For a reward offered for detection of a thief, on proof of information given and consequent arrest. *Brennan* vs. *Haff*, 1 Hilt., 151. Against his parent, for clothing furnished to a minor, previous payments without objection being shown. *Henry* vs. *Betts*, 1 Hilt., 156. For the price of land, conveyed by plaintiff to defendant, in pursuance of an oral contract for sale. *Thomas* vs. *Dickinson*, 2 Kern., 364. By a tenant, for repairs done, under a promise of the landlord to pay for them. *Oettinger* vs. *Levy*, 4 Smith, 288. By a tenant, for damages resulting from violation of the implied agreement of his landlord, to give possession upon the commencement of his term. *Trull* vs. *Granger*, 4 Seld., 115. (See above, under head of *Damages for Breach of Contract.*)

Assumpsit will also lie, for breach of an implied warranty, on transfer of a chose in action, that there is no legal defence to its collection, aris-

ing out of the transferror's own connection with it. *Delaware Bank* vs. *Jarvis*, 20 N. Y., 226. Against consignees, for a sale of property consigned, at an undervalue, contrary to instructions. *Milbank* vs. *Dennistoun*, 1 Bosw., 246.

As to the sufficiency of mutual promises, to constitute consideration, see *Nellis* vs. *De Forest*, 16 Barb., 61. But, to be binding, a promise of this kind must be concurrent, and obligatory upon both parties, and at the same time. See *Macedon and Bristol Plank Road Company* vs. *Snediker*, 18 Barb., 317.

A promise, though made in terms to a third person, inures to the benefit of the party entitled in fact. *Tredwell* vs. *Bruder*, 3 E. D. Smith, 596; and this, even although the consideration proceeds, in fact, from such third person, and not from the plaintiff. *Judson* vs. *Gray*, 17 How., 289; *Cailleux* vs. *Hall*, 1 E. D. Smith, 5; *Lawrence* vs. *Fox*, 20 N. Y., 268.

See, however, as to the invalidity of a parol promise, by a vendor of real estate, to pay for building materials supplied to the purchaser, as being within the statute of frauds. *Loonie* vs. *Hogan*, 5 Seld., 435.

A principal, ratifying or accepting the benefit of an act of his agent, is liable for it, though such act be originally without authority. *Corn Exchange Bank* vs. *Cumberland Coal Company*, 1 Bosw., 436.

But not so, where such adoption has not taken place in fact. *Same case.* Nor will a member of a committee be liable for the orders of others without his assent, in matters exceeding the scope of their original agreement. *Downing* vs. *Mann*, 3 E. D. Smith, 36; 9 How., 204.

Where the whole consideration of an accommodation note is received by a third party, the law implies a promise on his part, to save the parties to it harmless. *Neass* vs. *Mercer*, 15 Barb., 318.

As to the right to waive the tort, and to sue in *assumpsit*, in respect of a sale of goods induced by fraud, see *Kayser* vs. *Sichel*, 34 Barb., 84.

(*b.*) Subscriptions.

The liability of a defendant, on a contract of this nature, is of a somewhat mixed and transitionary nature, between the subjects of the present and the preceding section. It arises out of a signature of the defendant himself, or from his taking an interest, under an agreement, originally evidenced by signature, and, so far, the contract sued upon, may be considered as express; in its incidents and details, however, the liability rests equally and more peculiarly in *assumpsit*, and therefore falls more naturally under the present head. See *Northern Railroad Company* vs. *Miller; and Ogdensburgh, Rome and Clayton Railroad Company* vs. *Frost*, below cited.

Where no counter benefit accrues to the subscriber, and no act is done

upon the faith of his engagement, an action will not lie upon a mere voluntary subscription-paper. It is "*nudum pactum*," with no consideration to uphold the promise. *Stoddard* vs. *Cleveland*, 4 How., 148; see also *Trustees of Hamilton College* vs. *Stewart*, 1 Comst., 581.

Where, however, such subscription is for the purpose of paying for work to be done, and work is done accordingly upon the faith of it, and in reliance upon payment by that means, such work will constitute a sufficient consideration for, and will sustain the promise. So held as to a subscription paper, for erection of a church. *Barnes* vs. *Perine*, 2 Kern., 18; affirming decisions in *same case*, at general term, 15 Barb., 249; and at special term, 9 Barb., 202; *Trustees of First Baptist Society in Syracuse* vs. *Robinson*, 21 N. Y., 234. See, likewise, *Trustees of Hamilton College* vs. *Stewart*, 1 Comst., 581 (586); and this, even when a promise of this nature was made, antecedent to the actual incorporation of the plaintiffs. *Reformed Protestant Dutch Church of Westfield* vs. *Brown*, 29 Barb., 335; 17 How., 287.

So, where the subscriber himself derives any benefit from his subscription, that benefit will be a sufficient consideration to sustain the promise. A subscription to the stock of a company, formed for a profitable purpose, and entitling the subscriber to shares in the undertaking, is accordingly enforceable. And a simple allegation of such subscription will be sufficient, as implying a right to the shares subscribed for, and consideration flowing out of that right. *Oswego and Syracuse Plank Road Company* vs. *Rust*, 5 How., 390. Nor does the power of the company to forfeit the shares for non-payment, interfere with their right to enforce the subscription at their election. *Fort Edward and Fort Miller Plank Road Company* vs. *Payne*, 17 Barb., 567. (N. B. Not affected on this point, by the reversal, 15 N. Y., 583;) *Northern Railroad Company* vs. *Miller*, 10 Barb., 260; *Troy and Rutland Railroad Company* vs. *Kerr*, 17 Barb., 581; *Poughkeepsie and Salt Point Plank Road Company* vs. *Griffin*, 21 Barb., 454; *Ogdensburgh, Rome, and Clayton Railroad Company* vs. *Frost*, 21 Barb., 541; *Troy and Boston Railroad Company* vs. *Tibbets*, 18 Barb., 297; *Rensselaer and Washington Plank Road Company* vs. *Wetsel*, 21 Barb., 56; *The Same* vs. *Barton*, 16 N. Y., 457 (note); *Eastern Plank Road Company* vs. *Vaughan*, 20 Barb., 155; affirmed, 4 Kern., 546; *Lake Ontario, Auburn and New York Railroad Company* vs. *Mason*, 16 N. Y., 451; *Buffalo and New York City Railroad Company* vs. *Dudley*, 4 Kern., 336; *Buttershall* vs. *Davis*, 31 Barb., 323.

But, when stock has once been forfeited, an action for calls upon it cannot be maintained, and such forfeiture may be pleaded in bar of a pending action. *Small* vs. *Herkimer Manufacturing and Hydraulic Company*, 2 Comst., 330.

And it is not necessary, in order to maintain such an action, that the company should be actually incorporated, at the time of the subscription. If made with a view to a future incorporation, it is sufficient, and the company, when organized, may sue upon it, nor is it a condition precedent to its validity, that all the stock of the company should be taken, provided subscriptions have been obtained, to a sufficient amount to render that organization valid, under the statutes of incorporation. *Hamilton and Deansville Plank Road Company* vs. *Rice*, 7 Barb., 157; *Schenectady and Saratoga Plank Road Company* vs. *Thatcher*, 1 Kern., 102; *Rensselaer and Washington Plank Road Company* vs. *Wetsel*, 21 Barb., 56. See likewise *Eastern Plank Road Company* vs. *Vaughan*, 4 Kern., 546, affirming *same case*, 20 Barb., 155.

An agreement to take stock in a plank road company, executed before its organization, has been held binding, though the subscriber never signed the subsequent articles of association. *Poughkeepsie and Salt Point Plank Road Company* vs. *Griffin*, 21 Barb., 454. So also where, by an agreement of this nature, the subscribers promised to pay to individual members, the amount of subscriptions for building such a road, with authority to transfer such subscriptions to a company, when organized, and such transfer was made accordingly. *Eastern Plank Road Company* vs. *Vaughan*, 4 Kern., 546; affirming *same case*, 20 Barb., 155.

Under the railroad acts, it has been held, on the contrary, that signature of the preliminary subscription paper, is insufficient to create a liability for calls, and that, to be enforceable, the subscriber must have signed the subsequent articles of association, or taken up his certificate. *Troy and Boston Railroad Company* vs. *Tibbets*, 18 Barb., 297; *The same* vs. *Warren*, 18 Barb., 310.

And, until such articles of association have been actually filed, and the organization complete, it has been held that the obligation of a subscriber is merely inchoate, and he is at liberty to erase or modify his subscription. *Burt* vs. *Farrer*, 24 Barb., 518. Nor will such an erasure, where made in good faith, invalidate the articles, as to other members. *Rensselaer and Washington Plank Road Company* vs. *Wetsel*, 21 Barb., 56.

The above views, as to subscriptions being revocable, are, however, overruled, and it is now held that a subscription for stock, made before the incorporation of the company, is obligatory upon the subscriber, and cannot be revoked. *Lake Ontario, Auburn, and New York Railroad Company* vs. *Mason*, 16 N. Y., 451; *Rensselaer and Washington Plank Road Company* vs. *Barton*, 16 N. Y., 457, note; *Buffalo and New York City Railroad Company* vs. *Dudley*, 4 Kern., 336.

To be enforceable, the responsibility of a subscriber must be per-

fected. Where, therefore, duplicate lists were used, and that signed by the defendant was not duly filed in the secretary of state's office, it was held that an action against him could not be maintained. *Erie and New York City Railroad Company* vs. *Owen*, 32 Barb., 616.

A conditional subscription is void, as contrary to public policy, and cannot be enforced. *Fort Edward and Fort Miller Company* vs. *Payne*, 15 N. Y., 583; reversing *same case*, 17 Barb., 567; *Troy and Boston Railroad Company* vs. *Tibbets*, *supra*. See also, as to a subscription void on this account, and also for want of a mutual engagement on the part of the company, *Macedon and Bristol Plank Road Company* vs. *Snediker*, 18 Barb., 317.

An unauthorized extension of the undertaking, and increase of capital, will exonerate original subscribers from liability. *Macedon and Bristol Plank Road Company* vs. *Lapham*, 18 Barb., 312.

The mere conferring of additional privileges upon the company will not, however, have that effect. *Poughkeepsie and Salt Point Plank Road Company* vs. *Griffin*, 21 Barb., 454. Nor will an increase of capital, and extension, by authority of the legislature. *Schenectady and Saratoga Plank Road Company* vs. *Thatcher*, 1 Kern., 102; *Buffalo and New York City Railroad Company* vs. *Dudley*, 4 Kern., 336; *Northern Railroad Company* vs. *Miller*, 10 Barb., 260. See also *White* vs. *Syracuse and Utica Railroad Company*, 14 Barb., 559. See likewise, as to the power to make a deviation, *Hamilton and Deansville Plank Road Company* vs. *Rice*, 7 Barb., 157. Nor will the mere existence of an illegal power in the articles of association, invalidate them, when that power has never been exercised. *Eastern Plank Road Company* vs. *Vaughan*, 4 Kern., 546; affirming *same case*, 20 Barb., 155.

A payment of money, *eo nomine*, is not an indispensable condition precedent to the validity of a subscription. If the subscriber have credit for the amount, in another form, it will be a sufficient payment, and he cannot afterward question its validity. *Beach* vs. *Smith*, 28 Barb., 254.

An original subscriber still remains liable for his subscription, though, after a call made, and before it becomes payable, he has transferred his stock to a responsible party. *Schenectady and Saratoga Plank Road Company* vs. *Thatcher*, 1 Kern., 102.

But where, before payment, stock agreed to be taken in a banking association, was transferred, in good faith, and with the assent of the company, the assignee was held to be substituted, and the original subscriber exonerated from liability. *Cowles* vs. *Cromwell*, 25 Barb., 413.

It is not necessary, as a condition precedent to the liability of an individual subscriber, that a statutory deposit, if required, should be

paid on his individual share. It is sufficient, if the cash payments, by whomsoever made, amount in the aggregate to the sum required. *Lake Ontario, Auburn, and New York Railroad Company* vs. *Mason*, 16 N. Y., 451; *Rensselaer and Washington Plank Road Company* vs. *Barton*, 16 N. Y., 457, note.

Nor is it essential, that the subscriptions to the articles of association should all be on the same paper. If made at different places, on separate sheets, they will, if filed together, be equally valid. *Same cases.* See also, on the above points, *Hamilton and Deansville Plank Road Company* vs. *Rice;* and other decisions, above cited.

As to the form of a complaint, upon a subscription agreement of the above nature, and the nature of proof which may be requisite, see *Buffalo and New York City Railroad Company* vs. *Dudley*, 16 N. Y., 336.

As to the power of a corporation, which has entered upon its functions, and been recognized as such, to sue for calls, and the inability of a defendant, under such circumstances, to resist payment, on the ground of alleged defects in its organization, *vide Black River and Utica Railroad Company* vs. *Barnard*, 31 Barb., 258.

(*c.*) Shareholders and Trustees.

Analogous to the above, is the responsibility of shareholders and stockholders in incorporated companies, to the extent of any calls due upon their shares, enforceable in an action by and for the benefit of a creditor or creditors of such body; and also the similar right of such creditors, to resort to the accountability of trustees or directors, in the event of their neglect or malfeasance in office.

It is not of course proposed to enter into the detail of the statutes giving these remedies. A reference to some of the principal of them, and to the cases immediately bearing upon the question of averment, will be sufficient, leaving the matter for further and deeper research, in the preparation of a pleading for this purpose.

The principal statute in relation to corporations for mining, mechanical, or chemical purposes, was passed on the 11th of February, 1848. It will be found at 3 R. S. (3d edition), p. 613. See especially sections 10, 12, 13, 14, 15, 18, and 24. As to banking corporations and associations, *vide* chapter 226 of 1849, p. 340, amended by chapter 153 of 1853, p. 283; and chapter 365, of 1859, p. 880. The general railroad act, will be found in chapter 140, of 1850, p. 211. See especially section 10, as amended by chapter 282, of 1854, p. 68; section 16, p. 614. And the act for the incorporation of ocean steamship companies, chapter 228, of 1852, p. 302; sections 5, 6, 8, and 9.

In relation to the special liability of railroad shareholders, for debts owing to servants and contractors, under the sections last referred to, and the distinction between the liability under the original, and under the amended measure, see *Conant* vs. *Van Schaick*, 24 Barb., 87; and *Corning* vs. *McCullough*, 1 Comst., 47, there referred to. This peculiar liability, only extends to laborers employed by the company itself, not to those in the service of a contractor. A person in the latter category, cannot recover for his services, against a stockholder who has paid his calls in full. *Gallagher* vs. *Ashby*, 26 Barb., 143.

As to the liability of a shareholder in an ocean steamship company, see *Abbott* vs. *Aspinwall*, 26 Barb., 202. The same case decided that the liability of stockholders, under statutes of this description, is several, and not joint; each creditor has a separate remedy against each stockholder. See also *Eaton* vs. *Aspinwall*, 6 Duer, 176.

And such liability will not be discharged under that statute, by payment of calls to the company itself, unless and until a proper certificate of payment of all calls, shall have been filed as required by the statute. *Same cases.*

A *feme covert*, holding stock in a banking corporation, is liable, in common with other stockholders, to an assessment for its debts. *Matter of Reciprocity Bank*, 22 N. Y., 1.

Payment of debts of the company, to the amount of calls due from the party sued, will, however, be a complete defence, in an action of this nature. *Garrison* vs. *Howe*, 17 N. Y., 458. See also generally, as to the measure of liability of stockholders in this respect. *Remington* vs. *King*, 11 Abb., 278; *Woodruff and Beach Iron Works* vs. *Chittenden*, 4 Bosw., 406.

An action of this nature is not maintainable, by a creditor, under a mere executory contract, but only in respect of a debt actually due. *Garrison* vs. *Howe*, *supra.*

In relation to the liability of stockholders, being rather that of partners than of sureties, or guarantors, see *Moss* vs. *Averell*, 6 Seld., 449.

An action of this nature is maintainable, against a party holding a mere equitable interest in the stock in respect of which it is brought. *Burr* vs. *Wilcox*, 22 N. Y., 551; affirming *same case*, 6 Bosw., 198.

As long as the company continues in business, several actions of this nature are maintainable, and the most diligent will obtain priority. The granting of a sequestration and appointing of a receiver, however, on the insolvency of the company, in a general creditor's action, will put a stop to all further proceedings of this nature; and the further prosecution of one already commenced, after order for sequestration, though before the actual appointment of a receiver, will be enjoined. *Rankine, Receiver*, vs. *Elliott*, 16 N. Y., 377; affirming *same case*, 14 How., 339.

See also, as to stay of supplementary proceedings, in favor of a general creditor's proceeding, *Hammond* vs. *Hudson River Iron and Machine Company*, 11 How., 29.

As to the similar effect of the dissolution of a manufacturing corporation, under the special law relative to Herkimer county (chapter 361 of 1852, p. 572), see *Herkimer County Bank* vs. *Furman*, 17 Barb., 116; *Walker* vs. *Crain*, 17 Barb., 119.

In order to sustain a suit of this nature, against shareholders in a foreign corporation, the plaintiff must allege and show that, by the laws of the state where such corporation was created, the corporation itself would be competent to obtain the judgment or relief sought to be obtained, and also that a several, instead of a general action is maintainable. *McDonough* vs. *Phelps*, 15 How., 372.

To charge trustees with individual liability, by reason of an omission to file and publish the annual report required by law, the debt sought to be enforced must be contracted during, or must have existed at the time of a subsequent default. *Garrison* vs. *Howe*, 17 N. Y., 458; *Shaler and Hall Quarry Company* vs. *Brewster*, 10 Abb., 464.

As to the averments which may be admissible or proper, in actions of this last description, see *Andrews* vs. *Murray*, 9 Abb., 8; *Ogden* vs. *Rollo*, 9 Abb., 8, note.

As to the inability of directors, to effect a valid sale of the whole corporate property, as against any recusant stockholder, see *Abbott* vs. *The Hard Rubber Company*, 20 How., 199; 11 Abb., 204; affirmed, 21 How., 193.

In *Peckham* vs. *Smith*, 9 How., 436, it was held sufficient, in an action against a stockholder, to allege the recovery of a judgment against the company, and the other facts on which the liability of the defendant attached, without alleging the consideration or circumstances of the original indebtedness to the plaintiff.

See also same case, as to the right of stockholders, or their assignees, to recover back from the company, subscriptions paid by them for carrying out a purpose which has subsequently failed.

The complaint must also show that the parties sought to be held responsible, were stockholders at the time the plaintiff's debt was incurred. *Young* vs. *New York and Liverpool Steamship Company*, 10 Abb., 229.

As to the sufficiency of a complaint, averring that the defendants were shareholders, together with the contracting of the plaintiff's debt, proceedings taken by him, recovery of judgment thereon, and the issuing and return of an execution unsatisfied, whilst they remained such, see *Witherhead* vs. *Allen*, 28 Barb., 661.

In an action against a stockholder, it is not necessary to aver insol-

vency of the corporation, except in those cases where the liability depends upon such insolvency, or the creditor is required to exhaust his remedy against the corporation in the first instance. In other cases, the latter has his election to sue either. *Perkins* vs. *Church*, 31 Barb., 84.

(*d.*) Contribution and Subrogation.

One of several sureties, who has paid the debt of the principal, may maintain an action against the others, for their proportional parts of the total amount, nor is parol proof admissible, to qualify such liability. *Norton* vs. *Coons*, 2 Seld., 33.

A discharge of one surety, from the legal liability to answer for the demand against the principal, will however be a bar to an action of this nature. *Tobias* vs. *Rogers*, 3 Kern., 59.

So also will be an agreement, between the sureties themselves, that one should indemnify the other. *Barry* vs. *Ransom*, 2 Kern., 462.

In the analogous action against his principal, the surety, though entitled to indemnity against ordinary costs, cannot recover those of putting in a manifestly untenable defence. *Holmes* vs. *Weed*, 24 Barb., 546.

As to the right of the part owner of a vessel, to maintain an action for contribution by other part owners, toward a demand paid by him, see *Wood* vs. *Merritt*, 2 Bosw., 368.

As to the right of the owner in fee, to compel contribution on the part of a dowress, of her share of taxes and assessments, chargeable upon real estate, see *Linden* vs. *Graham*, 34 Barb., 316.

See also as to the right of a stockholder in a railroad corporation, when sued by a laborer or servant, to enforce payment by the others of their *pro rata* proportion of the recovery against him. Laws of 1854, p. 614, chapter 282, section 14, annulling the general act of the 2d of April, 1850, above referred to in last subdivision.

As between wrongdoers, no claim for contribution can be made; each must bear his own burden. So held, with reference to a claim made by a delinquent trustee of a manufacturing corporation, held liable by one of its creditors, as against his cotrustees, similarly liable. *Andrews* vs. *Murray*, 33 Barb., 354.

As to the right of the parties to an accommodation note, to look for indemnity to a third person, who has received the whole benefit of it, see *Neass* vs. *Mercer*, 15 Barb., 318.

In a complaint for relief of this nature, allegations of the making of the original obligation, and the payment of it by the plaintiff, are sufficient to establish a case against the defendant. He is not bound to state what proportion the defendant ought to pay; the law settles that: nor is he bound to state whether any thing has been repaid to him, that

being matter of defence. *Van Demark* vs. *Van Demark*, 13 How., 372.

A surety, who pays the debt of his principal, is entitled to a full subrogation to every remedy which the creditor so paid off possessed, and, for this purpose, to an assignment of the original debt, and the securities for it; and also to the benefit of any judgment which may have been recovered. *Goodyear* vs. *Watson*, 14 Barb., 481.

Where one of several joint debtors paid a judgment, partly out of his own money, and partly by the indorsement of a third party, an assignment of the judgment for the benefit of that party was sustained, and held enforceable, as an indemnity to the indorser. *Harbeck* vs. *Vanderbilt*, 20 N. Y., 395. So also a surety, paying a joint judgment, may take an assignment of it to himself, and enforce it, as against his principal. *Alden* vs. *Clark*, 11 How., 209. Or an assignment for his benefit to a third person will, in like manner, be valid. *Eno* vs. *Crooke*, 6 Seld., 60.

In *The People* vs. *Schuyler*, 4 Comst., 173, the sureties of the sheriff, on payment of a judgment against him for a wrongful seizure, were held entitled to be subrogated to an indemnity which he had taken.

Where the creditor had, by agreement, rendered valueless a security, to which the surety was entitled to be subrogated, the latter, who had paid the judgment in ignorance of such agreement, was held entitled to recover against the former, the amount of the defeated security. *Chester* vs. *Bank of Kingston*, 16 N. Y., 336.

The discharge of security for the liability, taken by one surety for his own indemnity, will defeat his right to claim contribution from others. All have an equitable interest in a security so taken, and, to the extent to which they are injured by such relinquishment, the fact of it will be a defence. *Ramsey* vs. *Lewis*, 30 Barb., 403.

Where an indorser gave his renewal notes, on separate discontinuance of an action brought against him and the maker, but omitted to pay them in full, he was held not to be entitled to demand an assignment of a judgment subsequently taken against the maker, though such was the agreement, at the time the notes were given. *Payton* vs. *Wight*, 2 Hilt., 77.

An accommodation acceptor is entitled to be subrogated to the benefit of an action by the holder against the drawer, on payment of the amount due to the plaintiff in such action. *Bank of Toronto* vs. *Hunter*, 4 Bosw., 646; 20 How., 292.

A person damnified by the acts of a wrongdoer, cannot claim to be subrogated to an indemnity, which such wrongdoer may nave taken, against liability in respect of his wrongful act. *McGay* vs. *Keilback*, 14 Abb., 142.

(*a.*) General Observations as to Pleading.

General Observations as to Pleading.

In relation to the remaining actions which fall under this class, a few general observations as to the structure of the complaint, as applicable to all without distinction, will be useful, before entering into the details belonging to each specific branch.

In actions of this description, the statement of the cause of action, when arising out of numerous items, may be made briefly, according to the old practice, and considerable latitude of implication will be allowed. As a general rule, the old form of count in *indebitatus assumpsit*, may be substantially followed, and the complaint will be good, provided it contains, either by way of express averment or necessary implication, a statement of all the substantial facts necessary to constitute a cause of action. See *Allen* vs. *Patterson*, 3 Seld., 476. See also, *Moffatt* vs. *Sackett*, 18 N. Y., 522 (525). The specific items need not be set out, the remedy of the defendant being, if he requires more detailed information, to move for a bill of particulars. *Cudlipp* vs. *Whipple*, 4 Duer, 610; 1 Abb., 106; *Graham* vs. *Cammann*, 5 Duer, 697; 13 How., 360; *Beekman* vs. *Platner*, 15 Barb., 550. So far as *Neefus* vs. *Kloppenburgh*, 2 C. R., 76, seems to prescribe a stricter rule than the above, it is, of course, overruled.

But, when different classes of items have accrued to the plaintiff, in respect of different interests, each class of items should be stated by way of a separate cause of action, with the appropriate averments. With this restriction, any number of items may, however, be properly inserted in a single count. *Adams* vs. *Holley*, 12 How., 326.

Nor must the plaintiff's demands, when stated in a single count, leave it indefinite or uncertain, whether he seeks to recover upon one or more separate causes of action. If so, it will be obnoxious to a motion under section 160. *Clark* vs. *Farley*, 3 Duer, 645. As to the necessity of a definite statement, with a view to show an indebtedness actually accrued, see *Chamberlain* vs. *Kaylor*, 2 E. D. Smith, 134. See also, as to the necessity of some legal liability being shown, on which to sustain an implied promise, *Cropsey* vs. *Sweeny*, 27 Barb., 310; 7 Abb., 129.

And, where the indebtedness has accrued under different contracts, it is admissible, and may be better, to divide the complaint into separate counts, one applicable to each contract. See *Accome* vs. *American Mineral Company*, 11 How., 24; *Staples* vs. *Goodrich*, 21 Barb., 317. And each statement must be complete in itself, and also sufficiently definite, or it will be impeachable, by motion in the latter, and by demurrer, in the former category. *Chesbrough* vs. *New York and Erie*

Railroad Company, 26 Barb., 9; 13 How., 557; *Farcy* vs. *Lee*, 10 Abb., 143.

But the old system of stating the same cause of action several times over, in different counts, is, under the Code, wholly inadmissible. See *Churchill* vs. *Churchill*, 9 How., 552, and numerous other cases heretofore cited in book VI.

(*b.*) Balance of Account.

In a complaint for an indebtedness of this description, a general allegation, in the nature of the old *indebitatus* count, will be sufficient, without any statement of details. *Vide Cudlipp* vs. *Whipple*, above referred to.

But, on the face of that complaint, the demand must be single in its nature; or, if stated in one count, it will be objectionable for uncertainty. *Clark* vs. *Farley*, *supra.*

In *Graham* vs. *Camman*, 13 How., 360; 5 Duer, 697, also above noticed, a short form of complaint upon an account stated, was sustained by the court.

As to what will be sufficient to constitute a settled account, the balance on which will be recoverable as admitted, and the account not allowed to be opened, see *Powell* vs. *Noye*, 23 Barb., 184.

The same principle was applied, and, where an account had been delivered and was not objected to, but the balance claimed thereon was paid at the time, it was held to be conclusive as an account stated, and that it could not be afterwards reopened, without affirmative proof of mistake or fraud, in *Lockwood* vs. *Thorne*, 1 Kern., 170; reversing *same case*, 12 Barb., 487.

On a subsequent trial of the same case, the above strict doctrine was qualified, and it was held that a mere omission to object, is only sufficient to raise a presumption of correctness, and that even an adjustment and payment of the balance, is repellable, by evidence of the course of dealing between the parties, or other circumstances, explaining or qualifying the implied admission, the impeachments being made within a reasonable time, to be determined from all the attending circumstances. *Lockwood* vs. *Thorne*, 18 N. Y., 285; reversing *same case*, 24 Barb., 391.

See definitions in same case, as to what will, or will not, be sufficient to constitute an account delivered, a stated, or a settled account respectively, as given by Pratt and Selden, J. J., 18 N. Y., 288 to 290, and 292.

As to the insufficiency of a mere delay in adjustment, to constitute an account stated or settled, see also *Porter* vs. *Lobach*, 2 Bosw., 188.

The giving of a promissory note is *primâ facie* evidence of an

accounting, and settlement of all demands between the parties, but subject to explanation. *Lake* vs. *Tyson*, 2 Seld., 461.

(*c.*) Money Lent or Advanced.

A firm is not responsible for an advance to its mere agent, though having a partial interest in the profits of particular transactions, unless it is shown to be on the account, or for the benefit of the partnership. *Porter* vs. *Loback*, 2 Bosw., 188.

A commission merchant, making advances on the faith of goods consigned to him, must rely, in the first place, upon the proceeds of those goods, and must show that fund to be insufficient, before he can recover against the consignor personally. *Gihon* vs. *Stanton*, 5 Seld., 476. See also *Mottram* vs. *Mills*, 2 Sandf., 189.

Where a note, given as security on a loan of money, was surrendered by the holder, on a promise to substitute another for it, he was held entitled to recover on the original consideration, on a refusal to perform the promise. *Westcott* vs. *Keeler*, 4 Bosw., 564.

Money loaned in contemplation of a contract prohibited by statute, but not *malum in se*, may be recovered back, in an action founded on the original consideration, or in one for money had and received. *Oneida Bank* vs. *Ontario Bank*, 21 N. Y., 490.

(*d.*) Money Paid.

One class of cases falling strictly within the scope of this division, has been, to a certain extent, anticipated in a previous section, under the head of *Contribution*.

The real cause of action by a subsequent indorser, in respect of moneys paid on taking up a promissory note, falls under this class, and is, as against each prior indorser, a separate liability, dating from the time of payment. *Barker* vs. *Cassidy*, 16 Barb., 177.

An action in this form on a note remaining unpaid, will be wholly unavailing to charge indorsers as such. *Cottrell* vs. *Conklin*, 4 Duer, 45.

A corporation cannot recover back money paid by it on an usurious transaction. The prohibition of the statute (Laws of 1850, chapter 172) extends equally to the assertion of such a claim, as to setting up usury as a defence, by a body of this description. *Butterworth* vs. *O'Brien*, 23 N. Y., 275.; affirming *same case*, 28 Barb., 187; 16 How., 503; 7 Abb., 456. See also *dicta*, in the case of *Curtis* vs. *Leavitt*, 15 N. Y., 9, referred to at close of opinion of Comstock, J.

But, as regards natural persons, a right of action to recover back money so paid, is expressly given by statute. *Vide* 1 R. S., 772, sections 3, 4.

Where an accommodation note had been loaned to a third party, who had received the exclusive benefit, and promised to save the others

harmless, the accommodation indorser, on subsequent payment to the holder, was held entitled to recover back the amount against such third party, as being in fact the principal debtor. *Neass* vs. *Mercer*, 15 Barb., 318.

Money paid, either by the party, or by his surety, in satisfaction of a judgment, subsequently reversed, may, on such reversal, be recovered back. *Lott* vs. *Swezey*, 29 Barb., 87; *Garr* vs. *Martin*, 1 Hilt., 358. In strictness however, the action is more properly for "money had and received." See next head.

When, by agreement, one party had subscribed for stock and paid the deposit, for the benefit of another, the former was held entitled to recover back, as against the latter, the amount of a subsequent instalment, which he had been compelled to pay, notwithstanding a repudiation of the bargain, and a refusal to accept a transfer of the stock, when tendered. *Orr* vs. *Bigelow*, 4 Kern., 556.

Payments made by the vendee on a contract void in law, cannot be recovered back by him, when the vendor is ready and offers to perform. *Collier* vs. *Coates*, 17 Barb., 471. But otherwise, where a payment of this description has been induced by false representations on the part of the vendor. *Hillman* vs. *Strauss*, 2 Hilt., 9. Nor is the defence of illegality available, as against an innocent party. *Merritt* vs. *Millard*, 5 Bosw., 645.

No recovery can be had by parties to an illegal contract, in respect of moneys paid, as between themselves. *Sharp* vs. *Wright*, 35 Barb., 236.

Money paid on a policy of insurance, may be recovered back by the insurers, if paid in entire ignorance of circumstances, which, if known, would have enabled them to resist the claim; but not so, if such insurers knew, or by inquiry, could have ascertained, the grounds on which they could have so resisted. *Mutual Life Insurance Company of New York* vs. *Wager*, 27 Barb., 354.

In relation to voluntary payments, the general rule is that, if one person pays the debt of another, without request or compulsion, or circumstances which amount to compulsion, such payment is voluntary, and, if made, is made in the payer's own wrong, and cannot be recovered back. See *Ingraham* vs. *Gilbert*, 20 Barb., 151; *Ogden* vs. *Des Arts*, 4 Duer, 275 (284); *Lowber* vs. *Selden*, 11 How., 526; *Nixon* vs. *Jenkins*, 1 Hilt., 318; *Hearne* vs. *Keene*, 5 Bosw., 579. But any request of the defendant, or any authority, express or implied, to make the payment, will take the case out of the operation of the rule. See last case.

So as to moneys paid voluntarily, to a person authorized to receive them, if collectable, upon an unfounded claim of right, but without misrepresentation or mistake, or objection or protest on the part of the

payer. *New York and Harlem Railroad Company* vs. *Marsh*, 2 Kern., 308. The payment there in question was to a tax collector, in respect of an actually void assessment. So also, as to money paid for redemption of taxes, on property sold by the vendor, with a covenant for quiet enjoyment, such payment being made, without request or eviction. *McCoy* vs. *Lord*, 19 Barb., 18.

And a party, having paid an assessment on his property, cannot afterwards maintain an action to recover back the amount, on the ground of irregularity or error in making it. He should have objected at the time. *Sandford* vs. *Mayor of New York*, 33 Barb., 147; 20 How., 198; 12 Abb., 23. Nor will a misapplication of the amount paid, by crediting it to another lot, be ground for the action. *Perdue* vs. *Mayor of New York*, 12 Abb., 31.

So likewise, as to money incautiously paid, under a mistake not clearly made out. *Taylor* vs. *Beavers*, 4 E. D. Smith, 215. See also *Mutual Life Insurance Company of New York* vs. *Wager*, 27 Barb., 354, above cited.

And money voluntarily paid upon a claim of right, without mistake or ignorance of the facts, cannot be recovered back. *Forrest* vs. *Mayor of New York*, 13 Abb., 350. Nor will the fact that the payment was made under protest, nullify its legal effect. See also *Fleetwood* vs. *City of New York*, 2 Sandf., 475.

But where a payment, though in fact of the debt of another, is made under circumstances of duress, or of imminent risk or damage to the party paying, the rule will not apply, and he may maintain an action.

So held, as to payment of taxes, by a person whose property is subject to distress, or who is also personally liable. *Lageman* vs. *Kloppenburg*, 2 E. D. Smith, 126. As to payment of the entire taxes on real property, by a life tenant, in order to protect her estate from the neglect of the owner of the fee to contribute his fair proportion. *Graham* vs. *Dunnigan*, 4 Abb., 426; 6 Duer, 629.

As to payment of an assessment by mistake, under threat of immediate enforcement. *Allen* vs. *The Mayor of New York*, 4 E. D. Smith, 404 (Ingraham, J., dissenting). As to payment of official fees, illegally exacted, but upon denial to afford required information, without their payment. *Townsend* vs. *Dyckman*, 2 E. D. Smith, 224.

The mere liability to ouster, on the suit of a superior landlord, is sufficient to protect an under-tenant, in paying rent to him, without suit or even demand, and to render it a valid payment, to the use of his immediate lessor. *Peck* vs. *Ingersoll*, 3 Seld., 528. The same is the case as to money paid on a subsequently reversed judgment, though paid at once, and not under actual duress. It is sufficient, if the pay-

ment, when made, could be compelled by law. *Lott* vs. *Sweezy*, 29 Barb., 87; *Garr* vs. *Martin*, 1 Hilt., 358.

As to an over-payment of freight, made under protest, by the owner of goods to a carrier, in order to obtain possession of them. *Harmony* vs. *Bingham*, 2 Kern., 99; affirming *same case*, 1 Duer, 209. See also, as to the recovery of an overcharge of duties, allowed in account by mistake, *Renard* vs. *Fiedler*, 3 Duer, 318.

The rule denying a recovery in respect of a voluntary payment, being in its nature harsh, will not be applied, in cases where a subsequent promise of repayment has been made. Such a promise is sufficiently supported by the actual payment, and may be enforced, against the actual maker, though not against another person jointly interested. *Nixon* vs. *Jenkins*, 1 Hilt., 318.

Moneys paid by the purchaser, on account of a contract subsequently rescinded by the vendor, may be recovered back. *Main* vs. *King*, 8 How., 535; *Fancher* vs. *Goodman*, 29 Barb., 315. See also next subdivision.

So also, as to money paid by mistake, by the owner of lands, for purchase of a non-existent tax title. *Martin* vs. *McCormick*, 4 Seld., 331; reversing *same case*, 4 Sandf., 366; *Gardner* vs. *The Mayor, &c., of Troy*, 26 Barb., 423.

Where the vendee is ready, and the vendor fails to perform a contract, deposit-money paid by the former may be recovered back by him. *Flynn* vs. *McKeon*, 6 Duer, 203.

Money paid at the request of a corporation, may be recovered back on the ordinary *assumpsit*, even although the contract on which such payment was made, was not binding on the corporation, as being *ultra vires*. *Parish* vs. *Wheeler*, 22 N. Y., 494.

See also cases cited in next subdivision, as to an action for money had and received, under circumstances analogous to those above stated.

(*e.*) Money Had and Received.

Many of the cases falling under this head are scarcely distinguishable from those coming under the last head, especially as regards those in relation to a reversed judgment, or an unperformed contract.

In *Ross* vs. *Curtis*, 30 Barb., 238, it is stated as an elementary principle, that, where one person receives money for another, and the law makes it the duty of the receiver to pay it to the person for whom or for whose use it is received, a promise to pay it in accordance with the duty is always presumed, and a privity established, as matter of law, between the parties. See likewise general principle, as stated in *Cobb* vs. *Dow*, 6 Seld., 335 (341).

Money received by the supervisor of a town, to be applied in pay-

ment of certain bonds, was therefore held, in that case, to be recoverable from him, in a suit by the bondholders, for whom he so held it as depositary.

A bare averment, according to the old forms, will not be sufficient in a complaint of this nature; the facts which show the receipt of the money by the defendant, and that such receipt was not on his own account, but for the use of the plaintiff, should be expressly alleged, or demurrer will lie. *Lienan* vs. *Lincoln*, 2 Duer, 670; 12 L. O., 29. See also *Cushingham* vs. *Phillips*, 1 E. D. Smith, 416.

Money paid by the vendee, under an uncompleted contract, subsequently rescinded by the vendor, may be recovered back by the vendor, as money had and received. *Utter* vs. *Stuart*, 30 Barb., 20. See sundry cases cited in last subdivision. See likewise, as to a contract rescinded for fraud, *Seaman* vs. *Low*, 4 Bosw., 337.

A deposit paid on a sale, induced by misrepresentations, may be recovered back, on a refusal to complete. *Hutcheon* vs. *Johnson*, 33 Barb., 392. So also, as to moneys paid in contemplation of a future contract, never in fact procured. *Phelps* vs. *Bostwick*, 22 N. Y., 242.

But if the purchaser retain any benefit under the contract, he cannot, whilst so retaining it, maintain an action of this description. *Goelth* vs. *White*, 35 Barb., 76.

Money loaned in contemplation of a contract, prohibited by statute, but not *malum in se*, may be recovered back, either as money advanced, or, on a disaffirmance of such contract, as money had and received. *Oneida Bank* vs. *Ontario Bank*, 21 N. Y., 490.

Money paid in violation of the statute against betting and gaming, may be recovered back, by an action in this form. *Betts* vs. *Bache*, 14 Abb., 297; affirming *same case*, 23 How., 197; 14 Abb., 297.

The defence of illegality is not available, as against a party who has paid money, in ignorance of its existence. *Merritt* vs. *Millard*, 5 Bosw., 645.

An action is maintainable for money paid on a contract, which, at the time of its making, was in fact impossible of performance. *Briggs* vs. *Vanderbilt*, 19 Barb., 222. See also *Bonesteel* vs. *The Same*, 21 Barb., 26. In the former of these cases, it is held that this is the only proper form of action under such circumstances, and that a complaint for money advanced, or money paid, will not lie.

An action of this description has been held to lie in the following cases:

By a donee, *inter vivos*, against the representative of the donor, who had, subsequently, collected the fund given. *Penfield* vs. *Thayer*, 2 E. D. Smith, 305.

By continuing partners, entitled to the assets of a dissolved firm,

against the outgoing partner, for moneys collected by him, contrary to such understanding. *Ross* vs. *West*, 2 Bosw., 360.

By a retiring member of a building association, for past subscriptions, to the return of which he is entitled under its articles. *Wetterwulgh* vs. *Knickerbocker Building Association*, 2 Bosw., 381.

Against the supervisors of a county, for the return of a tax illegally levied. *Hill* vs. *Board of Supervisors of Livingston*, 2 Kern., 52 (62, per Allen, J.). A municipal corporation is not responsible, for money received by its collector for redemption of taxes. The latter acts in such capacity as a public officer, and not as agent. *Onderdonk* vs. *City of Brooklyn*, 31 Barb., 505.

Against a stakeholder of moneys, deposited on an illegal wager, even though he have paid the amount over, by direction of the plaintiff. *Ruckman* vs. *Pitcher*, 1 Comst., 392; *Storey* vs. *Brennan*, 15 N. Y., 524; *O'Maley* vs. *Reess*, 6 Barb., 658; *Hendrickson* vs. *Beers*, 6 Bosw., 639.

Contractors, using the bills of the plaintiff for supplies furnished, by way of deduction, on a settlement with their laborers, were held liable for the amount of which they had thus obtained the benefit, as for money collected on account of the plaintiff. *Beach* vs. *Hungerford*, 19 Barb., 258.

Where wheat in store, belonging to one party, had been sold, and its avails received by another, through mistake, all parties concerned were held to be liable, in an action of this nature. *Cobb* vs. *Dow*, 6 Seld., 335.

An action is maintainable against a defaulting agent, in respect of moneys collected, and not paid over by him, without previous demand. *Hickok* vs. *Hickok*, 13 Barb., 632.

So also, as to moneys received by an agent, under a positive duty to remit at once, and not remitted accordingly. *Stacy* vs. *Graham*, 4 Kern., 492; affirming *same case*, 3 Duer, 444.

An agent, who has received money for sale of city bonds, is liable to pay the same over to his principals, though the issue and sale of such bonds was, in fact, unauthorized. *Mayor, &c., of Auburn* vs. *Draper*, 23 Barb., 425.

The duty of a treasurer is to pay over the moneys of his principal on demand. On demurrer, the service of a summons was held to be sufficient demand upon him. But, where no other is made previous to action, he should not, it seems, pay the costs. *Second Avenue Railroad Company* vs. *Coleman*, 24 Barb., 300. Of course he can only entitle himself to the benefit of this latter rule, by immediate payment or tender of the debt itself, when so demanded. Delay may be construed as a refusal.

A mere depositary of money cannot be sued for it, without previous demand and refusal. *Phelps* vs. *Bostwick*, 22 Barb., 314.

Nor can an action be maintained against a foreign factor or agent, until after default made by him on demand, or receipt of positive instructions to remit. *Halden* vs. *Crafts*, 4 E. D. Smith, 490; 2 Abb., 301. So also, as to goods delivered to, or left with factors, for sale on commission. *Baird* vs. *Walker*, 12 Barb., 298; 1 C. R. (N. S.), 329; *Brink* vs. *Dolsen*, 8 Barb., 337.

And if a foreign factor takes upon himself to make a remittance, without receipt of directions from his principals, he does so at his own risk. *Heubach* vs. *Rother*, 2 Duer, 227.

Where a particular course of dealing is prescribed between bailor and bailee, the former cannot recover without compliance with it. So held, as to a demand against a savings bank, without production of the deposit-book, according to regulation, or proof of its loss or destruction. *Warhus* vs. *Bowery Savings Bank*, 5 Duer, 67.

A disputed claim to real estate and its profits, cannot be asserted by means of an action of this nature. *Carpenter* vs. *Stillwell*, 3 Abb., 459.

The outgoing member of a law partnership, retaining no interest, was held not to be responsible for moneys come to the hands of the continuing partner after dissolution, received in a suit in which such continuing partner was originally, and remained the sole attorney of record. *Ayrault* vs. *Chamberlain*, 26 Barb., 83.

Nor will an action of this nature lie, for a subscription paid in for shares subsequently refused to be delivered; the remedy lies in an action on the implied promise to deliver. *Arnold* vs. *The Suffolk Bank*, 27 Barb., 424.

Nor can such an action be brought for moneys received under a contract, which does not bind the party who has received it. It must be founded on some duty incumbent on the defendant. *Neville* vs. *Neville*, 22 How., 500.

(*f.*) Work and Labor.

As to a complaint of this nature, and as to the power of a plaintiff, on the one hand, to frame his complaint in general terms, without specification of items, and the necessity, on the other, of his so framing it with sufficient precision and certainty, to indicate the real nature of his cause of action, and the period within which it arose, see the commencement of this section, and the cases there cited.

It may be convenient to divide this subdivision under two heads.

1. Work and labor performed, and materials furnished, in and about a building or manufacturing contract.

2. Work and labor performed, or services rendered, irrespective of any claim for materials furnished.

(*g.*) 1. Work, Labor, and Materials.

Under a contract for the manufacture and delivery of a specific article, a complaint in this form is proper, rather than one for goods sold and delivered. *Prince* vs. *Down*, 2 E. D. Smith, 525. The claim is not one of the latter nature, or within the statute of frauds. *Courtright* vs. *Stewart*, 19 Barb., 455.

If the work has been done in pursuance of a contract, and that contract has not been fully performed in all its parts, and fully complied with in all its requisitions, the action must be brought specially upon the contract itself, and not on the ordinary *assumpsit*. *Atkinson* vs. *Collins*, 30 Barb., 430; 18 How., 235; 9 Abb., 353. See especially, as to the necessity of furnishing an architect's certificate when, and in the form called for by the contract, *Adams* vs. *The Mayor of New York*, 4 Duer, 295; *Martin* vs. *Leggett*, 4 E. D. Smith, 255; *Smith* vs. *Brady*, 17 N. Y., 173. As to the form and conclusiveness of such a certificate, when granted, see *Bloodgood* vs. *Ingoldsby*, 1 Hilt., 388; and as to the conclusiveness of the architect's, testimony, see *Tucker* vs. *Williams*, 2 Hilt., 562. And, in a complaint of this nature, performance, or facts excusing a strict performance, must be fully and distinctly averred. *Smith* vs. *Brown*, 17 Barb., 431.

But, upon a special contract executed in all its parts, *assumpsit* may be maintained, and the plaintiff has his election, either to sue in this form, or upon the contract itself. *Farron* vs. *Sherwood*, 17 N. Y., 227. This case settles this question, and removes the doubts expressed in *Atkinson* vs. *Collins*, 30 Barb., 430; 18 How., 235; 9 Abb., 353.

On an entire contract, full performance must, as a general rule, be both averred and proved, before any recovery can be had, and, if the complaint falls short in this particular, demurrer will lie, or the objection, whenever taken, will be fatal. And, under such circumstances, actual occupation by the party with whom the contract is made, will not necessarily be a waiver of strict performance. "A party is entitled to retain, without compensation, the benefit of a partial performance, where, from the nature of the contract, he must receive such benefit, in advance of a full performance, and is, by the contract, under no obligation to pay, until the performance is complete." *Smith* vs. *Brady*, 17 N. Y., 173; *Cunningham* vs. *Jones*, 20 N. Y., 486; *McConihe* vs. *New York and Erie Railroad Company*, 20 N. Y., 495. As to unfinished work, see *White* vs. *Hewett*, 1 E. D. Smith, 395. And work unskilfully performed, or not performed according to contract, cannot, if not accepted, be recovered for. *Pullman* vs. *Corning*, 5 Seld., 93; affirming *same case*, 14 Barb.,

174; *Pike* vs. *Butler*, 4 Comst., 360. See also, on demurrer, *Smith* vs. *Brown*, 17 Barb., 431. And, as to the rule generally, *Tucker* vs. *Williams*, 2 Hilt., 562; *Neville* vs. *Frost*, 2 E. D. Smith, 62; *Smith* vs. *Coe*, 2 Hilt., 365; *Bonesteel* vs. *Mayor of New York*, 22 N. Y., 162; affirming *same case*, 6 Bosw., 550.

Where a contract has been performed, the fact that the contractor has done work in excess, does not affect his right to recover, if that excess is not detrimental to the employer. *Turner* vs. *Haight*, 16 N. Y., 465.

Where, on the balance of conflicting testimony, it appeared that a contract had been substantially performed, it was held, that a recovery might be had. See *Tucker* vs. *Williams*, 2 Hilt., 562. See also *White* vs. *Hewett*, 1 E. D. Smith, 395. A departure from the strict terms of the contract, by the direction or assent of the employer, will also excuse a strict performance, as regards the period limited, and substitute performance within a reasonable time. *Green* vs. *Haines*, 1 Hilt., 254.

Where, on a contract for manufacture and delivery of a large quantity of bricks, payment was to be made for them per thousand, as burnt, it was held, that, though the manufacturer himself abandoned the work, he might recover for what he had actually done, and that the employer's remedy lay in damages for the breach. *Snook* vs. *Fries*, 19 Barb., 313.

A right of election on the part of the employer, to have additions made to a contract during its progress, must also be reasonably exercised by him, or he will lose it. But, when exercised within a period limited by the contract, the contractor will be bound to complete within the time originally specified. *Lauer* vs. *Brown*, 30 Barb., 416.

When the terms of a contract are so uncertain, or have been so altered by the employer, that a strict performance is rendered virtually impossible, the contractor is entitled to recover for the work actually done upon a *quantum meruit*. *Smith* vs. *Coe*, 2 Hilt., 365.

When performance of a contract has been commenced, and is stopped, without fault on the part of the contractor, he is also entitled to recover upon a *quantum meruit*, for the work actually done. *Jones* vs. *Judd*, 4 Comst., 411.

So also, where the employer elects to abandon the contract, after commencement, but before full performance, the contractor may recover for work done, down to the receipt of notice of such abandonment. He cannot, however, do so, for work continued after such notice. His further remedy lies in damages for the breach. *Goodwin* vs. *Kirker*, 2 Hilt., 401.

As to the measure of recovery in such cases, being, for work and labor, *quantum meruit*, for materials, *quantum valebant*, see *Hauptman* vs. *Catlin*, 1 E. D. Smith, 729.

A party suing in this form, cannot claim or enforce a mechanic's lien for the amount; the complaint for that purpose must be special, and founded upon the statute. *Foster* vs. *Poillon*, 2 E. D. Smith, 556; 1 Abb., 321.

And a mechanic, making repairs on a specific article, under an agreement to give credit for the price, has no lien, and cannot retain it, in the event of the intervening insolvency of the employer. *Fieldings* vs. *Mills*, 2 Bosw., 489.

Although work done under a special contract, may fail in strict compliance with its terms, yet if actually accepted, or even impliedly, by omission to object at the time, it may be recovered for. See *Pullman* vs. *Corning*, 5 Seld., 93 (98), per Taggart, J.; and *Jewell* vs. *Schroeppel*, 4 Cow., 564, there cited. See also *Green* vs. *Haines*, 1 Hilt., 254. In such a case, the remedy of the employer for any deficiencies, is by way of recoupment, not resistance to the plaintiff's claim. See *Bloodgood* vs. *Ingoldsby*, 1 Hilt., 388 (392). But in a case of this description, the acceptance of the work, or the waiver of strict performance, must be directly, and not inferentially pleaded; if not, the complaint will be defective. *Smith* vs. *Brown*, 17 Barb., 431.

A party sending in a claim of this nature, must give all due credits, or a judgment by default against the employer, will not avail him in a subsequent action by the latter, to recover for the error, when discovered. *Smith* vs. *Weeks*, 26 Barb., 463.

Work done under a contract, entered into on behalf of a municipal corporation, without complying with the provisions of the statute in such cases, cannot be recovered for, in a suit under the contract; nor will even an assessment, in respect of such work, and confirmation of such assessment by the Common Council, avail to give it validity. *Brady* vs. *The Mayor of New York*, 20 N. Y., 312; 18 How., 343; affirming *same case*, 2 Bosw., 173; 16 How., 432; 7 Abb., 234. But see, as to the possibility of a recovery under such circumstances, on a *quantum meruit*, where the work has been accepted, and gone into use for public purposes, 20 N. Y. (319), per Denio, J. In *McSpedon* vs. *The Mayor of New York*, 20 How., 395, it was held, however, that where the contract under which printing had been done for the corporation of New York, was invalid, for non-compliance with the prescribed statutory formalities, the work so done could not be recovered for on *assumpsit*, even though actually made use of. The defendants could make no contract, or promise, express or implied, except as provided by the statute. See also *Bonesteel* vs. *The Mayor of New York*, 22 N. Y., 162; affirming *same case*, 6 Bosw., 550.

An action for work and services, in putting up and taking down a tent, used for meetings, during the canvass preceding a presidential

election, is not illegal in its nature, and may be maintained. *Hurley* vs. *Van Wagner*, 28 Barb., 109.

As to the right of the master of a vessel, as general agent for the owners, to bind them by his contract for necessary repairs, see *Provost* vs. *Patchin*, 5 Seld., 235.

(*h.*) WORK, LABOR, AND SERVICES.

Where the claim arises under a special contract, not fully performed at the time of suit, the contract should be declared upon accordingly. As a general rule, however, an action of this nature will rest in the ordinary form of *assumpsit*, either specifically on a contract fully completed, or on a *quantum meruit*, in respect of a contract, abandoned or unperformed.

Where performance of a contract of this nature is rendered impossible, by sickness or death, or other unavoidable cause, without fault on the part of the employee, he, or his representatives, may recover on a *quantum meruit*, for what he has done, though, in its origin, the contract was entire in its nature, and for a specific period. *Wolfe* vs. *Howes*, 20 N. Y., 197; affirming *same case*, 24 Barb., 174; *Fahy* vs. *North*, 19 Barb., 341. See generally *Jones* vs. *Judd*, 4 Comst., 411.

But, in such a case, the party can only recover for what his services were reasonably worth, and the contract price will not govern. *Clark* vs. *Gilbert*, 32 Barb., 576.

On the other hand, where a party, engaged for a specific period, continues to render the same services after its expiration, he will be entitled to further compensation at the same rate. The continuance is equivalent to a fresh hiring. *Vail* vs. *Jersey Little Falls Manufacturing Company*, 32 Barb., 564.

So likewise, if the employer, after making a contract for a specified period, fails to employ for the entire time, he is liable for what has been done, and in damages for the failure to continue. *Nounenbocker* vs. *Hooper*, 4 E. D. Smith, 401.

So also, if the employer discharge the employee, without just cause. *Heim* vs. *Wolf*, 1 E. D. Smith, 70; *Thompson* vs. *Wood*, 1 Hilt., 93. On an employment for a specified period, on a monthly compensation, the payments of salary become due at the end of each month. *Heim* vs. *Wolf*. And, in the event of a discharge, as above, the employee may either sue for his salary, as it becomes due from time to time, or bring an action for damages for breach of contract. *Thompson* vs. *Wood*, *supra*, 1 Hilt. (96), per Ingraham, J. The same is the rule, where the employee leaves the service of the employer on sufficient cause, or in exercise of a right to rescind the employment, under the contract of hiring. *Gates* vs. *Davenport*, 29 Barb., 160.

A party, under contract for a term, for compensation, payable at specific periods, if discharged by his employer, has three remedies, either of which he may pursue, at his election. 1. He may, at the moment the contract is broken, bring a special action to recover damages for the breach; 2. He may treat the contract as rescinded, and immediately sue on the *quantum meruit* for the work actually performed; or, 3. He may wait till the termination of the period for which he was hired, and claim, as damages, the wages agreed to be paid. He must, however, make such election, and a suit in one form will be a bar to any other. *Colburn* vs. *Woodworth*, 31 Barb., 381.

Where laborers had been employed generally, to work under a foreign contract, it was held that, after their discharge, they could not recover in an action of this nature, in respect of the period, after their discharge, until they could return and obtain fresh employment, but that their remedy, if any, lay in damages. *Wiseman* vs. *Panama Railroad Company*, 1 Hilt., 300.

See generally, as to an action for work and labor performed for another, without any special contract, and as to the measure of compensation in such cases, *Lewis* vs. *Trickey*, 20 Barb., 387. See likewise, as to the rule of compensation for services actually rendered, but in expectation of a specific compensation, under a contract, void under the statute of frauds, *Lisk* vs. *Sherman*, 25 Barb., 433.

An agreement for one year's services, to commence at a future date, is void under that statute, and, unless the performance of service be commenced under it, no recovery can be had. *Amburger* vs. *Marvin*, 4 E. D. Smith, 393.

But when, under such an agreement, such performance has commenced, and the employer has derived benefit from the services of the employee, the latter, though the contract is terminable at any time by either, is entitled to recover, on a *quantum meruit*, for the value of such services, and, in the absence of other evidence, the agreement may be referred to as the measure of damages. *Nones* vs. *Horner*, 2 Hilt., 116; *Little* vs. *Wilson*, 4 E. D. Smith, 422.

An illegal contract cannot be recovered upon, and, if entire in its nature, illegality in any portion of it will vitiate the whole; nor can the valid portion be sifted from the invalid. So held as to a contract embracing lobby services. *Rose* vs. *Truax*, 21 Barb., 361; *Bigelow* vs. *Law*, 5 Abb., 455; *Brown* vs. *Brown*, 34 Barb., 533; *Harris* vs. *Roof's Executors*, 10 Barb., 489. So also, as to a contract in relation to convict labor, rescinded by the attorney-general as being unauthorized by the statute. Nor, in such case, can a recovery be had on a *quantum meruit*, for services actually performed before such rescission. *Peck* vs. *Burr*, 6 Seld., 294.

But, if not illegal, and not tainted by actual fraud, the fact that a contract of this nature is discreditable, will not prevent a recovery upon it. *Moore* vs. *Remington*, 34 Barb., 427.

Assistance in enforcing a claim against the state, by supplying proofs and arguments, is not illegal, and a recovery may be had for services of this nature. *Sedgwick* vs. *Stanton*, 4 Kern., 289; affirming *same case*, 18 Barb., 473; *Brown* vs. *Brown*, 34 Barb., 533. So also, as to the rendering of assistance, in soliciting the increase of a revolutionary soldier's pension, pursuant to the United States' statute of June, 1832. *Jenkins* vs. *Hooker*, 19 Barb., 435.

In *Cropsey* vs. *Sweeney*, 27 Barb., 310; 7 Abb., 129, it was held that services rendered by a wife, as such, could not be recovered for, though her marriage was in fact invalid. And, in *Moore* vs. *Moore*, 21 How., 211, a claim for medical services rendered by a son to his father was disallowed, on the ground that, at the time of render, the intention was that they should be gratuitous.

A claim for necessary attendance in sickness upon a minor, absent from home, and self-supporting, was refused to be allowed as against the parent, and declared enforceable against the minor himself, in *Johnson* vs. *Gibson*, 4 E. D. Smith, 231.

An architect, jointly employed by parties having several interests in a building to be erected, may maintain an action against them jointly. *Beach* vs. *Raymond*, 2 E. D. Smith, 496.

To entitle himself to his compensation for superintendence, he must, however, bestow the necessary care and attention, and, if he fail to do so, and give unwarranted certificates for defective work, to the damage of his employer, he cannot recover. *Peterson* vs. *Rawson*, 2 Bosw., 234.

In relation to an action by an attorney or counsellor, for professional services rendered to his client, there is no longer any fixed standard or provision, regulating the amount of compensation recoverable by him. Under section 303 of the Code, that compensation is wholly left to the agreement, express or implied, of the parties.

Where an express agreement exists, the courts will execute that agreement, though in cases of gross oppression, they have, in some few instances, exerted their right to interfere, by means of their power over parties standing in the above relation, as being officers of the court. See this subject, heretofore considered, and decisions cited, in Book I., chapter VII., section 30.

Where such a party sues on the ordinary *assumpsit*, the implied agreement between him and the client stands on the ordinary footing, and, to entitle himself to recover, he must allege and prove the actual render of services under an employment by his client, and the value of those services. It seems that, where nothing is proved to have been done by

him in a matter, he cannot recover a retainer fee, though actually retained. *Slow* vs. *Hamlin*, 11 How., 452.

The allowances granted by the Code by way of costs, are allowances to the party, and not to the attorney, nor do they furnish any standard for regulating the measure of his compensation. *Slow* vs. *Hamlin*, *supra*. That compensation, be it greater or less, is to be assessed according to the actual value of his services. *Moore* vs. *Westervelt*, 3 Sandf., 762; 1 C. R. (N. S.), 131; *Garr* vs. *Mairet*, 1 Hilt., 498.

In relation to the mode of proof of such services, and their value, see *Clussman* vs. *Merkel*, 3 Bosw., 402.

It is sufficient, in a complaint of this nature, to allege the indebtedness in general terms, nor need the items of account, or even the specific suit in which services were rendered, be specified. The defendant's remedy is to apply for a bill of particulars, or move on the ground of uncertainty. And the complaint, being on an open account, embraces any number of items, which may be proved. *Beekman* vs. *Platner*, 15 Barb., 550.

Nor is an account actually delivered before suit, conclusive upon the attorney, but it is competent for him to show that his charge on such account was insufficient, and the services rendered, worth a larger sum. *Williams* vs. *Glenny*, 16 N. Y., 389.

An agreement with his client in relation to his counsel fee for a specific service, is no bar to his general right to recover on *assumpsit*, for other services in the same suit, rendered in his capacity of attorney. *Easton* vs. *Smith*, 1 E. D. Smith, 318.

But he cannot recover for sums paid by him to associate counsel, unless by the express authority of his client. *Cook* vs. *Ritter*, 4 E. D. Smith, 253.

In relation to an agreement for specific and contingent compensation, in respect of claims placed in an attorney's hands for collection, see *Mills* vs. *Fox*, 4 E. D. Smith, 220.

Where, by the written terms of sale, a purchaser was bound to pay the fees of the auctioneer, it was held that the latter might maintain an immediate action for them, in his own name. *Muller* vs. *Maxwell*, 2 Bosw., 355; *Bleecker* vs. *Franklin*, 2 E. D. Smith, 93.

An auctioneer, employed to sell property, is entitled to be paid for his expenses and services in bringing the property into notice, though it be afterwards disposed of by private sale. He cannot, however, charge commission, in a case where he has not himself introduced the purchaser. *Chilton* vs. *Butler*, 1 E. D. Smith, 150.

A physician is entitled to recover, as against the party who actually employs him, his fees for attendance upon a third person at the request of such party. The promisor has, however, a right to retract at any

time, and such retraction will bar any further claim. *Hanford* vs. *Higgins*, 1 Bosw., 441.

As to the claim of a clergyman for his salary as against a religious corporation, on a contract made with its trustees *de facto*, without notice of any illegality in their election, and before such illegality is judicially determined, see *Ebaugh* vs. *The German Reformed Church*, 3 E. D. Smith, 60.

A public officer suing for salary without actual proof of service rendered, is bound to prove that he has duly qualified, or he cannot recover. *Halbeck* vs. *Mayor of New York*, 10 Abb., 439. See also, as to an officer holding over, *The People* vs. *Tiemann*, 8 Abb., 359.

A party performing services under a licensed employment, cannot recover without proof of his license. So held as to a public carman. *Ferdon* vs. *Cunningham*, 20 How., 154.

And, since the recent revenue acts of the United States, a party exercising any of the professions, on the license to practise which a stamp duty is imposed, will doubtless be held to proof of his license, and payment of the duty. An averment of the fact on the face of his complaint will certainly be expedient, and may probably be held necessary.

The decisions in relation to the commissions of brokers are numerous.

To entitle him to recover, a person suing in this capacity, must allege and prove an actual employment, and actual render of services, and procurement of benefit to the employer pursuant to that employment. See *Chilton* vs. *Butler*, 1 E. D. Smith, 150.

To sustain a recovery, the broker must obtain a contract which his employer accepts, or such a contract as his employment authorizes him to negotiate, made with some person, which that third person is able and ready, or can be compelled, to perform. *Barnes* vs. *Roberts*, 5 Bosw., 73.

The mere introduction of a purchaser, from which introduction a sale afterwards results, as between the parties themselves, will not enable the introducer, when not a broker or agent by profession, to recover a broker's commission. *Lyon* vs. *Valentine*, 33 Barb., 271.

One who deals with a regular broker, will be presumed to contract with reference to the customs of brokers, whether known to him or not, nor will it be necessary to aver in the complaint, the knowledge of the defendant, or the details of the customs. *Whitehouse* vs. *Moore*, 13 Abb., 142.

In *Goodspeed* vs. *Robinson*, 1 Hilt., 423, a broker, who had actually negotiated a sale, was held not entitled to recover commissions from the vendors, though the agreement was drawn up by him, and the transaction completed at his office, there being no evidence to prove his

employment by them; but, what was given, tending rather to show that his employment was for the purchaser. Where, too, the vendor expressly refused to employ the broker, the mere fact that the latter sent a purchaser to him, with whom a sale was actually negotiated, was held insufficient to entitle him to his commissions. *Pierce* vs. *Thomas*, 4 E. D. Smith, 354.

Service, too, must be actually rendered under such employment. The mere fact, that a broker, originally employed, had, after the termination of the employment, informed another that the defendant's property was for sale, which information ultimately led to a purchase through such second broker, was held wholly insufficient to entitle the plaintiff to recover. *Holley* vs. *Townsend*, 2 Hilt., 34; 16 How., 125. So also, where a broker had undertaken to sell without authority, and the purchaser, before any further negotiation, effected his purchase directly from the vendor. *Cushman* vs. *Gori*, 1 Hilt., 356. So likewise, where the vendor first employed, then dismissed, and afterwards re-employed his original broker, who finally effected a sale, it was held that another, who had conducted intermediate negotiations, could not recover. *Ludlow* vs. *Carman*, 2 Hilt., 107. So again, where, pending negotiations by one broker, to obtain an advance on an offer already made, so as to approximate to a fixed price demanded by his principal, another stepped in on behalf of the same purchasers, and effected a sale, it was held the former could not recover. The contract was special, and, unless a sale was effected according to its terms, an action was not maintainable. *Jacobs* vs. *Kolff*, 2 Hilt., 133.

But, when a broker has actually introduced the parties, and actually negotiated a loan or sale, he has earned his commissions, and is entitled to recover them, even although the transaction may be subsequently broken off, and his employer may ultimately derive no actual benefit from it. *Glentworth* vs. *Luther*, 21 Barb., 145; *Van Lien* vs. *Byrnes*, 1 Hilt., 133; *Corning* vs. *Calvert*, 2 Hilt., 56; *Goldsmith* vs. *Obermeier*, 3 E. D. Smith, 121; *Holley* vs. *Gosling*, 3 E. D. Smith, 262. And, if one broker be originally employed, but delegates his employment to another, and such other goes on and performs the service, with the assent of the employer, such assent is equivalent to an original employment. *Holley* vs. *Gosling*, *supra.*

But, to entitle the broker to recover, the service rendered must be complete, and an agreement entered into, by which the parties are legally bound. *Barnard* vs. *Monnot*, 34 Barb., 90. In that case, negotiations having been broken off by the parties, and a new contract subsequently made between them as principals, for sale of part only of the property originally contemplated, the broker was held not to be entitled to any commission.

Where the negotiation results in a purchase, it is immaterial whether, after introduction, the principal goes on and completes the transaction in person; he cannot, by doing so, evade the payment, and the original introduction will be sufficient ground for a recovery. *Chilton* vs. *Butler*, 1 E. D. Smith, 150; *Morgan* vs. *Mason*, 4 E. D. Smith, 636; *Ludlow* vs. *Carman*, 2 Hilt., 107 (112).

But, pending any negotiations, the parties are at perfect liberty to take the matter into their own hands, and, if a sale be effected in good faith, to a person not originally introduced by the broker, he will not be entitled to any commission whatever. *Chilton* vs. *Butler*, 1 E. D. Smith, 150.

As to the liability of one broker to another, for a commission agreed to be divided, see *McLaughlin* vs. *Barnard*, 2 E. D. Smith, 372.

See also, as to the apportionment of a specified rate of compensation amongst parties who have concurred in rendering the services by which that compensation has been earned. *Ely* vs. *Spofford*, 35 Barb., 251.

On sales, there is no special regulation in relation to the rate of brokerages; express provision is made, as to loans, by statute. 1 R. S., part I., chapter XX., title XIX., article I.; 1 R. S., 709. By section 1, of that title, there is a statutory prohibition against taking more than one-half per cent (fifty cents on one hundred dollars) for procuring a loan for one year, or more than thirty-eight cents per one hundred dollars, for making or renewing any security, or counter-security, therefor. The case of a loan, for more than one year, is left unprovided for, and the custom is to charge a higher commission on loans of this nature, probably without illegality.

In cases unprovided for by the statute, evidence of usage may be introduced to fix the amount of compensation. *Morgan* vs. *Mason*, 4 E. D. Smith, 636. And, although the plaintiff had declared upon, and failed to prove a special agreement, the variance, and others of a similar nature were disregarded. Nor will an attempted overcharge for effecting a loan, affect the broker's right to recover the legal commission. *Vanderpool* vs. *Kearns*, 2 E. D. Smith, 170.

But, to be entitled to recover brokerage, according to the customary rate, or to vary an actual agreement between the parties, on the ground of custom, the plaintiff must show, not merely that he has conformed to the usual rules, but that he is himself a broker. *Main* vs. *Eagle*, 1 E. D. Smith, 619.

A broker can recover upon a *quantum meruit*, on an express proffer of compensation for services admitted to have been rendered, though it be not proved distinctly that such services have proved effectual. *Goldsmith* vs. *Obermier*, 3 E. D. Smith, 121. He may also sue on the

admission itself, for a commission admitted to have been earned. *Beebe* vs. *Roberts*, 3 E. D. Smith, 194.

In regard to brokerage on procuring a charter party, the mere holding of a legal interest in the vessel, does not, *per se*, render the holders liable. It was accordingly held, that, in the absence of any express agreement, or acknowledgment of the render of services, mortgagees of a vessel, not in possession, could not be held liable for a service of this nature. *Weber* vs. *Sampson*, 6 Duer., 358.

A broker who has acted for both parties in the same transaction, cannot demand double commissions; his claim is against the party who originally employed him, and, in such case, or where he has received compensation from one, he cannot recover against the other. *Watkins* vs. *Cousall*, 1 E. D. Smith, 65; *Vanderpool* vs. *Kearns*, 2 E. D. Smith, 170; *Goodspeed* vs. *Robinson*, 1 Hilt., 423. And if, having agreed with another to share the profits of negotiating a contemplated purchase, he receive for his own use a private commission from the seller, it will be a fraud upon his associate, which the court will redress. *Dunlop* vs. *Richards*, 2 E. D. Smith, 181.

The same rule was maintained in *Pugsley* vs. *Murray*, 4 E. D. Smith, 245; but it was doubted, *obiter*, whether, if a special agreement be made by both parties under such circumstances, with full knowledge of the double employment, a recovery might not be had upon the express promise. See also *Catlin* vs. *Grote*, 4 E. D. Smith, 296, where a double commission was substantially allowed by the same court.

(*i.*) Use and Occupation.

An action of this nature is expressly given, by statute, to a landlord, as against parties in occupation of his premises, under any agreement not made by deed; and, if any parol demise or agreement, reserving a certain rent, be put in evidence, it will not debar his recovery, but may be made use of, as settling the *quantum* of damages to be recovered. *Vide* 1 R. S., 748, section 26.

An action of this nature will, however, only lie, where the relation of landlord and tenant subsists between the parties, by agreement express or implied. Where the occupier has never admitted, but, on the contrary, denies the title of the plaintiff, it will not be maintainable. *Croswell* vs. *Crane*, 7 Barb., 191; *Hall* vs. *Southmayd*, 15 Barb., 32; *Jennings* vs. *Alexander*, 1 Hilt., 154; *Hurd* vs. *Miller*, 2 Hilt., 540; *Sylvester* vs. *Ralston*, 31 Barb., 286. The existence of an outstanding leasehold interest in a third party, will be sufficient of itself to rebut any implication of tenancy. *Journeay* vs. *Brackley*, 1 Hilt., 447. Nor

will the fact of an agreement having been made, render an action in this form maintainable, when the intended lessee has never entered into actual possession. *Croswell* vs. *Crane*, *supra*.

Where a party has entered under license, he will not be permitted to dispute the title of his licenser. An intended purchaser under a parol contract, but who had been allowed to take and keep possession, was therefore held liable to the owner for use and occupation, and the agreement, though invalid as one for purchase, was held admissible, in proof of the measure of damages. *Pierce* vs. *Pierce*, 25 Barb., 243. See also *Morris* vs. *Miles*, 12 Abb., 103.

So likewise, an actual occupant of wharfage, under contract to take a lease, but who had refused to fulfil such contract, was held liable to account for receipts during such occupation. *Mayor, &c., of New York* vs. *Hill*, 13 How., 280. The rule is otherwise, however, when an intended purchaser has entered under an actual contract, and subsequently abandons possession, on account of the vendor's inability to perform. *Sylvester* vs. *Ralston*, 31 Barb., 286.

Such an action lies against lessees, in possession under an unsealed lease, but permitted by a purchaser of the lessor's interest to continue, with knowledge on their part of such purchase; but the sum specified in such lease will be the measure of recovery. *Peckham* vs. *Leary*, 6 Duer, 494.

An action of this nature will not lie by a landlord, against a tenant partially evicted from his holding, in respect of his use and occupation of the remainder. *Christopher* vs. *Austin*, 1 Kern., 216; unless, indeed, such eviction have taken place, under a title paramount to that of such landlord, 1 Kern. (218).

Where there has been no express or concluded agreement between the parties, as to the amount to be paid, the measure of compensation for use and occupation will rest on a *quantum meruit*. *Scranton* vs. *Booth*, 29 Barb., 171.

Where the plaintiff declares generally for use and occupation, and introduces in evidence a special contract, which shows that there has been in fact a misjoinder of parties, the objection may, under such circumstances, be raised at the trial, though omitted to be taken by way of demurrer. *Phalen* vs. *Dingee*, 4 E. D. Smith, 379.

An action of this nature was held maintainable, by a surviving husband, for use and occupation of the lands of his deceased wife, in respect of his rights at common law, in a case prior to the recent statutes, in relation to the property of married women. *Jones* vs. *Patterson*, 11 Barb., 572.

Although a married woman may not be liable on her covenant for rent, an action will lie against her, for use and occupation of premises

of which she has taken a lease, and the amount will be a charge upon her separate estate. *Taylor* vs. *Glenny*, 22 How., 240.

As to the liability of one, who uses the chattels of another, with his assent, to a fair compensation for the value of such use, see *Rider* vs. *Union India Rubber Company*, 4 Bosw., 169; *The Same* vs. *The Same*, 5 Bosw., 85.

In an action of this nature, it is not necessary to aver upon the face of the complaint, how the relation of landlord and tenant arose between the parties, and minor defects in particularity of statement will not render the pleading obnoxious to a demurrer, but only to a motion for uncertainty. *Waters* vs. *Clark*, 22 How., 104.

(*j.*) Freight.

An action of this description is of a somewhat mixed nature. It is maintainable under all circumstances, where goods have been carried, whether on express or implied contract. Where, by a chartered vessel, and the terms of carriage are fixed by the charter party, the action will of course lie upon the express contract, and will fall under that class, and not that of ordinary *assumpsit*. For carriage in a general ship, the action lies, on the contrary, substantially upon the implied promise; but, under these circumstances, the measure of compensation is usually regulated by the terms of a bill of lading.

As regards the condition of the goods at the time of shipment, and the quantity contained in the packages, this instrument partakes of the ordinary character of a receipt, and is explainable. As regards the contract for carriage, the liability of the parties, and the compensation to be paid under the contract, the contrary is the case. On these subjects, the bill of lading merges all previous transactions, and is, as a general rule, conclusive, and cannot be explained. *Vide White* vs. *Van Kirk*, 25 Barb., 16; and *Crery* vs. *Holley*, 14 Wend., 26; and *Niles* vs. *Culver*, 8 Barb., 205, there cited. See also *Fitzhugh* vs. *Wiman*, 5 Seld., 559 (566); *Dorr* vs. *New Jersey Steam Navigation Company*, 1 Kern., 485; *Meyer* vs. *Peck*, 33 Barb., 532; and, as to the similar effect of a charter party, *Renard* vs. *Sampson*, 2 Kern., 561. As to the right of the shipowner to recover freight, for all goods actually delivered, *vide Meyer* vs. *Peck*, *supra*.

As to the effect of an unqualified bill of lading, in throwing all responsibility upon the carrier, and the counter effect of a qualification upon its face, in transferring that responsibility to the shippers, in respect of leakage of the goods carried, see *Nelson* vs. *Stephenson*, 5 Duer, 538.

A *bonâ fide* assignment of a clean bill of lading to a purchaser for value, is equivalent to an unconditional delivery of the goods them-

selves, and supersedes any conditional contract, between the owner or consignor and the consignee. *Wardwell* vs. *Patrick*, 1 Bosw., 406. See also *Dows* vs. *Rush*, 28 Barb., 157, and cases cited by Hogeboom, J., page 183.

But, where such bill of lading has been obtained by fraud from the owners, a purchaser, though *bonâ fide*, will not be protected by the transfer. *Dows* vs. *Perrin*, 16 N. Y., 325, and cases cited by Denio, Ch. J. (332 to 335).

An intermediate consignee, who accepts a delivery of goods, is liable thereupon to the carrier for the full freight, and, unless under special authority, in the bill of lading, has no power to adjust any claim for damage. *Canfield* vs. *The Northern Railroad Company*, 18 Barb., 586. See also *New York and Erie Railroad Company* vs. *Gilchrist*, 16 How., 564.

An assignee of a bill of lading, who receives the goods, is, in like manner, liable, though the assignment was not made, until after the goods had been sent to the public warehouse, under a general order to discharge. *New York and Havre Steam Navigation Company* vs. *Young*, 3 E. D. Smith, 187. See also *Burton* vs. *Strachan*, 3 E. D. Smith, 192, note.

As to the right of an equitable assignee of freight to recover from the shippers, see *Trask* vs. *Jones*, 5 Bosw., 62.

With respect to the mutual rights of the carrier and the owner, in relation to the delivery of goods, on arrival at the port of destination; and as to the principle that delivery and payment of freight are in the nature of simultaneous and concurrent acts, see *Clark* vs. *Masters*, 1 Bosw., 177. See also *Gaughran* vs. *One Hundred and Fifty-one Tons of Coal*, 18 How., 25 (United States Courts). It is also there held that the contract of affreightment is entire, and that the master has no right to divide it into lots or parcels, and demand a proportionate freight on each.

The existence of a charter party, which does not give the charterer entire control of the vessel, or postpone the payment of the charter money beyond the delivery of the cargo, does not deprive the general owner of his lien for freight, or his right to collect it; and payment to him, or to the master or his agent, will bar an action by the charterers. *Mactaggart* vs. *Henry*, 3 E. D. Smith, 390; *Holmes* vs. *Pavenstedt*, 5 Sandf., 97.

In relation to the right and duty of the master, to sell unclaimed goods, for the payment of freight, at the expiration of the regular lay days, or within a reasonable time thereafter, see *Robbins* vs. *Codman*, 4 E. D. Smith, 315.

As regards *pro rata* freight, and when it will or will not be claima-

ble by the shipper, against the owner of goods, in the event of the vessel becoming disabled during the voyage, see *Atlantic Mutual Insurance Company* vs. *Bird*, 2 Bosw., 195; *Kinsman* vs. *New York Mutual Insurance Company*, 5 Bosw., 460.

The charterer of a vessel is liable for demurrage, although the delay may be occasioned without his fault, and by the laws of a foreign country. *Rupp* vs. *Lobach*, 4 E. D. Smith, 69. So also, in respect of the time, between the termination of lay days allowed, and the actual delivery of the cargo. *Robbins* vs. *Codman*, 4 E. D. Smith, 315. But demurrage will not be claimable, in respect of goods transported in bond, for detention occurring, before the vendor can obtain from the custom house, a permit for their delivery. *Gillespie* vs. *Durand*, 3 E. D. Smith, 531. See, as to demurrage, in a case of delay occasioned by collision, *Brady* vs. *The Steamboat New Philadelphia*, 19 How., 315.

(*k.*) Goods Sold and Delivered.

In relation to the framing of a complaint of this description, see general observations at the commencement of the present section, and references there made.

The old form of count in *indebitatus assumpsit* may be substantially followed, nor is it necessary to make any statement of items in detail, provided the transaction is set out, with sufficient certainty as to dates and general particulars.

Where the liability arises in respect to different contracts of sale made at different periods, it is, however, admissible, and will be better to state them as separate causes of action. In such a case, separate actions will also be maintainable. See *Staples* vs. *Goodrich*, 21 Barb., 317.

See especially, among the cases above alluded to, in relation to the form of statement, and the extent to which express averments will be supplied by necessary implication, *Accome* vs. *The American Mineral Company*, 11 How., 24, and the leading case of *Allen* vs. *Patterson*, 3 Seld., 476; both bearing directly upon this particular description of action.

A general averment of the above nature, if traversed by the defendant, tenders a general issue, and evidence of a general nature tending to reduce the amount of the recovery, will be admissible. *Moffatt* vs. *Sackett*, 18 N. Y., 522.

Where goods have been sold upon credit, it should appear upon the face of the complaint, that, before bringing the action, that credit has expired. Where, however, a credit transaction has been induced by fraud, the fraud avoids the express contract, and the vendor may sue at once, as in a sale and delivery on the ordinary *assumpsit*. And, although admissible, it seems it will not be necessary to allege the circumstances,

and the action may be so maintained, leaving the facts to come out as matters of evidence, if the express contract be pleaded by the defendant. *Roth* vs. *Palmer*, 27 Barb., 652. Nor will it be necessary for the vendor, under such circumstances, to wait until the expiration of a term of credit agreed to be given. *Kayser* vs. *Sichel*, 34 Barb., 84.

An action is maintainable upon an unqualified promise to pay, nor will the mere allegation of a consent to give credit defeat it, unless positively proved. *Whitlock* vs. *Bueno*, 1 Hilt., 72.

The price or value of the goods sued for ought properly to appear upon the face of the complaint, and must, of course, be proved. See *Lambert* vs. *Seely*, 2 Hilt., 429.

The averment must substantially correspond with the actual contract or liability, or the complaint cannot be sustained. *Smith* vs. *Leland*, 2 Duer, 497. See, however, as to the disregard of immaterial variances, and the granting, without imposing terms, of an amendment to conform, *Barth* vs. *Walther*, 4 Duer, 228.

A complaint, averring a sale by several plaintiffs, was held sufficient on demurrer, without any specific averment that they made such sale as partners, in *Loper* vs. *Welsh*, 3 Duer, 644.

In suing for the price of goods, or for their non-delivery, under an executory contract, an allegation of performance, or a tender of performance, on the part of the plaintiff, according to the terms of such contract, is indispensable. *Clark* vs. *Dales*, 20 Barb., 42; *Dunham* vs. *Pettee*, 4 E. D. Smith, 500; *Same case*, 4 Seld., 508. See also *McDonald* vs. *Williams*, 1 Hilt., 365. See on the same subject, and, also, as to the extent to which an omission to state the time of performance will be supplied by implication, *Fickett* vs. *Brice*, 22 How., 194.

See also, as to the performance, or a readiness and offer to perform the entirety of a contract of this nature, being a condition precedent to the right to require payment on the part of the vendor, and as to his inability to maintain an action, in respect of a partial delivery, where the contract is entire in its nature, *Baker* vs. *Higgins*, 21 N. Y., 397.

See, *per contra*, as to the right of the vendor of articles, to be delivered from time to time in parcels, to suspend deliveries, on the purchaser's failure to pay for any specific parcel, when offered to be delivered; and as to a prior delivery without payment, not effecting a waiver of the condition, *Gardner* vs. *Clark*, 21 N. Y., 399. See also *Partridge* vs. *Gildermeister*, 6 Bosw., 57.

On an agreement for a sale of goods to be paid for by delivery of others, default on the part of one party must be shown by the other, before he can entitle himself to recover the price of those delivered by him. *Hunt* vs. *Westervelt*, 4 E. D. Smith, 225. See also *Chapin* vs. *Potter*,

1 Hilt., 366. See, however, as to the principles of averment, *Roth* vs. *Palmer*, above cited.

In respect to the liability of a parent, for goods delivered to a minor, and alleged to be necessaries, and where it does or does not accrue, see *Clinton* vs. *Rowland*, 24 Barb., 634.

A contract for sale of articles, designed for the commission of a fraud upon the public, was held void, as contrary to public policy, and that no recovery could be had upon it. *Bloss* vs. *Bloomer*, 23 Barb., 604.

Where, however, a contract is declared void by statute, the transaction must be brought strictly within its terms. A contract made on Sunday was, therefore, declared not to be void, and an action upon it to be maintainable, there being no evidence of public exposition on sale. *Miller* vs. *Roessler*, 4 E. D. Smith, 234. See also, as to the subsequent adoption and ratification of a technically illegal demand against a public body, enabling a recovery upon it, *Smith* vs. *Mayor of New York*, 21 How., 1.

When a custom is shown to exist in any particular trade or business, parties are presumed to contract with reference to it, in the absence of an express agreement, or of contravention of an established rule of law. *Dalton* vs. *Daniels*, 2 Hilt., 472; *Lees* vs. *Richardson*, 2 Hilt., 164.

To enable the plaintiff to recover upon a contract for manufacture and delivery, the order on the part of the defendant must be positive and direct. An implied liability will not be sufficient to sustain the action. *Murphy* vs. *Winchester*, 35 Barb., 616.

Where, under an arrangement for allowing one party to purchase goods in the name of another, the former had the possession and full benefit of goods so purchased, it was held that the latter and his assignee could maintain an action against him for their price, without proof that he had himself paid for them. *Hay* vs. *Hall*, 28 Barb., 378.

A sale to an agent should be averred as a sale to his principal. *Dollner* vs. *Gibson*, 3 C. R., 153; 9 L. O., 77. But, where the agent purchases in his own name, without disclosing his principal at the time, he is and will remain liable; a subsequent disclosure will not discharge him; its only effect will be to give the seller the option of suing either at his election. *Nason* vs. *Cockroft*, 3 Duer, 366. But where, at the time, the agent discloses his principal, and the vendors elect to take and accept the agent's own credit, they cannot afterwards hold the principal liable. *Ranken* vs. *De Forest*, 18 Barb., 143.

As to the right of a purchaser to pay or settle with an agent, who sells goods as such, without disclosing the name of his principal, see *Henry* vs. *Marvin*, 3 E. D. Smith, 71. Such payment, to bind the principal, must however be actual, and the mere giving of credit to the agent, against a pre-existing indebtedness, will not prevail.

Where the sale of goods has been induced by false representations, the point as to its validity or invalidity, will turn upon the question of fraudulent intent, and knowledge of such falsity. Mere concealment will not, *per se*, have that effect. *Hall* vs. *Naylor*, 6 Duer, 71; *Armstrong* vs. *Tuffts*, 6 Barb., 432. N. B.—The reversal of the former case, reported, 18 N. Y., 588, does not turn upon this specific point, but rather tends in affirmation of the general doctrine.

And where a contract of sale is sought to be avoided by the vendor for fraud, a return or tender of the consideration must be shown, and prompt action must be taken, or delay will be held a confirmation of the contract. *Fisher* vs. *Fredenhall*, 21 Barb., 82.

Although, as a general rule, a purchaser of goods from a fraudulent vendor will be protected, still, to claim the benefit of the rule, he must show the sale to be strictly *bonâ fide*. Where, therefore, a sale was made by an assignor, allowed to remain in possession of his whole stock, for a price to be thereafter ascertained, but on the basis of a large reduction, and that, not for cash, but for notes of the purchaser, the transaction was held void, as against execution creditors. *Pine* vs. *Rikert*, 21 Barb., 469. See likewise *Adams* vs. *Davidson*, 6 Seld., 309; and *Ludden* vs. *Hazen*, 31 Barb., 650. So also, as to a purchase of goods from a fraudulent vendor, without inquiry, and with notice of suspicious circumstances; *Danforth* vs. *Dart*, 4 Duer, 101; *Pringle* vs. *Phillips*, 5 Sandf., 157. A *bonâ fide* purchaser, from a person who has no actual title, cannot maintain his rights, against one who represents the real owner. So held, in the case of a sale by a husband, of his wife's separate property, as against her mortgagee. *Talman* vs. *Hawxhurst*, 4 Duer, 221.

As to the right of a purchaser to return and recover back the price paid for part of goods, sold to him at different times, and not by way of entire sale, as not corresponding with his contract, retaining the remainder, see *Manning* vs. *Humphreys*, 3 E. D. Smith, 218.

A parol promise to pay for goods, to be delivered to a third party, but on the credit of the promisor, when made before, and inducing such delivery, is not a collateral, but an original undertaking, and may be sued upon as such. *Briggs* vs. *Evans*, 1 E. D. Smith, 192; *Phillips* vs. *Gray*, 3 E. D. Smith, 69; *Griffin* vs. *Keith*, 1 Hilt., 58. See also, as to the liability of a principal, for a promise of this nature made by his authorized agent, even though in error, *Dunning* vs. *Roberts*, 35 Barb., 463. See likewise, generally, *Quintard* vs. *De Wolf*, 34 Barb., 97; *Devlin* vs. *Woodgate*, 34 Barb., 252.

But, to constitute it such, the credit must be exclusively given to the promisor; if otherwise, the undertaking will be collateral, and within the statute of frauds. Nor will a promise of this nature be held as con-

tinuing, unless such intention be clearly apparent. *Dixon* vs. *Frazee*, 1 E. D. Smith, 32; *Brady* vs. *Sackrider*, 1 Sandf., 514.

See also, as to a transaction of this nature, on which the guarantor received a separate consideration, being held to be an original undertaking, *Pennell* vs. *Pentz*, 4 E. D. Smith, 639.

But the mere charging against one person, of the price of goods delivered to another, for that other's use, will not constitute him a debtor, unless the evidence to show his assent is free from any suspicion, and the complaint contains proper and issuable averments of the authority to make such charge. *Smith* vs. *Leland*, 2 Duer, 497. Where, however, the defendant himself has given the direction for such delivery, he will be liable, under a complaint in the ordinary form. *Rogers* vs. *Verona*, 1 Bosw., 417.

To maintain an action in the ordinary form, actual or constructive delivery of the goods sold, must be both averred and proved. To sustain a general count in *assumpsit*, on transactions arising out of a special agreement, that agreement must have been so performed, as to leave a mere simple debt or duty between the parties. *Evans* vs. *Harris*, 19 Barb., 416. See also *Chapin* vs. *Potter*, 1 Hilt., 366.

If, under such a contract, not being entire in its nature, a partial delivery be made and accepted, and the contract be then abandoned, the seller may recover, *pro tanto*. *Terwilliger* vs. *Knapp*, 2 E. D. Smith, 86. See also *Shields* vs. *Pettie*, 4 Comst., 122; affirming *same case*, 2 Sandf., 262.

And if, after the delivery of goods, the plaintiff repossess himself of them, it will be a disaffirmance of the sale, and will bar an action by him for their price. So held, as to goods retaken under process of replevin, *Morris* vs. *Rexford*, 18 N. Y., 552.

An admission by the defendant, of delivery to him, will suffice to support the action, though such delivery have been actually made to a third person. *Griffin* vs. *Keith*, 1 Hilt., 58. See, as to an implied admission of the delivery of the residue, by a denial of the receipt of part of goods stated upon a bill, *Power* vs. *Root*, 3 E. D. Smith, 70.

On retail sales, the question of delivery rarely presents any difficulty. In wholesale or executory transactions, it is attended with more complication, as regards the question as to when title to the goods will or will not pass, by reason of the acts of the parties.

The general rule may be stated thus: where all that is necessary to be done by the vendor in order to place the goods in the possession or power of the purchaser has been accomplished, so that nothing remains to hinder or delay the latter from assuming such possession; the delivery is complete. Where, however, any thing remains to be done on the part of the vendor, either by way of conferring title or right upon

the purchaser, or in order to ascertain the quantity of the goods, or the price to be paid for them, the delivery is still imperfect, and title has not passed. See *Gerard* vs. *Prouty*, 34 Barb., 454.

A mere agreement to sell, advice of shipment, and acceptance of a draft drawn against goods, was held not to constitute such a delivery to the intended purchaser, as to entitle him to demand their possession, on his refusing to comply with conditions as to payment, imposed by the agent of the sellers. *Ralph* vs. *Stuart*, 4 E. D. Smith, 627.

Nor is the delivery of foreign goods complete, until the seller has perfected the necessary custom house entries, and conferred upon the purchaser the power to control them. Till then, and till the property is placed in the actual, and also in the legal control of the purchaser, the seller cannot maintain an action for its price. *Zachrisson* vs. *Poppe*, 3 Bosw., 171. And this was so held, although, notwithstanding such omission on the part of the seller, actual delivery of part had been made, and the rest, for aught that appeared, might have been actually taken. In *Gillespie* vs. *Durand*, 3 E. D. Smith, 531, the same rule was applied on a collateral question of demurrage, though the actual delivery was complete, and the goods, originally in bond, had left the port, by arrangement with the custom house authorities, before the regular entries had been, or in fact could have been perfected. Delivery of goods sold in bond at New York for exportation, to a carrier selected by the vendee, was held to pass the property in them; although they still remained subject to a lien for duties, and to the custody of the officers of the customs, until authority to pass them was received, which authority the vendor volunteered to take the necessary steps for obtaining. *Waldron* vs. *Romaine*, 22 N. Y., 368. See, however, as to the right of stoppage *in transitu*, under similar circumstances, *Holbrook* vs. *Vose*, 6 Bosw., 76.

Something more than mere words, is necessary to constitute a delivery of cumbrous articles. Superadded to the language of the contract, there must be some act of the parties, amounting to a transfer of the possession, and an acceptance thereof by the buyer. *Shindler* vs. *Houston*, 1 Comst., 261. And such transfer must be complete. *Chapin* vs. *Potter*, 1 Hilt., 366.

The mere taking away of a sample by the purchaser, will not effect a delivery of part, so as to bring the case within the statute. To constitute a symbolical delivery, the act must show that the vendor relinquishes his control of the property, and places it within the power of the purchaser. *Carver* vs. *Lane*, 4 E. D. Smith, 168. See also, as to a symbolical delivery, *Gray* vs. *Davis*, 6 Seld., 285.

The handing to an agent of the purchaser, of an order on the storekeeper of a public store in New York, for delivery of grain in store the

quantity having been previously ascertained by a measurer, appointed by the board of measurers, was held to constitute a complete delivery on the part of the seller, and to entitle him to recover for the whole, though the quantity received by the purchaser fell short. *McCready* vs. *Wright*, 5 Duer, 571. See also, as to the tender of a permit, by which the possession of goods in bond may be obtained, being a sufficient tender of performance under an executory contract, *Dunham* vs. *Pettee*, 4 Seld., 508 ; *Same case*, 4 E. D. Smith, 500. See likewise, as to the sufficiency of an offer to deliver bulky articles, without an actual manual tender, *Myers* vs. *Davis*, 26 Barb., 367.

The sale of a specified quantity of grain, included in a larger mass in store, and the delivery to the purchaser of an acknowledgment that such quantity was subject to his order, was held to pass title in such portion, without actual separation. *Kimberley* vs. *Patchin*, 19 N. Y., 330. The rule that the quantity of articles sold in bulk, must be ascertained before title passes, was considered not to be applicable to a contract of this description.

Where delivery is to be made by the seller at a distant place, the contract is ambulatory, till it is actually made at the place so agreed upon, and the price of any portion which does not arrive, is not recoverable, nor will the measuring or marking of part of the goods by the purchaser, at the place of sale, be such an acceptance, as will relieve the seller from the duty of transporting them to the place agreed upon. *Evans* vs. *Harris*, 19 Barb., 416.

Where the vendor has done his utmost towards effecting a delivery to the purchaser, and fails, through no fault of his own, he will not be liable to the latter in damages for the omission, nor will the giving of the purchaser's note effect a change in the principle, where such note has never been paid, and is produced for cancellation. *Hopkins* vs. *Grinnell*, 28 Barb., 533.

The subject of a conditional delivery has been partially treated above, under the head of *Replevin*. A sale for cash on delivery, according to the custom, is of this description, and, although actual possession be given, still title to the goods will not pass, until payment in pursuance of the condition. See *Freeman* vs. *McKean*, 25 Barb., 474 ; *Van Neste* vs. *Conover*, 20 Barb., 547 ; *Same case*, 8 Barb., 509 ; 5 How., 148 ; *Schmidt* vs. *Kattenhorn*, 2 Hilt., 157.

But where, on a sale originally made for cash or notes on delivery, delivery is made unconditionally at the time, without demand of the agreed consideration, and without attaching any other condition, the presumption will be that the original condition has been waived, subject, however, to rebuttal. *Smith* vs. *Lynes*, 1 Seld., 41 ; reversing *same case*, 3 Sandf., 203. See likewise *Wait* vs. *Green*, 35 Barb., 585.

So also, if cash be not promptly demanded, or if a postponement be assented to, or part payment accepted. *Lees* vs. *Richardson*, 2 Hilt., 164; *Ives* vs. *Humphreys*, 1 E. D. Smith, 196. But see, as to a conditional delivery, on notes to be made satisfactory to the sellers, *Draper* vs. *Jones*, 11 Barb., 263.

See these last cases, as to the rule, that delivery and payment on a cash sale are simultaneous acts, not being applicable to the sale of a large quantity of merchandise, the delivery of which must of necessity occupy a considerable time; and as to the power of the buyer to require a reasonable time for inspection, on the one hand, and of the seller, on the other, to defer the demand of cash pursuant to condition, till such delivery is fully completed, without losing his rights.

See, as to what will constitute a delivery under a sale of the above nature, sufficient to let in the rights of a party making a *bonâ fidè* advance to the buyer, in prejudice to those of the seller to demand payment, *Durbrow* vs. *McDonald*, 5 Bosw., 130.

Where the bill of lading of coals then at sea, was handed to a steamship company, and forwarded to their agents at the port of destination, with instructions to receive them, if quality approved by their engineer, it was held that, such approval being withheld, the company were not bound to receive or pay for them. *Heron* vs. *Davis*, 3 Bosw., 336.

Under a manufacturing contract, property in the object to be manufactured, does not pass to the purchaser, until its full completion and actual delivery, notwithstanding the existence of payments on account, or of default on the part of such purchaser, productive of delay. *McConihe* vs. *New York and Erie Railroad Company*, 20 N. Y., 495; *Andrews* vs. *Durant*, 1 Kern., 35; *Same case*, on subsequent trial, 18 N. Y., 496; *Brown* vs. *Morgan*, 2 Bosw., 485; *Low* vs. *Austin*, 25 Barb., 26; *Phillips* vs. *Wright*, 5 Sandf., 342; *Comfort* vs. *Kiersted*, 26 Barb., 472.

So also, where a manufactured article is actually delivered, but upon condition that the property therein is not to pass to the purchaser, until full payment of the price, the law will execute the contract, and recognize the vendor's title, as against a creditor of the purchaser. *Herring* vs. *Hoppock*, 15 N. Y., 409; affirming *same case*, 3 Duer, 20; or, as against a *bonâ fide* purchaser at a sheriff's sale, *Piser* vs. *Stearns*, 1 Hilt., 86.

A *bonâ fide* purchaser from the vendee, without notice of the condition, will, however, be protected. *Steelyards* vs. *Singer*, 2 Hilt., 96. See also *Smith* vs. *Lynes*, 1 Seld., 41, above cited.

In relation to the rule, that, so long as any thing remains to be done, to ascertain the quantity or value, or complete the transfer of goods sold in bulk, the delivery of them will not be complete, see *Vincent*

vs. *Conklin*, 1 E. D. Smith, 203; *Chapin* vs. *Potter*, 1 Hilt., 366 (371); *Evans* vs. *Harris*, 19 Barb., 416.

As to what will be sufficient to constitute an actual delivery, under a contract of this nature, see *Woodford* vs. *Patterson*, 32 Barb., 630.

After actual delivery made and accepted, the purchaser will nevertheless be entitled to recoup, for damages occasioned by deficient quality in the goods, as called for by the contract. *Davidson* vs. *Hutchins*, 1 Hilt., 123. So also, in respect of work unskilfully performed. *Norris* vs. *La Farge*, 3 E. D. Smith, 375. But, if the purchaser accepts and uses the goods, without an offer to return them, he will be precluded from raising the objection. *Warren* vs. *Van Pelt*, 4 E. D. Smith, 202.

To make a tender of a permit to remove goods in bond, equivalent to an actual delivery or tender of delivery, the power to remove must be unconditional. The existence of a lien for storage, will render it insufficient. *Dunham* vs. *Pettee*, 4 E. D. Smith, 500. As to a manual tender of bulky articles being unnecessary, and an offer to deliver them being sufficient, see *Myers* vs. *Davis*, 26 Barb., 367.

A contract for delivery of goods, not in the control of the seller, and at a future day, is valid, if the sale is intended to be an actual sale; but, though valid on its face, it will be void, if the real understanding be a mere payment of differences, rendering it, in fact, a speculation, and not a sale. *Cassard* vs. *Hinman*, 1 Bosw., 207.

As to the liability of the vendee, under a contract for purchase of goods to arrive, and its measure and extent, and when the sale will be held to be absolute, or conditional, see *Havemeyer* vs. *Cunningham*, 35 Barb., 515; 22 How., 87; *Dibble* vs. *Corbett*, 5 Bosw., 202.

An action is maintainable, on the failure to perform a promise to deliver goods, in payment of a prior indebtedness of the vendor, and in consideration of forbearance. *Fletcher* vs. *Derrickson*, 3 Bosw., 181. See also, as to the right to set off the price of goods manufactured under an executory contract, for parties becoming insolvent after order, as against an indebtedness due to the estate of such insolvents. *Myers* vs. *Davis*, 26 Barb., 367.

In relation to what will be sufficient to constitute an executory contract for sale, effected by way of correspondence, see *Clark* vs. *Dales*, 20 Barb., 42.

As to when such a contract will be considered in the light of one for work and labor, rather than of sale and delivery, as regards the operation of the statute of frauds, see *Donovan* vs. *Wilson*, 26 Barb., 138; *Parker* vs. *Schenck*, 28 Barb., 38.

As to the validity and power of enforcement of a contract, for the purchase of articles manufactured from the produce of a specified piece

of land, for a specific period, embracing restraints upon sale to others during that period, see *Van Marter* vs. *Babcock*, 23 Barb., 633.

Vendors, under an executory contract, are not bound to deliver, as against the notes of a third party originally agreed to be taken, when, at the time of tender, such party has become insolvent, even though such notes be not actually worthless. *Benedict* vs. *Field*, 16 N. Y., 595; affirming *same case*, 4 Duer, 154. See also, as to an executory contract for the purchase of stock certificates, *Kipp* vs. *Munroe*, 18 How., 383.

And, where a sale of goods had been contracted for, to be paid for in notes of a third party, and, after delivery of a portion, the defendant refused to perform, denying his liability, it was held that, by such denial, he relieved the plaintiff from the necessity of tendering more goods, and enabled him to sue at once for those actually delivered. *Partridge* vs. *Gildermeister*, 6 Bosw., 57.

As in the case of other contracts, the terms of a written order, will control any oral directions of the vendee, not shown to be communicated to the vendor. *Hooper* vs. *Taylor*, 4 E. D. Smith, 486.

In relation to the liability of partners, the following decisions require attention: A third person selling goods to one partner, in the usual course of business, and without notice, will be entitled to recover, as against the firm, though the articles of copartnership contain a prohibition against such partner contracting debts, without the consent of the other. *Frost* vs. *Hanford*, 1 E. D. Smith, 540.

After the dissolution of a partnership, no liability can be incurred upon its credit, unless the name of the firm was used in making the purchase. Where the partnership name is not altered, dealers who trust the supposed firm, without notice of dissolution, will be protected; but where the name has been changed, they cannot claim the benefit of the rule, without showing that notice of dissolution has not been given. *Kirby* vs. *Hewitt*, 26 Barb., 607.

Where, on the sale of goods, the vendor had taken the note of a supposed but non-existent firm, it was held that, upon its non-payment, he might maintain his action upon the original sale, against the persons to whom it was made. *Heroy* vs. *Van Pelt*, 4 Bosw., 60.

Credit actually given, though the transaction be nominally for cash, entitles the dealers with a firm to actual notice of its dissolution; and, if such notice be not given, a retiring member of a partnership, continued under the same name, will still continue liable. *Clapp* vs. *Rogers*, 2 Kern, 283; affirming *same case*, 1 E. D. Smith, 549.

The rule of *caveat emptor*, does not apply to a delivery of goods under an executory contract, and even after delivery and incorporation into a building, a suitable deduction in respect of imperfections may be

claimed. *Norris* vs. *La Farge*, 3 E. D. Smith, 375; *Renaud* vs. *Peck*, 2 Hilt., 137 (142); *Muller* vs. *Eno*, 4 Kern., 597 (610). See also the doctrine of implied warranty, on the sale of a chattel by its manufacturer, fully considered in *Hoe* vs. *Sanborn*, 21 N. Y., 552; and, generally with reference to executory sales, *Hamilton* vs. *Gaynard*, 34 Barb., 204; *Passenger* vs. *Thorburn*, 35 Barb., 17.

And, in a contract of this nature, for delivery of goods to arrive, the vendor impliedly warrants that they shall be of merchantable quality. *Cleu* vs. *McPherson*, 1 Bosw., 480; *Shields* vs. *Pettie*, 4 Comst., 122; affirming *same case*, 2 Sandf., 262. See also *Hargous* vs. *Stone*, 1 Seld., 73 (86), per Paige, J.

But, in the case of an executed sale, the rule will be enforced in all its strictness, unless there be an express warranty, or false representations on the part of the vendor. Mere silence will not render the latter responsible for latent defects, even though known to him, and unknown to the purchaser. *Paul* vs. *Hadley*, 23 Barb., 521; *Hotchkiss* vs. *Gage*, 26 Barb., 141; *Hyland* vs. *Sherman*, 2 E. D. Smith, 234; *Goldrich* vs. *Ryan*, 3 E. D. Smith, 324; *Fiedler* vs. *Tucker*, 13 How., 9.

Nor does the mere exhibition of a sample at the time of sale, create an implied warranty that the goods correspond. To have that effect, the sale must be expressly and in terms a sale by sample, without power or opportunity of inspection by the purchaser. And if, after delivery on an executory contract, the purchaser neglect to inspect the goods, and return such as are deficient, the rule will equally apply. *Hargous* vs. *Stone*, 1 Seld., 73; *Beirne* vs. *Dord*, 1 Seld., 95; reversing *same case*, 2 Sandf., 89.

If the representations of a vendor on the sale of goods, amount to an express or actual warranty, the purchaser is under no obligation to return them, but may, in an action for their price, recoup the damages sustained by him. *Warren* vs. *Van Pelt*, 4 E. D. Smith, 202; *Renaud* vs. *Peck*, 2 Hilt., 137; *Muller* vs. *Eno*, 4 Kern., 597; reversing *same case*, 3 Duer, 421. As to the rule of damages, on breach of a written warranty, see *Fales* vs. *McKeon*, 2 Hilt., 53.

As to the right of a vendee, to recover back the price of an article returned by him to the vendor, for breach of warranty, see *Collins* vs. *Brooks*, 20 How., 327.

§ 150. *Of Actions in Relation to Real Estate.*

(*a.*) General Remarks.—Reference to Statutory Provisions.

Remedies of this description may be divided into two grand classes, *i. e.*, legal and equitable in their nature. The former will be treated of in the present, the latter in the succeeding section.

The first of these two classes was, on the framing of the Revised Statutes, the subject of special regulations.

The following reservation in respect to these regulations is made by the Code, section 455:

> The general provisions of the Revised Statutes relating to actions concerning real property, shall apply to actions brought under this act, according to the subject-matter of the action, and without regard to its form.

This section forms chapter V., title XIII. of the measure.

It was, as were also the whole of the other chapters, comprised in that title, inserted for the first time, on the amendment of 1849. The Code of 1848 contained no provisions upon the subject.

The whole of that title has come down from 1849 to the present time, without amendment or alteration.

Chapters III. and IV. of the same title also relate to real estate proceedings. The former, having reference to partition, will be noticed in the next section, the latter, in the succeeding subdivisions of the present.

The provisions of the Revised Statutes, saved by section 455, are contained in chapter V. of part III. (2 R. S., pp. 303 to 347, inclusive). That chapter consists of eight titles. The last is strictly a special proceeding, regulating proceedings to discover the death of persons upon whose lives any particular estate may depend. As such, it is beyond the scope of the present work. The other seven refer to proceedings in actions, and are as follows:

1. Ejectment.
2. Proceedings to compel determination of claims to real property.
3. Partition.
4. Nuisance.
5. Waste.
6. Trespass.
7. General provisions concerning actions of this nature; which subjects, so far as the enactments remain unrepealed, will be noticed below under their several heads.

By the Revised Statutes (2 R. S., 342, 343, section 23), the practice in real actions had been assimilated to that in personal actions, except where special provision was made to the contrary. The same intention is carried out by the Code to its utmost limits, all distinction as to mere matters of form being now wholly abolished by the section above cited.

Although that section is of itself full and explicit on that head, the following may be cited as decisions in which the above principle is clearly recognized.

As regards the essentials of an action, and the rights of parties, the provisions of the Revised Statutes above cited are wholly saved.

As regards mere formalities, as contradistinguished from matters of substance, they are as wholly abolished. See *Lawrence* vs. *Williams*, 1 Duer, 585 (587); *Lang* vs. *Ropke*, 1 Duer, 701; *Lang* vs. *Wilbraham*, 2 Duer, 171; *Howard* vs. *Howard*, 11 How., 80; *Budd* vs. *Bingham*, 18 Barb., 494 (498, 499); *St. John* vs. *Pierce*, 22 Barb., 362; *Palen* vs. *Reynolds*, 22 How., 353; *Holmes* vs. *Davis*, 21 Barb., 265. N. B.—The reversal of this last case at 19 N. Y., 488, in no wise impairs this portion of the decision. See also a long essay on this subject, at 1 C. R., 19. The doubts entertained in *Traver* vs. *Traver*, 3 How., 351; 1 C. R., 112, as to the applicability of the Code to this class of proceedings, were expressed prior to the amendment of 1849. Since that amendment, there can be no doubt upon the subject.

Proceeding to the specific consideration of this class of proceedings, the first which presents itself is—

(*b.*) EJECTMENT.

The provisions of the Revised Statutes on this subject are numerous and specific, and a large portion of them are retained. They form title I. of chapter V. (2 R. S., pp. 303 to 312), and consist of fifty-eight sections.

It will be necessary to cite in detail, those which more immediately relate to the framing of the complaint, and convenient to notice some others—reserving their more detailed consideration for a future and more appropriate stage.

By section 1 of the chapter in question, the ancient action of ejectment is retained, subject to the specific regulations then imposed.

Under section 2, ejectment may be brought in the same cases in which a writ of right might then be brought by law to recover land, and by any person claiming an interest therein, in fee or for life, either as heir, devisee, or purchaser.

By any widow entitled to dower, at any time after the expiration of six months from the accruer of her right to recover such dower.

Section 3 limits the right of a plaintiff as follows:

§ 3. No person can recover in ejectment, unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established at the trial.

Section 4 provides thus as to the defendant:

§ 4. If the premises for which the action is brought, are actually occupied by any person, such actual occupant shall be named defendant in the declaration; if they are not so occupied, the action must be brought against some

person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.

Section 5 provides that the action shall be commenced in the name of the real plaintiffs, to whom all provisions of law concerning the lessors of a plaintiff shall apply; and section 6 abolishes all the ancient fictions.

Section 7 provides thus as to the contents of the declaration, *i. e.*, the complaint under the present system:

§ 7. It shall be sufficient for the plaintiff to aver in his declaration, that, on some day to be therein specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them as hereinafter provided; and, being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum which the plaintiff shall think proper to state.

Section 8 thus, as to the description:

§ 8. In such declaration, the premises claimed shall be described with convenient certainty, designating the number of the lot or township (if any) in which they shall be situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing the premises by metes and bounds; or in some other way, so that from such description, possession of the premises claimed may be delivered.

Section 9, as to statement of the plaintiff's interest, if undivided:

§ 9. If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in his declaration.

Section 10, generally as to statement, and especially as to dower:

§ 10. If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower, as widow of her husband, naming him. In every other case, the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or for the life of another, or for a term of years, specifying such lives, or the duration of such term.

Section 11, providing for the joinder of different parties, in different courts, is now abolished by the code, as are also sections 12 to 16, as to notice, service, etc.

Sections 17 to 24 inclusive, enable the defendant to enforce the production of the authority of the plaintiff's attorney to sue. See on this subject, *Howard* vs. *Howard*, 11 How., 80.

The remaining sections relate to the practice in a suit, when commenced. A large portion of them are obsolete, being superseded by pro-

visions of the Code; the remainder will be adverted to in due course, hereafter.

The following may however be specially noticed:

Section 29, provides that, in an action against several defendants, if it shall appear upon the trial that their occupations are distinct, the plaintiff may be put to his election at the trial, against which he will proceed. This rule does not apply however to several tenants, occupying different floors in the same building, the entirety of which is sought to be recovered. See *Pearce* vs. *Ferris' Executors*, 6 Seld., 280, below cited.

The case of a plaintiff whose interest expires *pendente lite*, is provided for by section 31. In this case he recovers his damages only, being nonsuited as to the possession.

Sections 43 to 54 inclusive, provide for the assessment of the plaintiff's consequent demand against the defendant, after recovery of the possession, by means of a suggestion on the record, instead of a separate action of trespass for *mesne* profits; such suggestion to be filed and issue joined upon it, and tried, as in the case of an action, and to be substantially in the same form as a declaration, in *assumpsit* for use and occupation. See also, as to assessment of such damages at the circuit, 2 R. S., 342, sections 20, 21. See below, as to the present practice in this respect.

And, lastly, by section 57, it is provided that

No action of ejectment shall hereafter be maintained by a mortgagee, or his assignees, or representatives, for the recovery of possession of the mortgaged premises.

His remedy lies in equity, by way of foreclosure.

The cases cited at the close of the remarks introductory to the present section, have all of them peculiar application to this specific remedy.

A provision is also made in section 17, title VII., of the portion of the Revised Statutes above referred to (2 R. S., 341, 342, section 17), that

Whenever any action shall be brought against any tenant to recover the land held by him, or the possession of such land, the landlord of such tenant, and any person having any privity of estate with such tenant, or with such landlord, in the premises in question, or in any part thereof, may be made defendant with such tenant, in case he shall appear, or may, at his election, appear without such tenant.

As to the liability for costs, of a landlord, defending in the name of his tenant, without such formal substitution, see *Farmers' Loan and Trust Company* vs. *Kursch*, 1 Seld., 558.

Of course, an appearance of this nature may, probably, involve some change in the framing of the complaint as originally contemplated.

Under the Code, as under the previous statutes and practice, the plaintiff in ejectment is bound to make strict proof of his title. He can only recover on the strength of that title, and not on any mere defect or weakness in that of his adversary; nor can he rest his case upon any mere presumption, unsupported by proof; the presumption lies, on the contrary, in favor of a defendant in possession. *Fosgate* vs. *Herkimer Manufacturing and Hydraulic Company*, 12 Barb., 352; affirmed, 2 Kern., 580; *Hill* vs. *Draper*, 10 Barb., 454; *Layman* vs. *Whiting*, 20 Barb., 559; *Barton* vs. *Draper*, 5 Duer, 130; *Munro* vs. *Merchant*, 26 Barb., 383 (396). And this principle holds equally good as against the people, as well as against an individual, both standing on the same footing. *The People* vs. *The Rector of Trinity Church*, 30 Barb., 537.

A defendant, who has come into possession, under title derived from the plaintiff, cannot, however, claim the benefit of this rule, or controvert the right of the latter. *Spencer* vs. *Tobey*, 22 Barb., 260; *Glen* vs. *Gibson*, 9 Barb., 634. See also *Clute* vs. *Voris*, 31 Barb., 511.

In *Spencer* vs. *Tobey*, *supra*, actual possession on the part of the plaintiff, at the time of making the contract, under which the defendant had entered, was held sufficient to support the action, as against the latter, though, as between the plaintiff and another, his title was in dispute. Possession is *primâ facie* evidence of title, and that of the highest estate, to wit, of a seisin in fee. *Hill* vs. *Draper*, 10 Barb., 454. See as to the presumption of a conveyance, *Munro* vs. *Merchant*, 26 Barb., 383 (408). And, where nothing but possession is shown on either side, priority of possession will be sufficient to authorize a recovery. *Brewster* vs. *Striker*, 1 E. D. Smith, 321.

Such proof will not avail, where the title, and the right to immediate possession appear, by other portions of the evidence, to be in another party. *Same case*, stated in note, p. 335, to have been affirmed in the Court of Appeals.

To enable a plaintiff to recover, the interest claimed by him must be visible and tangible, and capable of ascertainment and delivery by the sheriff on execution; and a right of entry must exist, at the commencement of the action. When these requisites concur, the action will be maintainable. *Rowan* vs. *Kelsey*, 18 Barb., 484.

Ejectment will not, therefore, lie in respect of an incorporeal hereditament, such as an easement, or the like. *Child* vs. *Chappell*, 5 Seld., 246; *Adams* vs. *Saratoga and Washington Railroad Company*, 11 Barb., 414. (N. B.—The reversal, 6 Seld., 328, was wholly technical and does not touch this ground.) *Redfield* vs. *Utica and Syracuse Rail-*

road Company, 25 Barb., 54; *Northern Turnpike Road* vs. *Smith*, 15 Barb., 355.

It will lie, however, for land under water. *Champlain and St. Lawrence Railroad Company* vs. *Valentine*, 19 Barb., 484. Also, for an entry upon unoccupied lands, the title to which is shown to be in the plaintiff. *Munro* vs. *Merchant*, 26 Barb., 383.

A mere agreement, as to the boundary lines of adjacent properties, is not, *per se*, any bar to an ejectment. *Terry* vs. *Chandler*, 16 N. Y., 354. But lengthened acquiescence in such an arrangement, sufficient to bring the case within the statute of limitations, will of course have that effect. *Baldwin* vs. *Brown*, 16 N. Y., 359.

In relation to what will constitute a dedication to the public, sufficient to preclude the owner of the soil from maintaining ejectment, as against parties making use of the easement thus conferred, see *Child* vs. *Campbell*; *Adams* vs. *Saratoga and Washington Railroad Company*; and *Redfield* vs. *Utica and Syracuse Railroad Company*, above cited.

Such a dedication, when intended, may be revoked before actual accomplishment, and, in such case, ejectment may be maintained by the owner. To render it complete, there must be either an acceptance by the public authorities, or an actual user by the public. *Bissell* vs. *New York Central Railroad Company*, 26 Barb., 630. See also *City of Oswego* vs. *Oswego Canal Company*, 2 Seld., 257. And, to render such a dedication complete, and available to the public, as such, as against the rights of the owner of the soil, a street, when laid out, and even opened, must be a thoroughfare. *Holdane* vs. *Trustees of Coldspring*, 23 Barb., 103. See, as to what will be sufficient to constitute an acceptance on the part of the public, of a dedication when made, *Clements* vs. *Village of West Troy*, 10 How., 199, overruling the stricter doctrine maintained on a previous hearing of the *same case*, 16 Barb., 251.

Nor does such a dedication impair the rights of the owner of the soil, to recover damages, as against parties using the property so dedicated, in a manner inconsistent with the public easement. *Williams* vs. *New York Central Railroad Company*, 16 N. Y., 87; reversing *same case*, 18 Barb., 222.

In an action of this nature, the plaintiff may impeach a deed under which the defendant claims title, both on legal and also on equitable grounds, both being now capable of joinder in the same proceeding. *Phillips* vs. *Gorham*, 17 N. Y., 270.

The plaintiff must, however, show either an immediate right to possession, or a legal title in himself. He cannot recover on a mere inchoate right. So held as to a party entitled as purchaser under an execution sale, after the expiration of the time for redemption, but who brought eject-

ment, before obtaining his deed from the sheriff. *Smith* vs. *Colvin*, 17 Barb., 157.

Ejectment will not lie against a party, legally in possession, and against whom the plaintiff has a remedy in equity. So held, as to the assignee of a mortgagee in possession. *St. John* vs. *Bumpstead*, 17 Barb., 100; and, as to such a mortgagee, *Randall* vs. *Raab*, 2 Abb., 307.

Nor can a plaintiff, though he has substantially acquired a legal right to the property, maintain his action, whilst any step remains to be taken by him, in order to perfect that right. So held, as to the case of a purchaser under a statutory foreclosure, who brought ejectment, before filing the affidavits and other proofs, as required by the statute. *Bryan* vs. *Butts*, 27 Barb., 503. So also, if there be this or any other imperfection in the proceedings. *Layman* vs. *Whiting*, 20 Barb., 559.

Though, on the contrary, a plaintiff may produce a deed otherwise valid at law, he cannot recover, if the proofs disclose an adverse equitable title. *Garfield* vs. *Hatmaker*, 15 N. Y., 475. See also *Thurman* vs. *Anderson*, 30 Barb., 621.

It is no longer necessary, in order to the validity of an action in ejectment, for the non-payment of rent, or breach of covenant, that an actual entry should be made, or attempted by the plaintiff before suit brought, nor need the notice, required by section 3 of chapter 274 of 1846, abolishing distress for rent, be given, in a case where it is clear there are no goods upon the premises. *Mayor of New York* vs. *Campbell*, 18 Barb., 156. See also, as to entry, *Lawrence* vs. *Williams*, 1 Duer, 585; or, when the stipulations of the lease specifically provide for reentry, without imposing notice, or an insufficiency of goods upon the premises, as a condition, *Keeler* vs. *Davis*, 5 Duer, 507.

Nor is the last mentioned provision applicable, where the breach arises in respect of any other covenant than that for payment of rent. *Garner* vs. *Hannah*, 6 Duer, 262. As to what will be a sufficient notice of the above nature, see *Van Rensselaer* vs. *Smith*, 27 Barb., 104. A notice under the statute in question, supplies the place of, and renders any formal demand of rent, or proof of insufficiency of goods unnecessary. *Van Rensselaer* vs. *Ball*, 19 N. Y., 100 (108); *The Same* vs. *Snyder*, 3 Kern., 299.

As a general rule, however, a court, in exercise of its equitable jurisdiction, will relieve against a forfeiture of this description. See *Garner* vs. *Hannah*, above cited. Nor can equitable relief be sought in an action of this nature, *Linden* vs. *Hepburn*, 3 Sandf., 668; 5 How., 188; 3 C. R., 65; 9 L. O., 80, in which case the plaintiff was put to his election. See also, as to the incompatibility of joining a claim for forfeiture, and also for damages for breach of covenant, in the same proceeding, *Underhill* vs. *Saratoga and Washington Railroad Company*, 20 Barb.,

455. See likewise, as to the incompatibility of the joinder of ejectment and trespass, *Budd* vs. *Bingham*, 18 Barb., 494.

A forfeiture cannot be created by implication, or by mere words. *De Lancey* vs. *Ganong*, 5 Seld., 9; affirming *same case*, 12 Barb., 120. Nor can ejectment for non-payment of rent be ever maintainable, unless the demise contains a positive proviso for re-entry, in that event. *Same case; Van Rensselaer* vs. *Jewett*, 2 Comst., 141 (148). See also last case, as to the strict regularity which the courts will require, in relation to the making of a demand for rent, when requisite, in order to sustain a subsequent ejectment.

A forfeiture, when incurred, will not be waived by an act of the landlord, done in ignorance of its existence. *Keeler* vs. *Davis*, 5 Duer, 507.

Ejectment in respect of forfeiture for non-payment is maintainable, not merely as between landlord and tenant, strictly considered, but, also, in respect of a perpetual rent-charge, reserved upon an absolute conveyance or demise. *Van Rensselaer* vs. *Ball*, 19 N. Y., 100; *The Same* vs. *Snyder*, 3 Kern., 299.

As to the rule in relation to heirship, in a case where there is a concurrence of illegitimacy and alienage, in the course of tracing the plaintiff's title, see *St. John* vs. *Northrup*, 23 Barb., 25. But, as regards resident aliens, mere alienage in the plaintiff or his ancestor, is no bar to the action, until office found. *Ford* vs. *Harrington*, 16 N. Y., 285 (294). See also, as to protection of the treaty rights of an alien in unoccupied lands, *Munro* vs. *Merchant*, 26 Barb., 383.

As to the right of a *feme covert*, to maintain ejectment in her own sole name, or in conjunction with her husband, in respect of lands held to her separate use, see *Darby* vs. *Callaghan*, 16 N. Y., 71; *Ingraham* vs. *Baldwin*, 12 Barb., 9; affirmed, 5 Seld., 45. See also *Ripple* vs. *Gilborn*, 8 How., 456, below cited, under *Partition*.

Transfer by the defendant to a third party, pending the action, abates the proceedings, and creates, in fact, a new cause of action against the transferree. *Mosley* vs. *Albany Northern Railroad Company*, 14 How., 71; *Putnam* vs. *Van Buren*, 7 How., 31.

As to proceedings in ejectment being absolutely abated, by the death of a party before verdict or report, see *Kissam* vs. *Hamilton*, 20 How., 369.

The only judgment that can be taken by a plaintiff, after abatement by alienation, is for damages under section 31 of the portion of the Revised Statutes as above cited. His right to possession must be asserted in a fresh action. *Lang* vs. *Wilbraham*, 2 Duer, 171.

In the ordinary action of ejectment, for lands held in common, it is not necessary that all the tenants in common should unite as coplain-

tiffs. Such joinder is only necessary, when the action is brought as a substitute for a writ of right, and to establish a common title to the whole of the premises. *Kellogg* vs. *Kellogg*, 6 Barb., 116.

As to the inexpediency of submitting a controversy of this nature under section 372, instead of going through the ordinary forms of an action, especially with regard to the statutory right to a new trial, see *Lang* vs. *Ropke*, 1 Duer, 701.

It is not essential that the title of a plaintiff in ejectment, should be immediate, at the time of its original acquisition. A lessee of the premises, for a term to commence on a future day, was accordingly held entitled to maintain ejectment against occupants of the demised premises, in a suit, brought after such term had actually commenced. *Trull* vs. *Granger*, 4 Seld., 115.

As regards the defendants in such cases, the primary defendant is the actual occupant of the premises. It is not, in strictness, necessary at the outset of the action to join any other, and, where there is such an occupant, he must be joined in all cases, the action being strictly possessory in its nature. This part of the practice is still regulated by section 3 of the portion of the Revised Statutes above cited. Where there exists no such occupant, the action must be brought against the other parties in that section mentioned, and in the order there prescribed. See *Taylor* vs. *Crane*, 15 How., 359; *People* vs. *The Mayor of New York*, 28 Barb., 240; 17 How., 56; 8 Abb., 7 (15). See, however, as to the case of a mere occupant, not holding any interest, but in charge under superior officers, *People* vs. *Ambrecht*, 11 Abb., 97.

Ejectment for dower is maintainable by a doweress, against the actual occupant alone, and this, before assessment or admeasurement (though provision for that purpose should be made in the judgment), and also without previous demand. *Ellicott* vs. *Mosier*, 3 Seld., 201; affirming *same case*, 11 Barb., 574.

As to property of a religious incorporation, the corporation is the proper party to be sued as occupant, and not its trustees. The former is the actual owner, the latter mere temporary fiduciaries. *Lucas* vs. *Johnson*, 8 Barb., 244.

Ejectment will not lie, against parties who are not and never have been in possession, or receipt of the rents or profits of the property claimed. *Van Horne* vs. *Everson*, 13 Barb., 526; *Putnam* vs. *Van Buren*, 7 How., 31. See also *Van Buren* vs. *Cockburn*, 14 Barb., 118; *Palen* vs. *Reynolds*, 22 How., 353.

Nor, as a general rule, and unless he shall elect to appear under the provision of the statute, will it lie, in the first instance, against a lessor not in possession. *Champlain and St. Lawrence Railroad Company* vs. *Valentine*, 19 Barb., 484; *People* vs. *The Mayor of New York*,

supra; Ellicott vs. *Mosier*, *supra*. See, however, *Fosgate* vs. *Herkimer Manufacturing and Hydraulic Company*, below cited.

In an action brought for the recovery of an entire building, separate tenants of different rooms, or stories, may all be joined as defendants, and a recovery may be had against all. They are joint trespassers; nor will the plaintiff be bound to elect, under the provisions of the statute (§ 29), as to the holders of several interests. *Pearce* vs. *Ferris's Executors*, 6 Seld., 280; affirming *same case*, reported as *Pearce* vs. *Colden*, 8 Barb., 522. In *Fosgate* vs. *Herkimer Manufacturing and Hydraulic Company*, 9 Barb., 287, the possession of the defendants, as to the land, forming part of the premises sought to be recovered, was clearly several.

The objection as to parties must, in order to be available, be taken at the outset of the suit, by demurrer; if not, it cannot be raised at the hearing. *Fosgate* vs. *Herkimer Manufacturing and Hydraulic Company* (on further trial), 12 Barb., 352; affirmed, 2 Kern., 580.

In the same case it is held that, where a landlord, or where parties other than the actual occupant, claim an interest in the premises sought to be recovered, it may be admissible, and even proper to join them as additional parties defendant in the first instance, under the authority conferred by section 118, and in order to a complete determination of the controversy, inserting the necessary averments, without waiting the signification of their election to be so brought in, under the provision of the Revised Statutes above referred to. See per Crippen, J., 2 Kern., 583. An appearance and answer by the party so joined will clearly amount to an election, and will make the pleading regular. This view was acted upon, and an abated action, continued against the heirs at law of a deceased defendant, in *Waldorph* vs. *Bortle*, 4 How., 358, it being held, moreover, that if there existed an actual occupant, he ought also to be joined (p. 359). See likewise, as to ejectment for dower, *Ellicott* vs. *Mosier*, above cited, 3 Seld., 201 (207, 208).

In regard to the framing of the complaint in this action, the requisitions of the Revised Statutes (see sections 7 to 10, above cited), should be kept strictly in view, and the complaint framed in accordance with their spirit.

In *Warner* vs. *Nelligar*, 12 How., 402, the court went so far as to strike out a statement of the conveyance under which the plaintiff's title was derived, on the ground that all beyond what was required by the Revised Statutes, was redundant. See also *Ensign* vs. *Sherman*, 13 How., 35; reversed, 14 How., 439, as below stated.

This case seems, however, to carry the doctrine a little too far, and to establish too strict a rule, the reservation of the former statutory provisions, effected by section 455, being substantial, and not formal in its nature. (See 28 Barb., 235, per Balcom, J.).

Those portions of the form of allegation, prescribed by the provisions above referred to, which are strictly formal in their nature, and are not necessary to be sustained by actual proof on the trial, are not, it would clearly seem, essential, under the Code, the spirit of which is to exclude all merely formal, and, *a fortiori*, all fictitious allegations. Of this nature is the allegation of actual possession, and of the date of that possession, and of his actual ejection from the premises by the defendant, in a case, where those specific facts do not really exist, as between the plaintiff and the defendant. In such a case, it will be sufficient to aver in the complaint that the plaintiff has lawful title as owner, &c. (describing the nature of his ownership), and that the defendant is in possession of the premises, and unlawfully withholds such possession. So far, the strict letter of the section 7 may, and should be departed from. As regards the statement of the facts which constitute the plaintiff's title or right to possession, they are, however, in full operation, and relieve him from the necessity of any detailed allegation on the subject, those facts being merely probative, not constitutive in their nature. See *Ensign* vs. *Sherman*, 14 How., 439; reversing *same case*, 13 How., 35, which held that, when the statutory form is not strictly followed, the facts, showing the defendant's possession to be unlawful, must be specifically averred. See also, *Sanders* vs. *Leavy*, 16 How., 308; *Walter* vs. *Lockwood*, 23 Barb., 228; 4 Abb., 307; *The People* vs. *The Mayor of New York*, 28 Barb., 240 (248); 17 How., 56; 8 Abb., 7 (15). See likewise, *Garner* vs. *Manhattan Building Association*, 6 Duer, 539, where a complaint, alleging seizure and possession in the ancestor of the plaintiffs, title in the plaintiffs as his heirs, and wrongful possession on the part of the defendants, was held sufficient.

By this series of decisions, *Lawrence* vs. *Wright*, 2 Duer, 673, holding that the facts showing that the plaintiff has a legal title must be specifically averred, may be considered as overruled.

The old practice of stating a cause of action against the defendant, in different counts, as applicable to the rights of different plaintiffs, permitted by the Revised Statutes, is wholly abolished by the Code. *St. John* vs. *Pierce*, 22 Barb., 362.

A total omission to describe the premises sought to be recovered, in a manner sufficient for their identification, will be a fatal objection to the complaint. *Budd* vs. *Bingham*, 18 Barb., 494. A slight uncertainty may, however, be disregarded or amended. See *St. John* vs. *Northrup*, 23 Barb., 25.

To sustain an action of ejectment by one tenant in common, against another, actual ouster, or some act amounting to a total denial of the plaintiff's right, must be alleged. *Edwards* vs. *Bishop*, 4 Comst., 61.

A mere assertion of right, or claim of title, on the part of the defendant, will not be sufficient to maintain the action, if not followed up by acts amounting to a positive or virtual dispossession. *Same case.* Where, by the complaint, it appears that he is not deprived of actual possession, his remedy for acts of mere disturbance of, or interference with that possession, lies in trespass instead of ejectment, and, if he desires to obtain the determination of an adverse claim of title, that remedy lies by proceedings under the statute for that purpose. *Taylor* vs. *Crane*, 15 How., 359. See also *Peck* vs. *Hiler*, 31 Barb., 117.

As to what acts will amount to an actual disseisin, so as to create a freehold by wrong, see *McGregor* vs. *Comstock*, 16 Barb., 427.

As to the power of the court to disregard or amend immaterial variances, and this, even prior to the Code, and irrespective of the additional facilities which it gives, see *Kellogg* vs. *Kellogg*, 6 Barb., 116 (131, and cases cited).

Since the passage of the Code, the remedy of a plaintiff, recovering in ejectment, in respect of mesne profits of the land recovered, is by action, and not by suggestion on the record, according to the former practice, and the sections of the Revised Statutes before referred to. The action so brought will, however, still be governed by the latter provisions, so far as regards the principle upon which a recovery is to be had, and the measure of that recovery. *Holmes* vs. *Davis*, 19 N. Y., 488. See also *same case*, in the court below, 21 Barb., 265; the reversal of that decision only going to the measure of damages, and not affecting the general principle laid down. See, as to a similar action brought by a defendant, originally ejected, but subsequently restored to his possession by a writ of restitution, *Sheldon* vs. *Van Slyke*, 16 Barb., 26.

In *Livingston* vs. *Tanner*, 12 Barb., 481, it is held that a plaintiff may elect either to bring a separate action for this purpose, consequent upon his recovery in ejectment, or to assert both claims in one and the same suit. In the latter case, he must, however, include, in his complaint, separate allegations, the same in substance as those required by the Revised Statutes to be inserted in a suggestion, or he cannot recover in this respect. He must, in fact, insert the ordinary statements in a complaint for use and occupation. See likewise *Holmes* vs. *Davis*, 21 Barb., 265 (274); *The People* vs. *The Mayor of New York*, 28 Barb., 240 (250); 17 How., 56 (64); 8 Abb., 7 (15).

The Code itself (section 167, subdivision 5) seems, in fact, clearly to admit, and to provide for this species of joinder. See *Tompkins* vs. *White*, 8 How., 520 (521).

But this principle must not be carried too far, and, in strictness, it would seem to be confined to those cases, in which the demand for recovery of possession, and the claim in respect of mesne profits, are

made against one and the same person. In ejectment brought against a mere occupant, without joinder of his landlord, a claim in respect of mesne profits is clearly inconsistent with the ordinary principles of an action for use and occupation. And, even when the landlord and tenant are both defendants, the latter might have a right to object for misjoinder, under the last clause of section 167, to the claim for mesne profits extending to a period beyond that of his own occupation. See *The People* vs. *Mayor of New York*, above cited.

Nor can a claim of this nature be asserted against one only of two joint defendants, on a mere allegation of the receipt of rents by him. Such a claim is several, and can only be recovered in a several action, for money had and received. To authorize a recovery for mesne profits, in the same action in which ejectment is sought, some connection must be shown between the alleged withholding of possession, and that of the rents and profits sought to be also recovered. *Tompkins* vs. *White*, 8 How., 520, above cited.

Nor can a claim to real property be asserted, under the form of an action for money had and received. *Carpenter* vs. *Stillwell*, 3 Abb., 459.

(*e.*) TRESPASS ON LANDS.

Under title VI., chapter V., part III., of the Revised Statutes before referred to (2 R. S., 338, 339), treble damages are recoverable, in an action of this nature.

1. For the wilful taking away, or destruction of growing timber. Sections 1, 2, 3.

2. In respect of a forcible ejectment, or exclusion from real property.

See also, chapter 234 of 1841, sections 8 and 9, as to the remedy for a trespass on Indian lands.

An injury to the plaintiff's possession being the gist of the action, an allegation and proof of such possession is sufficient to enable him to maintain it. *Vide Althause* vs. *Rice*, 4 E. D. Smith, 347.

But, for such purpose, the plaintiff must either show actual possession, or title in himself, at the time the injury was committed. A mere allegation of a conveyance to him, prior to that injury, will be insufficient, unless it be shown that his grantor was in possession, or had title. *Gardner* vs. *Heart*, 1 Comst., 528.

Where no paper title is shown, actual possession will, of itself, be sufficient to maintain the action, and, where there is a conflict as to the facts, the party proving the oldest possession will prevail. *Kellogg* vs. *Vollentine*, 21 How., 226.

If out of possession himself, the plaintiff cannot recover in this description of action, against parties in actual possession, under claim of

title. *Frost* vs. *Duncan*, 19 Barb., 560. Nor can he unite a claim of this nature, in the same complaint with one for ejectment. *Budd* vs. *Bingham*, 18 Barb., 494.

A landlord is, however, entitled to recover, as against his tenant, for an injury to the freehold, though committed before the expiration of his term. *Ray* vs. *Ayers*, 5 Duer, 494.

Trespass will not lie in this state, for injury to lands situate in another. *Hurd* vs. *Miller*, 2 Hilt., 540.

An administrator is entitled to maintain a suit, in respect of a trespass, committed on the lands of his intestate, during the latter's lifetime. *Rockwell* vs. *Saunders*, 19 Barb., 473 (481). See 2 R. S., 114, §§ 4, 5; *ibid.*, 447, § 1.

Nor does a dedication of land to the public use, preclude the owner from maintaining trespass, for an user of such land, inconsistent with the public easement. *Williams* vs. *New York Central Railroad Company*, 16 N. Y., 87, before cited.

As to acts on the part of a landlord towards his tenant, which will constitute a trespass, though falling short of an eviction, see *Vatel* vs. *Herner*, 1 Hilt., 149; *Randall* vs. *Alburtis*, 1 Hilt., 285; *Campbell* vs. *Shields*, 11 How., 565; *Peck* vs. *Hiler*, 31 Barb., 117.

Where, on a general complaint of this nature, the defendant sought to justify, a new and specific assignment of the trespass complained of, was held to be neither necessary nor allowable. *Stewart* vs. *Wallis*, 30 Barb., 344. *Sed* query, whether the same object might not have been attained, by amendment on the answer coming in.

As to the right of an owner of lands to recover damages, in respect of the diversion of a running stream, and the circumstances under which it may be asserted, see *Bellinger* vs. *New York Central Railroad Company*, 23 N. Y., 42; *Haight* vs. *Price*, 21 N. Y., 241; *Lampman* vs. *Milks*, 21 N. Y., 505; *Pixley* vs. *Clark*, 32 Barb., 268.

As to the right of one adjoining proprietor of lands, to maintain trespass against another, for cutting trees standing on their boundary line, see *Relyea* vs. *Beaver*, 34 Barb., 547.

It has been held, that a remainder-man may maintain an action, for injury to the inheritance by acts of this nature. Also, that such an action would lie against an intended purchaser, whilst actually in possession. *Van Deusen* vs. *Young*, 29 Barb., 9.

As to the liability in damages, for an adjoining owner interfering with a party-wall, without consent, see *Potter* vs. *White*, 6 Bosw., 644.

(*d.*) Slander of Title.

Another injury in connection with real estate, for which redress is obtainable by action, is that of slander of title.

To sustain it, there must be want of probable cause, and special damages must be alleged, and that circumstantially. A general allegation of loss will not be sufficient. Nor will a defendant be responsible for what he says or does, in pursuance of a claim of title in himself, provided there be any ground for such claim. *Bailey* vs. *Dean*, 5 Barb., 297.

In *Kendall* vs. *Stone*, 1 Seld., 14; reversing *same case*, 2 Sandf., 269, the rule is laid down thus: to maintain an action for slander of title to lands, the words spoken must not only be false, but they must be uttered maliciously, and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged and proved. Nor can a plaintiff recover damages, by reason of the breaking off of a contract, occasioned by words spoken by the defendant, when such breaking off is by his own voluntary act.

Where the damages arise from the plaintiff's being precluded from selling or mortgaging the property which is the subject of the slander, it is essential, in stating a cause of action, to name the person or persons who refused, from that cause, to loan or purchase. An omission to do so will render the complaint demurrable. *Linden* vs. *Graham*, 1 Duer, 670; 11 L. O., 185.

(*e.*) Determination of Claims.

This, and the two following heads, form the subject of a special chapter in the Code, chapter IV., title XIII., of part II.

The provision on this particular subject is contained in section 449 (dating from 1849), which runs as follows:

§ 449. Proceedings to compel the determination of claims to real property, pursuant to the provisions of the Revised Statutes, may be prosecuted by action under this act, without regard to the forms of the proceedings, as they are prescribed by those statutes.

The statutory provisions on the subject, are contained in title II., chapter V., part III., of the Revised Statutes, 2 R. S., 312 to 316. They have, however, been extensively amended; first, in part by chapter 50, of 1848—see 3 R. S., 711 (3d edition); and latterly, by chapter 511, of 1855, p. 943, which substantially remodels the whole title, absolutely repealing sections 4, 8, 9, 10, 11, 12, and adding, by section 11 of that measure, a right of appeal, as in other actions under the Code.

By chapter 116, of 1854, p. 276, the provisions in question, as they then stood, were extended to corporations, who were enabled to proceed under them, in the same manner as individuals, with certain modifications in form as there prescribed.

Section 1 (amended in 1848) provides thus:

Where any person singly, or he and those whose estate he has, shall have been for three years in the actual possession of any lands or tenements, claiming the same in fee or for life, or for a term of years not less than ten, he may compel a determination upon any claim, which any other person may make, to any estate in fee or for life, or for any term of years not less than ten, in possession, reversion, or remainder, to such lands or tenements, in the manner and by the proceedings hereinafter specified.

Section 2 (amended in the same year) runs thus:

§ 2. He shall serve a notice, subscribed with his name and place of residence, on such claimant, stating,

1. His right to the premises demanded, in a brief manner, and whether his estate therein is for fee or for life, or for a term of years not less than ten, and whether he holds the same as heir, devisee, or purchaser, with the source or means by which his right immediately accrued to him.

2. The premises claimed, with the same certainty as hereinbefore required in a declaration in ejectment.

3. That such premises then are, and for the three years preceding such notice have been, in his actual possession, or in the actual possession of himself and those from whom he derives his title; and,

4. That the person to whom such notice is directed, unjustly claims title to such premises, and that, unless such person appear in the Supreme Court within the time, and assert his claim, in the manner provided by law, he and all persons claiming under him, will be forever barred from all claim to any estate of inheritance or freehold, or for a term of years not less than ten, in possession, reversion, or remainder, to the premises described in such notice.

Section 3 proceeds as follows:

§ 3. Such notice can be directed to and served, only upon a person being at the time of full age and not insane, nor imprisoned on any criminal charge or conviction, and not being a married woman; and it shall be served, by delivering a copy thereof personally to the individual to whom it is directed.

The remainder of the statute, as amended and remodelled in 1855, goes on to provide as to the appearance and answer of the defendant, if he contests, and for the adjudication upon, and final and conclusive disposition of the controversy thus created; or for a perpetual bar to the assertion of such claim, as against the plaintiff, should the defendant neglect to appear, or fail to establish the claim thus sought to be determined.

Prior to the amendments of 1855, it was doubted whether, notwithstanding the express provision in section 449, the very nature of these proceedings did not render it impossible for them to be carried on, in conformity with the forms of the Code, or otherwise than as a strictly statutory proceeding. See *Crane* vs. *Sawyer*, 5 How., 372; 1 C. R. (N. S.),

30. See, however, *obiter dictum* in *Stryker* vs. *Lynch*, 11 L. O., 116 (118). This view was, however, controverted in *Hammond* vs. *Tillotson*, 18 Barb., 332, in which case, it was considered that an action in the ordinary form under the Code is the proper mode of assertion of this remedy, and that a complaint, drawn out and subscribed in the ordinary manner, and which stated substantially all that was required to be stated, and demanding the like relief, as was directed to be specified in the notice prescribed by section 2 of this portion of the Revised Statutes, as above cited, was a sufficient and proper form of bringing the plaintiff's case before the court.

The amendments of 1855 give additional weight to this view, which is doubtless correct. The authority of *Hammond* vs. *Tillotson* is acknowledged, and its principles carried out in *Mann* vs. *Provost*, 3 Abb., 446, in which a judgment by default, obtained by the plaintiff in proceedings of this nature, was opened upon terms, under the general authority conferred by section 174.

To authorize a proceeding of this nature, the claim of the defendant must be adverse to that of the party in possession. A tenant for life cannot maintain it, against devisees in remainder. Nor can it be instituted by one who is not in possession himself. *Onderdonk* vs. *Mott*, 34 Barb., 106.

(*f.*) Waste.

This form of action is thus provided for, by sections 450 to 452 of the Code, first passed in 1849, and which have come down without amendment.

§ 450. The action of waste is abolished, but any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected thereby. Wrongs heretofore remediable by action of waste, are subjects of action as other wrongs, in which action there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises.

§ 451. The provisions of the Revised Statutes relating to the action of waste, shall apply to an action for waste, brought under this act, without regard to the form of the action, so far as the same can be so applied.

§ 452. Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion, shall be adjudged in the action, to be equal to the value of the tenant's estate, or unexpired term, or to have been done in malice.

The provisions of the Revised Statutes in relation to this action, as above referred to, will be found in title V., chapter V. of part III., 2 R. S., pp. 334 to 338.

The provisions requiring citation on the present occasion, are as follows :

The rights of plaintiffs are thus provided for, by sections 1 to 4 inclusive, and also by section 20 :

§ 1. If any guardian, or any tenant by the courtesy, tenant in dower, or for term of life or years, or the assigns of any such tenant, shall commit waste during their several estates or terms, of the houses, gardens, orchards, lands or woods, or of any other thing belonging to the tenements so held, without a special and lawful license in writing so to do, they shall be respectively subject to an action of waste.

See, as to waste occasioned by cutting timber, *McGregor* vs. *Brown*, 6 Seld., 114.

§ 2. In case any such tenant shall let or grant his estate, and still retain possession of the same, and commit waste, the party entitled to the reversion of the tenements, may maintain his action of waste against such tenant.

§ 3. If one joint tenant, or tenants in common, shall commit waste of the estate held in joint tenancy or in common, he shall be subject to an action of waste, at the suit of his cotenant or tenants.

§ 4. An heir, whether he be within or of full age, may maintain an action, for waste done in the time of his ancestor, as well as in his own time.

§ 20. Whenever any lands or tenements shall be sold by virtue of an execution issued upon any judgment or decree, the person to whom a conveyance may be executed by the sheriff, pursuant to such sale, may maintain an action for waste, against any person who may have been in possession of the premises so conveyed, after the sale thereof, for any waste committed on such premises after such sale.

But, by sections 21 and 22 a number of specific acts are exempted from the scope of section 20, and licensed on the part of the intermediate occupant, during the fifteen months, between such sale and the execution of the sheriff's deed.

Although superseded by the usual process under the Code, the section prescribing the form of summons under the Revised Statutes seems to require citation, inasmuch as it seems beyond a question, that all the particulars required to be inserted in that summons must also be included in a complaint under the present form of action.

That section (section 5) prescribes thus :

Such summons should require the defendant (styled A. B. in the section) to show wherefore he has committed waste, to the injury of C. D. (the plaintiff), of a certain dwelling-house and garden, situate in the town of , in the county of [describing the premises, according to their actual situation, and with the same certainty, as in this chapter before required in declaration in ejectment], and which premises the said A. B. holds in dower,

of the inheritance of the said C. D. [or, which the said A. B. holds as tenant, for years, or otherwise, as the case may be].

The remainder of the sections in the title prescribe the practice in such proceeding, when commenced, and are either superseded by the Code, or will be noticed hereafter. Treble damages are recoverable in all actions, except those brought by joint tenants or tenants in common. Section 10. In this latter class, the plaintiff may elect either to recover such damages, or to have partition made of the premises, for effecting which, in such case, the necessary machinery is provided.

The following decisions have reference to the form of action under the Code, thus authorized:

In *Harder* vs. *Harder*, 26 Barb., 409, the evidence necessary on a writ of inquiry, on a default taken in an action of this nature, is discussed, and the principle laid down in section 452 carried out, that the plaintiff cannot have judgment to recover the place wasted, where he fails to prove affirmatively, that the injury to his inheritance is equal to the value of the defendant's estate.

As to the extent to which a tenant of land, leased in an uncultivated state, may cut timber, without being guilty of waste, see *Kidd* vs. *Dennison*, 6 Barb., 9.

The right of the party redeeming under a sale on execution, and who subsequently takes out the usual sheriff's deed, to recover damages for intermediate waste, between the sale and the delivery of such deed, is recognized and enforced in *Thomas* vs. *Crofut*, 4 Kern., 474. The decision is based, however, on the rights of the grantee, under 2 R. S., 373, section 61, and the specific provision in section 20 of the title above cited is not adverted to.

In framing the complaint in an action of this nature, care must be taken to comply with all the requisites, prescribed as constitutive parts of the former statutory summons: see section 5 of the title of the Revised Statutes, as above cited; and also to lay ground for the taking of judgment of forfeiture and eviction, under section 452, by a specific allegation that the injury complained of is equal to the value of the tenant's estate, or that such injury has been done in malice, when either is the case. The nature of the alleged waste, of the title of the plaintiff, and of the tenancy or occupation of the defendant, should also be clearly shown, attention being paid to the phraseology of the statute, as above cited, in framing the allegations for these purposes; and the specific relief to which the plaintiff is entitled, under any of the different provisions above cited, according to the nature of the action, should be specifically demanded.

(*g.*) Nuisance.

The Code makes provision on the subject of this cause of action, as follows; both sections having been passed in 1849, and having come down unaltered:

§ 453. The writ of nuisance is abolished; but any proceeding heretofore commenced, or any judgment rendered, or right acquired, shall not be affected thereby.

§ 454. Injuries heretofore remediable by writ of nuisance, are subjects of action, as other injuries, and, in such action, there may be judgment for damages, or for the removal of the nuisance, or both.

The provisions of the Revised Statutes, in relation to this remedy, are contained in title IV., chapter V., part III., 2 R. S., 332, 333.

It may be convenient to cite the following sections, the substance of which may be considered as retained. As to matters of form, they and the other sections which constitute the title in question, are either repealed, or superseded.

§ 2. In cases of nuisance, the plaintiff shall not go without remedy, because the land is transferred to another; but, in such case, the party by whom the nuisance was erected, and he to whom it was transferred, shall both be named as defendants in the writ.

Section 3, relates to the form of writ, and, in framing the complaint, care should be taken to combine all the requisites there imposed.

That section prescribes the following form of statement:

Whereas, A. B. has complained to us, that C. D. unjustly has raised a certain dam [or a certain pool, or a certain house, or thrown down a certain hedge, &c., as the case may be], in the town of , in your county, to the nuisance of the freehold of the said A. B.; we do, therefore, command, &c.

The other sections provide as to the service, joinder of issue, trial, and judgment upon such writ, when issued, and are repealed or superseded as above.

In framing the complaint, attention should be paid to the requisites imposed by section 3, as above cited. The *seizin* of the plaintiff should be positively stated, and the nature and extent of the act complained of, and of the injury resulting therefrom to the plaintiffs, must also be clearly and positively averred; in order, at once, to ground a claim for adequate damages, and also for the guidance of the court, in making a proper order for its cessation or removal.

In *Ellsworth* vs. *Putnam*, 16 Barb., 565, it is distinctly laid down that, in a complaint of this nature, the plaintiff must aver all that was necessary to sustain a writ of nuisance under the former practice.

Where the injury complained of, is in respect to the erection of a nuisance on land of the plaintiff, in possession of the defendants, the former must allege ownership of the freehold in himself, and tenancy of such freehold by the defendants, at the time when the acts complained of were committed.

The action in this form is not favored, and mere possession is not sufficient to sustain it. Ownership of the freehold on the one hand, and injury to such freehold on the other, are essential to its maintenance, and the substance of the statute must be strictly pursued. Judgment of abatement must be against the owner in fee, and, where the land has been aliened, both the original erector and the continuer of the nuisance complained of, must be joined, or the action cannot be maintained. It will not lie for a bare continuance of a previous injury. *Same case. Brown* vs. *Woodworth*, 5 Barb., 550.

It has been held, that, as against the continuator of a previously existent nuisance, notice to abate, before suit brought, should necessarily be proved. *Hubbard* vs. *Russell*, 24 Barb., 404. But see, *per contra*, *Brown* vs. *Cayuga and Susquehanna Railroad Company*, 4 Kern., 486.

As against a party continuing, every act of continuance is a fresh nuisance, and entitles the party injured to maintain a fresh action for damages. Nor will a prior recovery bar a fresh action; and, in framing the complaint, it is not necessary, though advisable, to refer to such prior proceeding. *Beckwith* vs. *Griswold*, 29 Barb., 291. See also *Brown* vs. *Cayuga and Susquehanna Railroad Company*, 2 Kern., 486, above cited.

A suit of this description is subject to all the incidents of an ordinary suit under the Code, including the power of amendment, or disregard of formal objections. *Beckwith* vs. *Griswold; Hubbard* vs. *Russell*, *supra.*

In relation to the personal right of a party injured, to abate a nuisance, and the restrictions under which it may be exercised, see *Northrup* vs. *Burrows*, 10 Abb., 365.

The equitable remedy for abatement of a nuisance by injunction, has been above adverted to, under the head of *Provisional Remedies*, and will be more fully considered in the succeeding section.

In relation to what will or will not constitute a nuisance at law, the following decisions may be adverted to:

As to when noise will or will not constitute a nuisance, see the conflicting cases of *First Baptist Church in Schenectady* vs. *Schenectady and Troy Railroad Company*, 5 Barb., 79; and *The Same* vs. *Utica and Schenectady Railroad Company*, 6 Barb., 313.

A railroad is not *per se* a nuisance, *Drake* vs. *Hudson River Rail-*

road Company, 7 Barb., 508; *Hentz* vs. *Long Island Railroad Company*, 13 Barb., 646. See also heretofore, under the head of the provisional remedy of *Injunction*.

As to the effect of noisome smells, and the principle that any thing done to the hurt or annoyance of the lands of another, is a private nuisance, remediable by action, see *Cropsey* vs. *Murphy*, 1 Hilt., 126.

In relation to such acts, in connection with the erection of a building, as will or will not constitute a nuisance to the property of another, and the general principles of law in this respect, see *Pickard* vs. *Collins*, 23 Barb., 444, and the cases there cited or referred to.

As to the unauthorized setting up of a monopoly, being held to constitute a nuisance at law, see *Hecker* vs. *New York Balance Dock Company*, 13 How., 549.

The erection of a dam, or the collection of water in a reservoir, is not *per se* a nuisance, unless extraneous facts, or circumstances rendering it such, be proved. Their existence is a question for a jury, and the powers of a board of health do not extend to order an abatement in such a case. *Rogers* vs. *Barker*, 31 Barb., 447.

§ 151. *Suits in Equity Generally Considered.*

The above remarks, though embracing many, do not, of course, profess to include, still less to give, forms for every species of complaint, which will be necessary in practice. The same general principles, however, apply to all, and all must now be framed upon the same model, *mutatis mutandis*.

The foregoing observations have more peculiar reference to actions, where the relief demanded would, under the old system, have been more peculiarly of common law cognizance. The class of equitable actions, if they may so be termed, remains to be noticed.

The consideration of this branch of the subject, in its more general aspects, has been already anticipated in the preceding book, especially in section 121. The safest guide which can be taken with reference to the averments in a complaint of this nature, will, perhaps, be a well-drawn bill in chancery under the old practice; carefully retrenching, in the process of adapting that form to the present requisites, every verbal surplusage, and every merely probative allegation.

Some discussion has heretofore arisen, as to the extent of the jurisdiction of the courts over controversies of this nature, arising out of the following provision at 2 R. S., 173, section 37, in relation to the former Court of Chancery, grounded on the theory that cognizance of controversies of trifling pecuniary value was beneath its dignity, if attempted to be brought before it, in accordance with that view.

§ 37. The Court of Chancery shall dismiss every suit concerning property, where the matter in dispute, exclusive of costs, does not exceed the value of one hundred dollars, with costs to the defendant.

This section is now repealed by chapter 460 of 1862 (the last amendment of the Code), section 39.

There is, therefore, no longer any limitation on the powers of the courts in this respect. However small may be the value of the subject-matter, they have now jurisdiction of the controversy.

Before this settlement of the question, it was contended, in one class of cases, that this restriction was still operative, and that the court was bound, on the objection being brought to its notice, to give it full weight, and carry out the statutory direction. See *Shepard* vs. *Walker*, 7 How., 46; *Woolsey* vs. *Judd*, 4 Duer, 596 (a dissenting opinion), and *Marsh* vs. *Benson*, 19 How., 415; 11 Abb., 241.

On the other hand, it was held that the restriction was abolished, by means of the changes in the organization of the courts, under the constitution of 1846, and the consequent measures, in the following cases: *Cobine* vs. *St. John*, 12 How., 333; *Marsh* vs. *Benson*, 19 How., 425; 11 Abb., 250 (dissenting opinion); *Mallory* vs. *Norton*, 21 Barb., 424; *Woolsey* vs. *Judd*, 4 Duer, 379; 11 How., 49 (majority opinion). See likewise, *Quick* vs. *Keeler*, 2 Sandf., 231 (233).

And suits, in which the demand for equitable relief was not of a nature to be represented by any specific value, were also considered not to be within the restriction, if existent. See note, 4 Duer, 600, also 19 How., 424.

A party suing, as in equity, will not merely be debarred from relief of that nature, in a case where his right to a common law remedy is clear (see before, section 121, and cases there cited); but, in a case which draws near to the limits formerly existent between the concurrent jurisdictions, he should, on the face of his complaint, establish by proper allegation, that he is, in fact, remediless in the premises, unless relief be administered in the case upon equitable principles. See *Marsh* vs. *Benson* (*supra*), 19 How., 415 (421); 11 Abb., 241; *Mills* vs. *Block*, 30 Barb., 549; *Williams* vs. *Ayrault*, 31 Barb., 364; *Wilson* vs. *Forsyth*, 24 Barb., 105.

In *Heywood* vs. *City of Buffalo*, 4 Kern., 534 (540), the same rule is thus stated in terms: "It is still the law, that a party who brings an equitable action, must maintain it on some equitable ground; and, if his cause of action is of a legal, and not an equitable, nature, he must bring a legal action, or pursue a legal remedy. Where a matter is clearly or *primâ facie* one of legal cognizance, a party must, in order to maintain an equitable action upon it, state clearly facts sufficient to

entitle him to equitable relief, and to show that a perfect remedy cannot be obtained at law."

See likewise, to the same effect as the above, *Coster* vs. *New York and Erie Railroad Company*, 6 Duer, 43; 3 Abb., 332; also noticed, 5 Duer, 677; *Vanderbilt* vs. *Garrison*, 5 Duer, 689; 3 Abb., 361.

Where, too, fraud on the part of the defendant is the *gravamen* of the plaintiff's title to relief, it should, according to the former practice in equity, be expressly charged. *The People* vs. *Lowber*, 7 Abb., 158 (181), per Ingraham, J.

A mere legal presumption in favor of the plaintiff, though fully available as a defence, will, standing alone, be insufficient to support a suit. To obtain equitable relief, a party must lay ground for it, by the assertion of substantial facts. *Morey* vs. *Farmers' Loan and Trust Company*, 4 Kern., 302. See also, *Lawrence* vs. *Ball*, 4 Kern., 477.

Where, in a proceeding already commenced, a party has an affirmative equitable defence, he ought, it seems, to set it up in that form, and a cross-suit, in order to obtain the same relief, will not, as a general rule, be proper. *Winfield* vs. *Bacon*, 24 Barb., 154. To warrant the application of this rule, it must, of course, be clear that the relief which a party so situated can obtain by way of defence and counter-claim, will be coincident, or equally efficient with that which he could seek in an affirmative proceeding.

In the absence of any allegation of injurious consequences, or of any attempt to enforce them within their jurisdiction, the courts of this state will not interfere to set aside the proceedings of those of a sister sovereignty, even though confessedly illegal. *Hill* vs. *Hill*, 28 Barb., 23. See also general principle, as stated in *Williams* vs. *Ayrault*, 31 Barb., 364.

Where, however, the parties are regularly brought within the jurisdiction, and the case is one in which the plaintiff is entitled to equitable relief, the courts of this state will assume cognizance of a controversy brought before them, though the subject-matter of that controversy be within another state, and will enforce obedience to their decree, by exercise of their personal control over the parties. See *Gardner* vs. *Ogden*, 22 N. Y., 327; *Field* vs. *Holbrook*, 3 Abb., 377; *Williams* vs. *Ayrault*, 31 Barb., 364; *Newton* vs. *Bronson*, 3 Kern., 587; *Bailey* vs. *Ryder*, 6 Seld., 363 (370); *Cleveland* vs. *Burrill*, 25 Barb., 532; *D'Ivernois* vs. *Leavitt*, 23 Barb., 63; *Mussina* vs. *Belden*, 6 Abb., 165. See also, as to their power, under similar circumstances, to detain and appropriate a fund existent in this state, though the parties holding it may be amenable in respect of it to a foreign jurisdiction, *Tinkham* vs. *Borst*, 31 Barb., 407.

It would be idle to attempt, and far beyond the limits of the present

work, to seek to embrace every description of controversy properly falling within the general classification of a suit in equity. Such an attempt would involve the composition of an extended treatise, rather than that of a chapter in a work on practice. Some few of the principal heads will, however, be touched upon, according to the plan hitherto pursued in this division of the work, the general principles of averment adverted to, and the recent decisions bearing upon the most prominent points shortly noticed.

§ 152. *Suits in Relation to Contracts and Instruments.*

This extended and important branch of the jurisdiction formerly exercised by courts of equity, presents itself for consideration at the outset. It may be convenient to subdivide it into the following derivative heads:

1. The specific performance.
2. The reformation.
3. The rescinding or vacating of contracts, instruments, or incumbrances; leaving the consideration of the proceeding by way of creditor's bill, and those relating to the enforcement of liens, for the next section; and prefacing the above heads by a preliminary notice of a few recent decisions of general bearing, on the subject of the contracts to which this class of remedies is more peculiarly applicable.

(*a.*) Notice of Decisions.

Among the primitive and elementary principles which require constant attention in instituting proceedings of this nature, is the general rule that, where a treaty between parties has resulted in a written contract, or where an executory agreement has been carried into effect, by means of a conveyance or other paper of the like nature, all prior negotiations or circumstances which may have led to the former, or preceded the latter, are merged in the written stipulation, or the executed instrument, and are to be wholly rejected, for the purposes of explanation or giving construction to such contract, on the one hand, or of restricting or controlling the operation of such executed document, on the other. See statement of general principle, in *Witbeck* vs. *Waine*, 16 N. Y., 532 (535); *Renard* vs. *Sampson*, 2 Kern., 561; affirming *same case*, 2 Duer, 285; *Speckels* vs. *Say*, 1 E. D. Smith, 253. See also, *Barry* vs. *Ransom*, 2 Kern., 462 (464); *Wright* vs. *Weeks*, 3 Bosw., 372.

In cases which coincide with this rule, it may be looked upon as inflexible. It has, however, been so far relaxed, as to authorize the admission and consideration of collateral proof, of stipulations actually made, and material to the actual contract between the parties, but

which, in the reduction of the understanding into writing, or of the executory into an executed instrument, have been omitted to be adverted to or carried out. See *Morris* vs. *Whitcher*, 20 N. Y., 41; *Witbeck* vs. *Waine*, *supra*, 16 N. Y., 532 (536); *Renard* vs. *Sampson*, *supra*, 2 Kern., 561 (567); *Wood* vs. *Hubbell*, 6 Seld., 479.

And, although parol evidence be inadmissible, for the purpose of explaining or giving construction to the terms of a written contract or deed, where neither mistake nor fraud is shown, parol proof of a distinct and subsequent agreement to vary or rescind the terms of such written instrument, has been held allowable. *Flynn* vs. *McKeon*, 6 Duer, 203; *Townsend* vs. *Empire Stone Dressing Company*, 6 Duer, 208 (213, 214). But such an agreement cannot affect a lien for further advances, on the property comprised in a mortgage for a specific sum. See last case, pp. 219, 220.

So likewise, a parol agreement between sureties, under a written obligation by which one engaged to indemnify the others, was held capable of being proved and enforced, in discharge of a claim for contribution. *Barry* vs. *Ransom*, 2 Kern., 462.

A deed or contract arising out of fraud, is incapable of enforcement on the one hand, or impeachment on the other, in equity, as between the original parties or their privies, such as a transferree with notice, express, or implied from neglect to make the proper inquiries. *Chamberlain* vs. *Barnes*, 26 Barb., 160; *Morgan* vs. *Chamberlain*, 26 Barb., 163; *Moseley* vs. *Mosely*, 15 N. Y., 334; *Westfall* vs. *Jones*, 23 Barb., 9.

The same is the rule as to transactions, either directly illegal, or of a nature not recognized by law. See *Austin* vs. *Searing*, 16 N. Y., 112, as to the exercise of *quasi*-judicial functions, by a self constituted body, to carry out which the court refused to interfere.

See, as to a contract void by the laws of this state, but enforceable by those of the place where it was made, *Thatcher* vs. *Morris*, 1 Kern., 437.

In relation to contracts effected by correspondence, and as to the rule that they become binding, from the moment that the acceptance of a proposition so made is actually mailed, but that if any countercommunication is required, the matter still rests in proposition, but not in contract: see *Hough* vs. *Brown*, 19 N. Y., 111; *Vassar* vs. *Camp*, 1 Kern., 441; affirming *same case*, 14 Barb., 341; *Clark* vs. *Dales*, 20 Barb., 42.

(*b.*) Specific Performance, or Enforcement.

It may be safely assumed, that a majority of suits of this description, arise out of transactions relating to, or connected with the purchase of land. The treatment in this subdivision will not, however, be con-

fined to the subject in this especial relation, but will embrace it, also, in its more general bearings.

A court of this state will entertain this species of controversy, as to property territorially situate within the limits of another, in cases where the parties have been brought, by service, within its own jurisdiction, and will enforce its decree on that controversy, by means of the power which it possesses over the persons of such parties. See *Gardner* vs. *Ogden*, 22 N. Y., 327; *Newton* vs. *Bronson*, 3 Kern., 587; *Bailey* vs. *Ryder*, 6 Seld., 363 (370); *Cleveland* vs. *Burrill*, 25 Barb., 532. See analogous principles as to jurisdiction, laid down in *Auchincloss* vs. *Nott*, 12 L. O., 119.

In contracts for the sale of land, the courts will, as a general rule, and in the absence of express stipulation, compel the vendor to give to the purchaser a good title, free from incumbrances, and a deed with full covenants. *Burwell* vs. *Jackson*, 5 Seld., 535; *Fletcher* vs. *Button*, 4 Comst., 396; *Hill* vs. *Ressegieu*, 17 Barb., 162 (164); *Earl* vs. *Campbell*, 14 How., 330; *Rigney* vs. *Coles*, 6 Bosw., 479.

Where however the defect is of such a nature that it may be made the subject of compensation, the purchaser substantially obtaining that for which he contracted, the court will decree a specific performance, providing for the assessment of the compensation to be so made. *Guynet* vs. *Mantel*, 4 Duer, 86.

And, in *Stevenson* vs. *Buxton*, 8 Abb., 414, the court made a decree in the alternative, *i. e.*, that the defendant do either specifically perform, or, in default, pay damages for non-performance, assessed in the same suit. See likewise *Clarke* vs. *Rochester, Lockport, and Niagara Falls Railroad Company*, 18 Barb., 350 (356).

An objection, otherwise tenable, and which would have brought the case within the operation of the general principle above referred to, is capable of waiver. See, as to the effect of an unconditional entry into possession, with notice of the defect, *Guynet* vs. *Mantel*, 4 Duer, 86, *supra;* of an election to take a decree for a substituted equivalent, even though such equivalent may fail, from the subsequent insolvency of the vendor, *Weber* vs. *Fowler*, 11 How., 458. (See, however, reservation, p. 462.)

Where the plaintiff, seeking specific performance of a contract for exchange, had omitted to specify, before suit, an objection to the defendant's title, it was held that he could not resist a claim of the latter for relief, by a rescission of the contract, on the ground that such objection was capable of being removed by further proceedings. *Benson* vs. *Cromwell*, 26 Barb., 218; 6 Abb., 83.

Conjectural defects, resting on a mere possibility, and not having any actual existence or reasonable probability at the time, will not form

ground for resisting a specific performance. *Schermerhorn* vs. *Niblo*, 2 Bosw., 161.

In *Viele* vs. *The Troy and Boston Railroad Company*, 21 Barb., 381, the following general principles are laid down, in relation to suits of this description. In equity, on a bill for specific performance, the leading inquiry is, whether in conscience, the contract should be enforced, and mere technical objections, that would defeat an action at law for damages, are not allowed to produce inequitable or oppressive results. If it be conscientious that an agreement should be performed, performance will be decreed, though the plaintiff's right of action be lost at law.

Further, thus: "Whether a court of equity shall decree the specific performance of an agreement, is a matter resting in its discretion, but this is a sound legal discretion. The court will not lend its aid to enforce an unconscientious contract. The case presented must be fair, just, and reasonable, the contract free from fraud, misrepresentation, or surprise, and not hard, unconscionable, or unequal. It must also be entered into upon adequate consideration, and when the inadequacy of price in a contract to sell, is so great, as to be conclusive evidence of fraud, as where it would shock the moral sense of an indifferent man, a court of equity should not carry it into effect. But inadequacy of price merely, without being such as to prove fraud conclusively, the contract being entered into deliberately, and fair in all its parts, is not an objection to its being executed."

The same case lays down the rule that, where there is nothing to show that the parties have made time of the essence of the contract, it will not be so considered, and a suit will lie for specific performance, though the remedy of the plaintiff at law be gone, especially where the defendant is in possession, or will lose nothing by the delay. See also *Stone* vs. *Sprague*, 20 Barb., 509; *Beebe* vs. *Dowd*, 22 Barb., 255. Where, however, a specific time for payment had been fixed, and, on default in payment on the part of the purchaser, the vendor had acted upon such default, and sold to another, it was held that the former could not claim a specific performance. *Drew* vs. *Duncan*, 11 How., 279. See also, as to the effect of a lengthened delay, on the part of a plaintiff applying for relief, without any fault in the adverse party, *Tompkins* vs. *Seeley*, 29 Barb., 212; *Mc Williams* vs. *Long*, 32 Barb., 194.

Where the default of one party in a strict performance, is in any manner induced by the acts of the other, the latter cannot take advantage of his own wrong, and will forfeit all title to relief in respect of it. *Stone* vs. *Sprague*, 20 Barb., 509, above cited.

The rule that an action for a specific performance is an appeal to the equitable jurisdiction; that the relief is matter, not of absolute

right in the party, but of sound discretion in the court; that, to sustain such an action, the granting of the relief must appear to be entirely equitable; and that the court will never compel a performance specifically, when, looking at all the circumstances on both sides, it is apparent that injustice would thereby be done; is laid down distinctly in *Clarke* vs. *Rochester, Lockport, and Niagara Falls Railroad Company*, 18 Barb., 350.

Although, however, the power of the court to grant relief be discretionary, still, when, by settled practice, the plaintiff is clearly entitled to the relief he seeks for, it may not be capriciously withheld. *Bowen* vs. *Irish Presbyterian Congregation of the City of New York*, 6 Bosw., 245.

A suit of this nature is not maintainable, on a mere presumption of law in favor of the plaintiff. Such a presumption is matter of defence only, and cannot be made the basis of an aggressive proceeding. *Morey* vs. *Farmers' Loan and Trust Company*, 4 Kern., 302; reversing *same case*, 18 Barb., 401. See also *Lawrence* vs. *Ball*, 4 Kern., 477, as to such a presumption being inefficient, as the basis of a claim for equitable relief on the part of a defendant.

A party, himself in default, cannot maintain a suit of this description. *Payton* vs. *Wight*, 2 Hilt., 77; *Watt* vs. *Rogers*, 2 Abb., 261; *Tompkins* vs. *Seely*, 29 Barb., 212; *Chase* vs. *Hogan*, 6 Bosw., 431.

A parol contract, void by the statute of frauds, cannot be enforced by means of a direct action for that purpose. It is true that money paid under such circumstances may be recovered back, or the balance of unpaid purchase-money recovered in *assumpsit*, by a vendor who has fully performed his part; but such remedy can only be had, in a proceeding in disaffirmance, and not by means of one in affirmance of the invalid arrangement. *Baldwin* vs. *Palmer*, 6 Seld., 232; *Thomas* vs. *Dickinson*, 14 Barb., 90. See also *Haight* vs. *Child*, 34 Barb., 186.

Still less will an action lie, to recover a specific sum as the price of land taken possession of, when, in fact, there has been no real agreement ever come to between the parties, as to the amount. *Reynolds* vs. *Dunkirk and State Line Railroad Company*, 17 Barb., 613.

As to the invalidity of a parol contract of this nature, and the extent of that invalidity, see *Day* vs. *New York Central Railroad Company*, 31 Barb., 548; *Walker* vs. *Paine*, 2 E. D. Smith, 662.

It seems, however, that, in a case where there has been a mutual part performance, and delivery over of possession, under a parol agreement for exchange, the case is taken out of the statute, and relief may be had in equity. *Beebe* vs. *Dowd*, 22 Barb., 255.

A contract, which is in itself incomplete, by an omission to state the consideration, in compliance with the statute of frauds, cannot be

enforced, nor can the defect in it be supplied by collateral evidence. *Wright* vs. *Weeks*, 3 Bosw., 372.

Where a contract was, after default made, superseded by another, conditionally entered into, it was held that, though the condition of the second failed, neither could be enforced. *Price* vs. *McGown*, 6 Seld., 465.

A suit of this description will only lie, as between the parties to the contract itself, nor can a stranger to the original arrangement be joined, for the purpose of asserting independent equities. *Chapman* vs. *West*, 17 N. Y., 125.

Nor will it lie by an individual, for the purpose of enforcing a public duty. *Getty* vs. *Hudson River Railroad Company*, 21 Barb., 617.

Before commencing such a suit, it is, as a general rule, the duty of the party seeking relief, to make a formal tender of performance on his part to the adverse party. See, as to the duty of a vendor to prepare and tender a conveyance under such circumstances, and the extent of that duty, *Carman* vs. *Pultz*, 21 N. Y., 547; *Flynn* vs. *McKeon*, 6 Duer, 203. The necessity of a strictly legal tender, or demand, may, however, be waived, by an absolute refusal on the part of the adverse party. *Cornwell* vs. *Haight*, 21 N. Y., 462; *Stone* vs. *Sprague*, 20 Barb., 509. Or, by a clear failure of title in such party, rendering a formal tender nugatory in fact. *Burwell* vs. *Jackson*, 5 Seld., 535.

And, in a case where possession of exchanged lands had been mutually delivered, it was held that a tender of a deed by the defendant, after suit brought and before answer, was valid, and that a bare offer of performance in the answer would have been sufficient. *Beebe* vs. *Dowd*, 22 Barb., 255.

As to the duty of a purchaser, who has taken and retains possession, to keep and pay for the estate, or give it up, and account for the rents and profits; and, if he himself seeks a specific performance, to make payment of all that is due from him, together with all costs which his non-payment may have rendered necessary, before he can claim a deed, see *Wright* vs. *Delafield*, 23 Barb., 498.

Where one partner to a joint enterprise held property in trust for himself and the other, it was held that, on its termination, he could not be compelled to convey the share of the latter, unless or until he was repaid his due share of advances, made for the joint benefit of both. *Cheeseman* vs. *Sturgis*, 6 Bosw., 520. See also same case, as to the extent to which the *cestui que trust*, under such circumstances, will be entitled to charge the trustee, with the value of shares taken by him, on an unauthorized but *bonâ fide* sale of the property.

See likewise, as to the power of an attorney to demand payment of any advances, and also of a debt due to him for professional services,

before he can be compelled to convey over property, purchased by him on his client's behalf, *Currie* vs. *Cowles*, 6 Bosw., 452.

See also *Wright* vs. *Delafield*, above cited, as to the liability of a purchaser, who has entered into possession under a contract, and when the vendor is not in fault for the delay, to pay interest on his purchase-money, from the time he shall have been placed in default, or, if he give up the estate, to account for intermediate rents and profits. See also *Cleveland* vs. *Burrill*, 25 Barb., 532; *Viele* vs. *Troy and Boston Railroad Company*, 21 Barb., 381.

In *Mills* vs. *Van Voorhis*, 23 Barb., 125, it was held that where the state of the title is fully known to both parties at the time of the contract, and the vendor offers to the purchaser all the title that he has, the latter, if he declines accepting it, cannot maintain a suit to compel the giving of one more complete and perfect. If the title, as given, fails, his remedy lies in damages. By *Mills* vs. *Van Voorhis*, 20 N. Y., 412; 10 Abb., 152, this judgment was reversed, and a new trial granted, on various considerations arising out of the general ground that, in proceedings by a purchaser to enforce a partial performance and compensation for defects, in a case where a complete title cannot be had, by reason of the inability of the vendor to give it, great caution is to be exercised before granting relief. The result of the deliberation of the court is, however, indecisive, and the new trial was granted, for the express purpose of having the facts bearing upon the plaintiff's title to some relief more fully investigated, and more deliberately passed upon. See 20 N. Y., 423.

As to the enforcement of a specific performance, against the heirs of a deceased vendor, and the nature of the covenants which may be required on a conveyance from them to the purchaser, see *Hill* vs. *Ressegieu*, 17 Barb., 162; *Moore* vs. *Burrows*, 34 Barb., 173; *Adams* vs. *Green*, 34 Barb., 176.

See, *per contra*, as to the right of the heirs of a deceased vendor, to compel performance of his contract, by his executor, for their benefit, *Lamport* vs. *Beeman*, 34 Barb., 239.

As to the right of a principal, to compel specific performance of a contract, made in the name of an agent, where he has himself performed such contract on his own part, see *St. John* vs. *Griffith*, 13 How., 59; 2 Abb., 198.

In cases, however, where an agent has exceeded his authority, in making a sale or purchase, the principal will not be bound, and performance cannot be enforced against him; nor will even a partial payment, made in ignorance of the facts, and, when known, immediately retracted, amount to a ratification. *Roach* vs. *Coe*, 1 E. D. Smith, 175; *Coleman* vs. *Garrigues*, 18 Barb., 60. Nor can the agent him-

self be held, in respect of a purchase made by him in excess of his authority. *Hegeman* vs. *Johnson*, 35 Barb., 200.

And the mere giving of authority to an agent to contract with a third person, will not enable that person to compel a specific performance, where the principal withdraws his authority, before an actual contract is effected. *McCotter* vs. *Mayor of New York*, 35 Barb., 609.

A fortiori, will such be the case, where one party has assumed to act for or to bind another, without any actual authority. *Williams* vs. *Christie*, 4 Duer, 29; *Comstock* vs. *White*, 31 Barb., 301.

The following recent cases may be adverted to:

Specific performance of a covenant by a landlord to repair, may, in a proper case, be granted, but only when it is apparent that the tenant will otherwise be irreparably injured, and cannot be sufficiently compensated by damages. *Vallotton* vs. *Seignett*, 2 Abb., 121.

A covenant for renewal of a lease, made by trustees, may be enforced as against their successors. *Newcombe* vs. *Ketteltas*, 19 Barb., 608.

See, as to the power of a lessor to enforce the performance of a covenant, under which the lessee is bound to submit to a valuation, and to accept payment of the value of his improvements, in lieu of a removal, *Reformed Protestant Dutch Church of New York*, vs. *Parkhurst*, 4 Bosw., 491. See also *Johnson* vs. *Conger*, 14 Abb., 195.

A contract for sale, under which the purchaser has entered into possession, may be enforced, as against the grantee in a sheriff's deed, on a subsequent sale in execution against the vendor; and payments made by the purchaser to the vendor himself, without notice of the judgment, will be allowed to him in taking the account. *Moyer* vs. *Hinman*, 3 Kern., 180; modifying decision in *same case*, 17 Barb., 137.

An agreement to convey a portion of an estate, when recovered, in compensation for services rendered in its recovery, is not illegal and may be enforced. *Sedgwick* vs. *Stanton*, 4 Kern., 289; affirming *same case*, 18 Barb., 473.

A sale of property, under the provisions of an agreement for dissolution of partnership, may be compelled, by means of proper proceedings for that purpose, though, if made previously, and without the consent of all the parties, it will be invalid, *Comstock* vs. *White*, 31 Barb., 301.

As to proceedings under chapter 327 of the Laws of 1855, to compel payment of a proportionate share of an assessment on premises, in which several parties are interested, see *Jackson* vs. *Babcock*, 16 N. Y., 246.

The performance of a condition may be compelled by suit for that purpose. *Aiken* vs. *Albany, Vermont, and Canada Railroad Company*, 26 Barb., 289.

Performance of a resulting trust, in premises purchased with money

obtained by means of the fraud of the grantee, was enforced in *Day* vs. *Roth*, 16 N. Y., 448; and the plaintiff declared entitled to a lien for the amount thus obtained from her.

See also, as to the enforcement of such a trust, for the benefit of the creditors of a party advancing the consideration for a conveyance made to another, *Wood* vs. *Robinson*, 22 N. Y., 564.

Where, too, the defendant, standing in relation of trustee of a fund, and also in that of successor to it, in the event of the intestacy of the *cestui que trust*, had, by a promise to hold such fund for the benefit of an intended legatee, prevented a formal bequest of it, and had subsequently acted in such arrangement, his representative was held to be a trustee according to such promise, and that payment of the fund was compellable. *Williams* vs. *Fitch*, 18 N. Y., 546.

In *Richards* vs. *Edick*, 17 Barb., 260, a contract, partly express, and partly supplied by necessary implication, was held on demurrer to be enforceable.

As to the effect of an auctioneer's memorandum of sale, effecting an enforceable contract, see *Tallman* vs. *Franklin*, 4 Kern., 584; reversing *same case*, 3 Duer, 395; *Pinckney* vs. *Hagadorn*, 1 Duer, 89; *Earl* vs. *Campbell*, 14 How., 330. In *McQuade* vs. *Warren*, however, 12 L. O., 250, such a receipt, signed by a mere clerk, and not on the occasion of the sale itself, or in the auctioneer's presence, was held insufficient to constitute a binding engagement.

As a general rule, the specific performance of the contract of an adult for personal services, will not be enforced, *Haight* vs. *Badgeley*, 15 Barb., 499; the remedy lies in damages.

The contract of a married woman, having power to dispose of property, under an ante-nuptial contract, made prior to the law of 1848, is binding, and may be enforced against a purchaser, by her assignee. *Van Allen* vs. *Humphrey*, 15 Barb., 555.

The rule with regard to the extent of the vendor's duty to disclose material facts in relation to the subject-matter of the contract, will be found fully considered in *Bench* vs. *Sheldon*, 14 Barb., 66.

As to the enforcement of a provision in an ante-nuptial contract, contemplating a future provision to be made, by the parents of one of the parties contracting matrimony, see *De Pierres* vs. *Thorn*, 4 Bosw., 266.

As to the enforcement of a contract, made by the trustees of a religious corporation, under authority of an order of the Supreme Court, and as to what will, or will not, constitute an excuse for non-performance, see *Bowen* vs. *Irish Presbyterian Congregation of City of New York*, 6 Bosw., 245.

As to the power to compel performance of a contract, on the part of a purchaser of property, to resell for a specific price, if realizable, and to

account for a certain proportion of the profits to the vendor, see *Lorillard* vs. *Silver*, 35 Barb., 132.

In relation to the averments in a suit of this description, the following cases require citation, and the principles laid down in them must be strictly attended to, in framing a complaint for such purpose.

An allegation of performance, or of a readiness and consequent offer or tender to perform, on the part of the plaintiff, and proof in support of such allegation, is indispensable in all cases, with the single exception below noticed. *Lester* vs. *Jewett*, 1 Kern., 453; *Dunham* vs. *Pettee*, 4 Seld., 508; *Beecher* vs. *Conradt*, 3 Kern., 108; *Van Schaick* vs. *Winne*, 16 Barb., 89; *Kelley* vs. *Upton*, 5 Duer, 336; *Warburg* vs. *Wilcox*, 2 Hilt., 118; 7 Abb., 336; *Haight* vs. *Child*, 34 Barb., 186. See also, generally, as to the necessity of averments of this description, *Fickett* vs. *Brice*, 22 How., 194; *Frey* vs. *Johnson*, 22 How., 316. And, in a case where special terms are fixed by the contract, the offer of performance must be alleged, in exact accordance with those terms. See *Clark* vs. *Dales*, 20 Barb., 42; *Considérant* vs. *Brisbane*, 14 How., 487; 6 Duer, 686.

But, where the plaintiff relies on facts, which excuse the making of an actual tender of performance, an allegation of those facts may be substituted, and will be sufficient. *Smith* vs. *Betts*, 16 How., 251; *Clarke* vs. *Crandall*, 27 Barb., 73. See also *Stone* vs. *Sprague*, 20 Barb., 509; *Cornwell* vs. *Haight*, 21 N. Y., 462.

And such an averment may, under certain circumstances, be not merely advisable, but indispensable, inasmuch as evidence of facts in excuse, cannot properly be received, under an averment of actual performance. *Oakley* vs. *Morton*, 1 Kern., 25.

In a complaint of this nature, it is necessary to supply a description of the property, sufficiently certain to form the ground of a decree. The same absolute precision which is required in a deed, is not, however, absolutely indispensable (though never unadvisable). It is sufficient, for the purposes of the pleading, that the description should be sufficiently accurate to enable the identification of the property. *Richards* vs. *Edick*, 17 Barb., 260. And extrinsic evidence is admissible, for the purpose of ascertaining and locating the property. *Tallman* vs. *Franklin*, 4 Kern., 584; *Pinckney* vs. *Hagadorn*, 1 Duer, 89.

In suing upon a foreign contract, illegal here, but valid by the laws of the place where it was made, the provisions and circumstances which give it such validity, and the fact that it was made at such place, must be expressly and distinctly averred. *Thatcher* vs. *Morris*, 1 Kern., 437.

Where an agreement sued upon is in writing, the better course will be to aver it to be so, in all cases. It has, it is true, been held, that this is not absolutely necessary, and that an affirmative allegation of the

existence of an agreement, implies every circumstance necessary to give it validity. *Livingston* vs. *Smith*, 14 How., 490; *Stern* vs. *Drinker*, 2 E. D. Smith, 401; *Washburn* vs. *Franklin*, 7 Abb., 8. See, *per contra*, *Thurman* vs. *Stevens*, 2 Duer, 609; *Le Roy* vs. *Shaw*, 2 Duer, 626. In view of this conflict of decisions, there can be little question that the former is the more advisable course.

(*c.*) Reformation, or Correction.

Relief of this nature is not unfrequently sought and obtained collaterally, and in connection with proceedings for other purposes. A direct suit for this object is, however, maintainable, in a case where mistake or inadvertence is clearly established, to an extent sufficient to call for the interference of the court. A clear and sufficient case must, however, be shown, before such interference can be invoked with effect, the presumption being strongly in favor of a written contract, as containing the true expression of the meaning of the parties, especially where, in its terms, it is clear and unambiguous. See *Isles* vs. *Tucker*, 5 Duer, 393.

The principles by which the courts are guided, in dealing with controversies of this description, are laid down very fully in *Kent* vs. *Manchester*, 29 Barb., 595.

After stating the fact that the rule by which the sound common-law principle as to the exclusion of evidence tending to add to, or vary the terms of a written contract, had been progressively extended to cases of innocent accident, inadvertence, or mistake, as well as those of which fraud might be predicated, the learned judge added that, in such extension, it was found necessary to qualify that extension with conditions, among which were the following:

1. Relief will be granted in the case of written instruments, only where there is a plain mistake, clearly made out by satisfactory proofs.

2. The mistake must not only be established to the satisfaction of the court, but it must be a mutual mistake. It is not sufficient for the plaintiff to allege inadvertence and mistake on his part only; he must allege and prove it to be mutual.

3. Ignorance of the law is no ground of relief. Where the party acts with full knowledge of the facts, the court, where neither surprise nor fraud exists, will not release him, though he act under a mistake as to the law.

4. Where a contract, whose terms are manifested by writing, is sought to be changed and reformed, it should be made clearly to appear what the real contract was. Its terms should be definite and precise; and it will never answer for the party to call upon a court to spell out a contract, or for the court to impose upon the parties, one which neither of them has really made.

Of course, where either surprise or fraud exists, it will tend to take the case out of the strict operation of the rules, as above stated, and furnish ground for a wider scope of relief.

The principle that the court will not interfere to make a contract for the parties, into which they have never in fact entered, and that relief, by way of reformation, will not be granted, unless it clearly appear that both parties agreed together and intended to make a contract, in the manner to which that existent is sought to be conformed, is clearly laid down in *The New York Ice Company* vs. *The North Western Insurance Company*, 31 Barb., 72. See also *Stoddard* vs. *Hart*, 23 N. Y., 556.

And, in reformation of deed, in a case of clear mistake, the court will only carry into effect the expressed, and not the silent, intent of the party executing it. *Smith* vs. *Howard*, 20 How., 151.

The courts will not go behind and reform a consummated contract, unless fraud be established. *Faure* vs. *Martin*, 3 Seld., 210; *Van De Sande* vs. *Hall*, 13 How., 458.

Nor will the court interfere in this manner, except in relation to an agreement, between actually and mutually contracting parties. An official deed, executed in the form prescribed by the court, or by a judicial officer, cannot be reformed by means of a suit of this description. *Ryan* vs. *Dox*, 25 Barb., 440; *Laub* vs. *Buckmiller*, 17 N. Y., 620.

In *Newcomb* vs. *Ketteltas*, 19 Barb., 608, relief was granted by way of reformation, according to the original agreement between the parties, on directing the execution of a renewal of a lease according to covenant.

In a suit for this purpose, length of time, without assertion of a mistake having been committed, short of such as would bring the case within the scope of the statute of limitations, is no bar to the application for relief, and is only important, as evidence bearing upon the probability of a mistake having been actually made. *Bidwell* vs. *The Astor Mutual Insurance Company*, 16 N. Y., 263.

The same case is also authority, that relief by way of damages for breach of the contract as established by the judgment, may be sought for and obtained, in the same action in which such reformation is sought, if demanded in the complaint.

In *Wemple* vs. *Stewart*, 22 Barb., 154, the following principles are laid down:

A written contract, in the absence of fraud, can only be reformed, when it is shown by satisfactory proof that there is a plain mistake in the contract, by the accidental omission or insertion of a material stipulation, contrary to the intention of both parties, or by expressing something different in substance from the truth of that intent, and under a mutual mistake. To show that a written contract does not conform to the actual agreement, made and intended to have been reduced into

writing, the actual agreement should be stated, and the mistake in reducing it into writing alleged.

In *Grafton* vs. *Remsen*, 16 How., 32, a voluntary settlement, as to which the grantor had acted under the evident assumption that she possessed authority to revoke it, was reformed by the insertion of a power for that purpose, under the prayer for further relief, though the principal relief sought, *i. e.*, that it should be declared null and void, was denied.

(*d.*) RESCINDING, OR VACATING.

The rules in this respect are substantially the same as those stated in the last subdivision, where this description of relief is sought on the ground of mistake, except that the remedy sought, being more complete and extensive, the standard as to the prerequisites for obtaining that relief, will necessarily be higher. See *Haggerty* vs. *Simpson*, 1 E. D. Smith, 67.

Failure of consideration will afford another and independent ground for an application for relief of this description. Where fraud is established, the remedy will be especially appropriate.

The rule is thus generally expressed in *Ketchum* vs. *Bank of Commerce*, 19 N. Y., 499 (502); affirming *same case*, 6 Duer, 463: "Where there is a common mistake in respect to the existence of a thing undertaken to be sold, and it does not in fact exist, the contract for the sale is void, and any money which the purchaser has paid on account of it, may be recovered back in the equitable action for money had and received." See also *Gardner* vs. *The Mayor of Troy*, 26 Barb., 423; *Renard* vs. *Fiedler*, 3 Duer, 318.

In *Belknap* vs. *Sealey*, 4 Kern., 143; affirming *same case*, 2 Duer, 570, it was held that a court of equity would, on the application of the vendee, rescind an executory contract for the purchase of land, in a case of an important misdescription as to quantity, where the mistake on the part of the purchaser was caused by the misrepresentation of the vendor, though not fraudulently made, and where such mistake so materially affected the value of the premises, that the contract would not have been made had it not existed. See also, *Martin* vs. *McCormick*, 4 Seld., 331.

In *Field* vs. *Holbrook*, 6 Duer, 597; 14 How., 103, the rule is thus generally stated by Duer, J.:

The exercise of the jurisdiction of a court of equity to order instruments in writing to be delivered up and cancelled, is confined to the following classes of cases:

1. When the plaintiff alleges that the instrument which he prays may be surrendered up or cancelled, is void, upon grounds of which a

court of equity alone can take cognizance; in other words, when he sets up a purely equitable defence.

2. When the instrument is a deed or other document, concerning real estate; which, though inoperative, would, if uncancelled, be a cloud upon the title.

3. Where the instrument is of a negotiable character, and the putting it into circulation by the holder would be a fraudulent act.

4. Where the plaintiff claims to have a defence valid in law, but which rests upon evidence which he is in danger of losing, if the adverse party is suffered to delay the prosecution of his claims.

All these classes rest substantially upon the same grounds, i. e., that the plaintiff will either sustain a present, or will be exposed to the hazard of a future injury and loss, should the defendant be suffered to retain the possession of the instrument, of which the delivery and cancellation are demanded; and all point to the prevention of an injury, that might otherwise prove irreparable, and which a court of equity is alone competent to prevent.

But, if the instrument is, on its face, plainly illegal and void, the court will not interfere.

The same case lays down, in relation to the subject of averments, that, when application of this nature is made to the discretionary power of a court of equity, the special circumstances which can alone justify its exercise, must be set forth in the complaint, since these are emphatically the facts which constitute the cause of action.

In *Drew* vs. *Duncan*, 11 How., 279, where a purchaser had entirely failed to perform his contract, a rescission of it was granted at the suit of the vendor, by Roosevelt, J.

See also as to the vendor's right to rescind a contract for sale of goods, under similar circumstances, *McEachron* vs. *Randles*, 34 Barb., 301.

As to the rescinding of a contract, on the ground of the infancy of the maker, the burden of proof in such a case, and the terms which will be imposed on a rescission, if granted, see *Gray* vs. *Lessington*, 2 Bosw., 257.

An instrument, inchoate in its nature, is not binding, until it is actually completed by delivery, although it may have been even executed by one party, conditionally, and in connection with a proposition; it is competent for such party to withdraw or rescind it, any time before it is actually accepted by the other. *Stephens* vs. *Buffalo and New York City Railroad Company*, 20 Barb., 332. See also *Vassar* vs. *Camp*, 1 Kern., 441. But, if a delivery be made, it can no longer be revoked, even though a counterpart be not signed. *Worrall* vs. *Munn*, 1 Seld., 229.

A notice of rescinding, if given by one party to the other, is binding on the giver, and, if accepted and acted upon by the receiver, cannot be revoked. *Terwilliger* vs. *Knapp*, 2 E. D. Smith, 86.

When a contract is rescinded by mutual agreement, and without fault of either party, each is at once remitted to his former legal rights in the premises. *Vide Battle* vs. *Rochester City Bank*, 3 Comst., 88; see also *Stevens* vs. *Hyde*, 32 Barb., 171.

The rule of law that, where one party designs to rescind a contract, he must do whatever is necessary to restore the other to his original condition, in respect to the thing sold, and the consideration paid, and that, before suit; and, also, that he cannot affirm in part and rescind in part, will be found fully considered in *The Matteawan Company* vs. *Bentley*, 13 Barb., 641. See also *Rosenbaum* vs. *Gunter*, *infra*. This rule is, however, inapplicable to a case where the vendor has performed his part of an invalid contract, and sues for the balance of purchase-money. It holds good in relation to valid contracts only; to the exclusion of such as are in themselves incapable of enforcement. See *Thomas* vs. *Dickinson*, 14 Barb., 90, before cited.

The same rule that a party, seeking to rescind a contract, must, in all cases, return in full the consideration which he has received, is further laid down in *Utter* vs. *Stewart*, 30 Barb., 20; *Magee* vs. *Badger*, 30 Barb., 246; *Stevens* vs. *Hyde*, 32 Barb., 171.

And such return, or a tender of it, must in all cases be made promptly. Delay will be held to amount to a confirmation of the contract. *Fisher* vs. *Fredenhall*, 21 Barb., 82; *Lowber* vs. *Selden*, 11 How., 526; *Rosenbaum* vs. *Gunter*, 3 E. D. Smith, 203.

Nor will a suit lie for the purpose of rescission, while any part of the consideration is retained by the plaintiff. *Fisher* vs. *Conant*, 3 E. D. Smith, 199; *Rosenbaum* vs. *Gunter*, *supra*; *Goelth* vs. *White*, 35 Barb., 76.

The preceding cases have rather had in view the rescission of executory, those following belong more peculiarly to that of executed contracts.

In *Farrington* vs. *Frankfort Bank*, 24 Barb., 554, a suit for the cancellation of indorsements, obtained by means of fraud and misrepresentation, and for an injunction against the holders, was declared maintainable. See *same case*, 31 Barb., 183.

In *Ford* vs. *Harrington*, 16 N. Y., 285, an assignment, fraudulently obtained by a party standing in the relation of attorney, was set aside, on the ground of that relation, though his client had in fact been a participant in the fraud; and but for that relation, the court would not have interfered.

As to an action to obtain the due cancellation, and suspension of proceedings upon a satisfied judgment, in respect of which the plain-

tiff would otherwise be without remedy, see *Mallory* vs. *Norton*, 21 Barb., 424.

In a case where an arbitrator has clearly exceeded his authority, whether consciously or through mistake, the court will entertain a suit to set his award aside. *Borrowe* vs. *Millbank*, 6 Duer, 680; 5 Abb., 28.

As to the power of the courts to entertain a suit to set aside a judgment, entered upon an insufficient confession, see heretofore, book III., section 48, concluding subdivision, and cases there cited.

In relation to the subject of mental incapacity and undue influence, and what will, or will not, be so considered, see *Davis* vs. *Culver*, 13 How., 62; *Lee* vs. *Dill*, 11 Abb., 214. See, however, *Bergen* vs. *Udall*, 31 Barb., 9, as to the jealous scrutiny, with which the courts were disposed to view a voluntary conveyance, obtained by a father from his daughter, immediately upon her coming of age.

The power of the courts of this state to entertain a controversy in relation to a fraudulent instrument affecting property in another, has been already considered, and the cases in point cited in the preceding section of this work.

As to the setting aside of deeds, obtained by means of a fraudulent conspiracy, and the principles upon which such relief will be granted, see *Gale* vs. *Gale*, 19 Barb., 249. But see, as to the refusal of such relief, when applied for by a participant in such fraud, or by a subsequent purchaser, with notice, *Chamberlain* vs. *Barnes*, 26 Barb., 160; *Morgan* vs. *Chamberlain*, 26 Barb., 163.

A cancellation of a chattel mortgage, fraudulently procured, was set aside, and the mortgagee restored to the benefit of his former lien, in *Lynch* vs. *Tibbits*, 24 Barb., 51. See also, as to setting aside a mortgage, grounded on an illegal consideration, for money advanced by a party to the illegality, *Fellows* vs. *Van Hyring*, 23 How., 230.

A mortgage, professing to secure further advances, without limit, will be held void as against subsequent creditors, in respect of its vagueness and uncertainty. *Youngs* vs. *Wilson*, 24 Barb., 510. If limited to a specific amount, it will be sustainable, *pro tanto*, in respect of such advances. See *same case*, p. 512; *Truscott* vs. *King*, 2 Seld., 147; *same case*, 6 Barb., 346. The condition of such a mortgage cannot be extended by parol, so as to cover advances not originally in contemplation of the parties. *Townsend* vs. *Empire Stone Dressing Company*, 6 Duer, 208. Nor, when advances have been once made to the amount stipulated, and, subsequently, repaid, can the lien of the mortgage be further kept alive, so as to include subsequent transaction. *Truscott* vs. *King*, 2 Seld., 147; reversing *same case*, 6 Barb., 346, above cited.

Where a mortgage is executed for a specific time, in consideration of

advances to be made, and the mortgagee refused to fulfil his agreement, the court will set aside the security, so far as regards the unperformed portion, and, on a total refusal to perform, would order it to be cancelled. *Dart* vs. *McAdam*, 27 Barb., 187.

As to relief against an usurious transaction, and the extent to which, and terms on which it will be granted, see *Schermerhorn* vs. *Tallman*, 4 Kern., 93.

As to the right of a purchaser to rescind a contract, induced by misrepresentations on the part of the vendor, see *Hutcheon* vs. *Johnson*, 33 Barb., 392; *Elwell* vs. *Chamberlain*, 4 Bosw., 230; *Seaman* vs. *Low*, 4 Bosw., 337. Or, where the vendor is chargeable with technical misconduct, rendering the contract invalid. *Conkey* vs. *Bond*, 34 Barb., 276.

A party, entitled to rescind a contract, on the ground of a partial non-performance, must exercise that right promptly, or it will be waived. See *Sinclair* vs. *Tallmadge*, 35 Barb., 602.

As to the averments in a suit for relief of this description, see *Williams* vs. *Ayrault*, 31 Barb., 364. If there are any circumstances tending to show that the plaintiff cannot obtain perfect relief at law, he should state them on the face of his complaint. But, in the case of a mortgage upon real estate, the necessity of coming into a court of equity for relief, will be sufficiently apparent, without showing any other reason, than the fact that the instrument has been executed and recorded, if it be claimed to be void, from any cause not apparent upon its face. See *Ward* vs. *Dewey*, 16 N. Y., 519, there referred to (p. 525). Of course, that cause must be made patent, by proper and sufficient averment.

A party seeking to set aside a transaction, or judicial action on the ground of fraud, must disprove *laches* in the assertion of his remedy. He should also show due diligence, and ignorance or fraud practised upon him at the time, by proper averments for that purpose. *Hamel* vs. *Grimm*, 10 Abb., 150; *Munn* vs. *Worrall*, 16 Barb., 221; *Carwithe* vs. *Griffing*, 21 Barb., 9.

The mere presumption of negligence in such assertion, arising from implied notice, is, however, repellable, by direct proof to the contrary. *Williamson* vs. *Brown*, 15 N. Y., 354.

It remains to notice suits for relief of this description, in the nature of the removal of a cloud upon the applicant's title.

An instrument or record, absolutely void upon its face, does not constitute a cloud, nor can relief of this nature be obtained in respect of it. *Ward* vs. *Dewey*, 16 N. Y., 519; *Field* vs. *Holbrook*, 6 Duer, 597; 14 How., 103.

Nor can such relief be asked for where, from an inspection of the

document, it is apparent, that no danger to the title or interest of the applicant is to be apprehended. *Cox* vs. *Clift*, 2 Comst., 118.

Or, where the plaintiff, at the time of the commencement of the action, has parted with, and no longer retains any interest in the premises affected. *Townsend* vs. *Goelet*, 11 Abb., 187.

But, in any case, where the circumstances attending upon the execution of an instrument, are sufficient to create a presumption, however slight, in favor of its validity, as in the case of one made by a party in possession, during title, the facts will be sufficient to constitute a cloud, and a suit of this nature will be maintainable. *Ward* vs. *Dewey*, *supra*.

So, also, where, by statute, the instrument in question is made presumptive evidence of its own validity, as in the case of a sale by a municipal corporation, under an illegal assessment. *Seott* vs. *Onderdonk*, 4 Kern., 9. See also *Johnson* vs. *Stevens*, 13 How., 132, where similar relief was granted, by cancelling the certificate of such a sale.

As to the right of a grantee of this description to repair his fraud, and make a conveyance of the legal title to the true owner, without impediment, on the part of such of his own creditors as have not obtained actual liens prior to such conveyance, see *Davis* vs. *Graves*, 29 Barb., 480.

A suit for this purpose will not, however, lie, in a case where the assessment is upon its face illegal. To sustain the proceeding, it must appear upon the face of the complaint, that such assessment is a lien upon land, and that extrinsic evidence is necessary to show its invalidity. *Heywood* vs. *The City of Buffalo*, 4 Kern., 534.

In *Lounsbury* vs. *Purdy*, 18 N. Y., 515, a resulting trust was established, in favor of the party who had furnished the money to pay for an estate, her agent wrongfully taking the deed in his own name. Such party was held entitled to bring a suit, to cancel a sheriff's certificate of sale, on execution against the wrongful grantee, as a cloud upon her title, without waiting for the expiration of the period for redemption.

As to the setting aside of stock certificates, fraudulently issued by an officer of a public company, as constituting a cloud upon the title of the general stockholders, see *New York and New Haven Railroad Company* vs. *Schuyler*, 17 N. Y., 592; 7 Abb., 41; reversing *same case*, 1 Abb., 417.

In *Monroe* vs. *Delavan*, 26 Barb., 16, a suit for cancelling the record of a judgment, adjudged in another proceeding to be fraudulent, was declared maintainable by any party interested. See likewise *Mallory* vs. *Norton*, 21 Barb., 424.

An invalid assignment, executed by part of the members of a partner-

ship firm, without the consent of the remainder, was set aside, as a cloud, in a suit instituted by judgment-creditors, in *Haggerty* vs. *Granger*, 15 How., 243. See also, as to setting aside such an assignment, whilst in an inchoate state, and before actual delivery, *Gasper* vs. *Bennett*, 12 How., 307.

In a suit for this purpose, it is sufficient if the facts, which constitute a cloud, be distinctly and specifically averred. The mere non-user of the term itself, will not form a valid ground of objection. *Williams* vs. *Ayrault*, 31 Barb., 364 (371).

§ 153. *Enforcement of Equitable Liens.*

(*a.*) Creditors' Bills.

By this important description of remedy, creditors are enabled to reach equitable assets of their debtor, not attainable by the ordinary process of execution.

Suits of this nature may be classified under three distinct heads:

1. The ordinary creditors' bill, existent under the old practice, and the subject of special statutory regulation, by which personal assets of the debtor are sought to be reached, for the individual benefit of the plaintiff in that suit.

2. The analogous proceeding, by which an individual plaintiff seeks for his own benefit, to enforce the lien, created by the docketing of his judgment, as against real estate or leviable personal assets of the debtor, or to remove any obstructions in the way of enforcement of that lien.

3. The proceeding, by way of general creditors' bill, in which the relief sought is not individual but general, and for the benefit of the whole class of which the plaintiff is a member, or such of them as shall come in and contribute to the expenses.

The two first of these classes bear, as before remarked, a close analogy to each other, and are susceptible of combination, and not unfrequently combined in one and the same proceeding. See *Cooper* vs. *Clason*, 1 C. R. (N. S.), 347; *Parshall* vs. *Tillou*, 13 How., 7. The third is of a distinct and separate nature, and is capable of being made to embrace a larger class of suitors, and a somewhat wider scope of relief.

A large proportion of the difficulties which have been raised, and of the seeming contradictions and confusion which occasionally occur, in the numerous decisions bearing generally upon the above remedies, will be found, upon a closer examination, to have arisen from an omission to advert to these different distinctions, and may be greatly, if not entirely obviated, by a closer attention being paid to them.

The regulations by which proceedings under the first of the above classes, were governed under the former practice, will be found at 2 R. S., 173, 174, sections 38, 39.

§ 38. Whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole, or in part, the party suing out such execution may file a bill in Chancery, against such defendant, and any other person, to compel the discovery of any property, or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him; and to prevent the transfer of any such property, money, or thing in action, and for the payment and delivery thereof to the defendant; except where such trust has been created by, or the fund so held in trust, has proceeded from some person other than the defendant himself.

§ 39. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgment, out of any personal property, money or thing in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in Chancery, whether the same were originally liable to be taken in execution or not.

So far as regards the obtaining of a discovery by means of this form of proceeding, the above provisions are entirely superseded, and in fact repealed by section 389 of the Code. The other relief, for which the sections provide is, however, still obtainable by means of this form of procedure, and, therefore, with the above exception, they may be looked upon as still existent, and unrepealed in matters of substance, though abolished, as regards pure matters of form, inconsistent with the mode of procedure prescribed by the Code. See *Rogers* vs. *Hern*, 2 C. R., 79. See also, as regards the similar abolition of the former rules of court, as to the matters to be stated in the bill, *Quick* vs. *Keeler*, 2 Sandf., 231.

That these remedies are still existent, and the provisions above cited substantially unrepealed—that a proceeding of this nature is not an action upon a judgment, falling within the prohibition imposed by section 71 of the Code; and that the remedy provided by that measure, by way of proceedings supplementary to execution, is not a substitute for a suit of this description, which may, on the contrary, be carried on independently, is abundantly established by judicial decision. *Goodyear* vs. *Betts*, 7 How., 187; *Catlin* vs. *Doughty*, 12 How., 457; *Hammond* vs. *Hudson River Iron and Machine Company*, 20 Barb., 378; *Dunham* vs. *Nicholson*, 2 Sandf., 636; *Rogers* vs. *Hern*, 2 C. R., 79; *Quick* vs. *Keeler*, 2 Sandf., 231. See, however, *Taylor* vs. *Persse*, 15 How., 417, to the effect that the ordinary creditors' bill, for the mere discovery and prevention of the transfer of equitable assets, may possibly be looked

upon as superseded by the present supplementary proceedings, but that, if any collateral relief is sought, those proceedings do not provide a remedy, and the suit is maintainable. The learned judge, however, declined to put the plaintiff to his election between the two forms of proceeding, both of which were then pending.

The principle that such a suit is maintainable, even after the appointment of a receiver on supplementary proceedings, where the lien of the plaintiffs accrued *prior* to such appointment; and that such receiver, if he neglects to act in the premises, may be even made a defendant, is laid down in *Gere* vs. *Dibble*, 17 How., 31. And, in a contest between the two proceedings, that by creditors' bill, commenced before the appointment of a receiver was perfected, was held to have effected a prior lien, in *Voorhies* vs. *Seymour*, 26 Barb., 569.

To maintain the ordinary creditors' bill, the recovery of a judgment, and the issuing and return of an unsatisfied execution against the property of the defendants, are indispensable statutory prerequisites. An averment to the above effect must be inserted, or the suit will be unsustainable. A mere creditor at large cannot maintain it. *Reubens* vs. *Joel*, 3 Kern., 488; affirming *same case*, 2 Duer, 530; 12 L. O., 148, disapproving *Mott* vs. *Dunn*, 10 How., 225. See also, *Parshall* vs. *Tillou*, 13 How., 7; *Cropsey* vs. *McKinney*, 30 Barb., 47; *Sage* vs. *Chollar*, 21 Barb., 596; *McCartney* vs. *Bostwick*, 31 Barb., 390; *Bishop* vs. *Halsey*, 13 How., 154; 3 Abb., 400; *Willetts* vs. *Vandenburgh*, 34 Barb., 424; *McCullough* vs. *Colby*, 5 Bosw., 477; *The Same* vs. *The Same*, 4 Bosw., 603. Nor can a mere creditor at large, defend his possession against others holding executions. *Andrews* vs. *Durant*, 18 N. Y., 496. See likewise, *Hazzard* vs. *McFarland*, Selden's Notes, of April 18th, 1854.

It has been also held that, before such a bill can be filed, it is essential that execution should have been issued into every county in which any one of the defendants resides, and returned unsatisfied; and also into every county in which they, or any of them, own real estate; a transcript of the plaintiff's judgment being previously filed in each such county, in order to render the execution effectual: and the facts should be alleged accordingly (*Millard* vs. *Shaw*, 4 How., 137); but, if the defendant have consented to waive any of the above prerequisites, a simple allegation of that consent will be sufficient, without giving all the details.

See also, as to the rule that the plaintiff must show that he has exhausted his legal remedies against all parties, *Field* vs. *Hunt*, 22 How., 329; *Field* vs. *Chapman*, 13 Abb., 320 (*same case*).

See, however, subsequent decision in *same case*, *Field* vs. *Hunt*, 23 How., 80; *Field* vs. *Chapman*, 14 Abb., 133, to the effect that, where a

joint debtor's judgment has been entered, a creditor's bill may be maintained upon it, without exhausting the plaintiff's remedies, against defendants not served with the original process.

The point as to whether it is necessary, in order to the validity of such a suit, that the sheriff should wait the whole period of sixty days, before returning the execution, has been much discussed. In *Field* vs. *Hunt*, also reported as *Field* vs. *Chapman*, above cited, a strict view is taken upon this subject. In the following cases, however, it has been held that the proceeding is maintainable after the actual return of the execution, though made before the regular return day. *Field* vs. *Hunt*, 23 How., 80; *Forbes* vs. *Logan*, 4 Bosw., 475 (Bosworth, Ch. J., dissenting); *Knauth* vs. *Bassett*, 34 Barb., 31. See also, same subject hereafter considered, in connection with proceedings supplementary to execution.

Nor has an attaching creditor, before judgment, a sufficient lien for that purpose. *Mills* vs. *Block*, 30 Barb., 549; *Hall* vs. *Stryker*, 29 Barb., 105; *Brooks* vs. *Stone*, 19 How., 395; 11 Abb., 220. See, however, as to the lien acquired by attachment, and the possibility of its enforcement, after the recovery of judgment and the mere issuing of execution, *Skinner* vs. *Stuart*, 13 Abb., 442; *Schlussel* vs. *Willett*, 22 How., 15; 12 Abb., 397. See likewise, generally, *Jacobs* vs. *Remsen*, 35 Barb., 384; 12 Abb., 390.

In cases where an obstruction in the way of the realization of leviable property is sought to be removed, in aid of an execution already issued, and a specific lien has been actually acquired on such property, the rule, it would seem, is not quite so strict, and allegation of the recovery of judgment, and issuing of execution, will be sufficient to sustain the suit, without showing a return. See *Crippen* vs. *Hudson*, 3 Kern., 161 (166); *Hall* vs. *Stryker*, 29 Barb., 105 (110); *Bishop* vs. *Halsey*, 13 How., 154 (160); 3 Abb., 400; *McCullough* vs. *Colby*, 5 Bosw., 477; *Skinner* vs. *Stewart*, and *Schlussel* vs. *Willet*, above cited.

The above distinction proceeds evidently upon the theory of an actually acquired lien. *A fortiori*, is this the case as regards real estate, on which a lien is acquired by the creditor, not as an incident to execution issued, but prior to, and independent of that procedure, and by the mere docketing of his judgment, in the county in which the lands sought to be reached are situate.

In this latter class of cases, and so far as regards the application for removal of obstructions impeding the plaintiff's remedy on the lien so acquired, or the assertion of that lien, separately considered, all that is strictly indispensable is, an allegation of the docketing of the judgment, and those as to the issuing and return of execution may be unnecessary.

In all cases, however, it is better to insert, whenever practicable, all

the usual averments, and that in full detail. The complaint will then be good in all its aspects, and will lay ground for every description of relief that may, under the proofs, appear to be obtainable. See *Parshall* vs. *Tillou; Cooper* vs. *Clason*, above cited; *Neusbaum* vs. *Keim*, 1 Hilt., 520; 7 Abb., 23; *Crippen* vs. *Hudson*, 3 Kern., 161 (166); *North American Fire Insurance Company* vs. *Graham*, 5 Sandf., 197; *McCullough* vs. *Colby*, 5 Bosw., 477.

The classification above noticed is recognized in *Greenwood* vs. *Brodhead*, 8 Barb., 593, where it is laid down, that a creditor must obtain a specific lien in the property, either legal or equitable, or be in a situation to assert one, before he can interfere to control it: if the property be real estate, by judgment; if personal, by levy under execution; and, if it be choses in action, by the return of an execution unsatisfied, and the filing of a complaint.

Till one or other of these conditions is satisfied, the defendant's power of dealing with the estate cannot be interfered with. *Same case.* See also *Davis* vs. *Graves*, 29 Barb., 480.

But, to enable a suit of this nature, the lien must be completed and valid. If imperfect, it will not be maintainable. Such an action cannot be brought upon a justice's judgment, or the return of a justice's execution, unless and until it has been docketed in the county clerk's office, and an execution issued accordingly, against both real and personal estate. *Crippen* vs. *Hudson*, 3 Kern., 161. Nor is such a suit maintainable upon a foreign judgment. Before it can be brought, the plaintiff must show the recovery of one in this state, and execution thereon. *McCartney* vs. *Bostwick*, 31 Barb., 390.

As to the power of assertion of such a lien, when complete, and the removal of obstructions in the way of that assertion, by way of fraudulent assignment, or otherwise, see *Hammond* vs. *Hudson River Iron and Machine Company*, 20 Barb., 378 (383); *Barney* vs. *Griffin*, 2 Comst., 365; *Leitch* vs. *Hollister*, 4 Comst., 211; *Paton* vs. *Wright*, 15 How., 481; *Gasper* vs. *Bennett*, 12 How., 307; *Carpenter* vs. *Roe*, 6 Seld., 227; *Adams* vs. *Davidson*, 6 Seld., 309; *Robinson* vs. *Stewart*, 6 Seld., 189.

On the assertion of a similar remedy, against the estate of a deceased partner, by the holder of a partnership debt, an additional prerequisite is necessary, and the plaintiff, before he can maintain his suit, must show that he has exhausted his remedy against the partnership assets, and the separate estate of the survivors. *Voorhies* vs. *Child's Executors*, 18 Barb., 592; 1 Abb., 43; affirmed, 17 N. Y., 354. See also *Dubois case*, 3 Abb., 177. As to the marshalling of claims, between conflicting creditors in such cases, see *Meech* vs. *Allan*, 17 N. Y., 300. As to the invalidity of an assignment, giving preference to individual over part-

nership creditors, see *Wilson* vs. *Robertson*, 19 How., 350; overruling, *pro tanto*, *Cox* vs. *Platt*, 19 How., 121; 32 Barb., 126.

The rule as to a suit to interfere with the administration of the assets of an insolvent general partnership, is the same as in ordinary cases. The creditor must have reduced his debt to a specific lien, before he can have a standing in court. A creditor at large cannot invoke its equitable powers. *Crippen* vs. *Hudson*, 3 Kern., 161; *Greenwood* vs. *Brodhead*, 8 Barb., 593. These cases overrule *Dillon* vs. *Horn*, 5 How., 35, and *Mott* vs. *Dunn*, 10 How., 225; disapproved also in *Reubens* vs. *Joel*, 3 Kern., 488 (492).

In the case of a limited partnership, the rights of creditors are somewhat wider, the statute, 1 R. S., 766, 767, sections 20, 21, forbidding the giving of any preferences, on the occasion of insolvency, actual or contemplated, thus giving the creditors in general, without distinction, the right to an equal distribution. A creditor at large may, under these circumstances, assert his remedy, even against others who have previously reduced their debts into judgment. *Jackson* vs. *Sheldon*, 9 Abb., 127; *Hayes* vs. *Heyer*, 3 Sandf., 284 (293); *James* vs. *Lansing*, 7 Paige, 583; *Gray* vs. *Kendall*, 10 Abb., 66; 5 Bosw., 666.

It has been held, that, in these cases, a creditor cannot maintain the ordinary suit for his own exclusive benefit. He must bring a general bill, for the benefit of himself and all others. *Greene* vs. *Breck*, 10 Abb., 42; *Lachaise* vs. *Lord*, 4 E. D. Smith, 612; 10 How., 461; 1 Abb., 213. The same would be the case, where an assignment, giving preferences and attacked on that ground, is invalid in part only, and not impeachable as a whole. See *Cox* vs. *Platt*, 32 Barb., 126; 19 How., 121. *Greene* vs. *Breck* stands, however, reversed, so far as regards a suit, commenced in the absence of any proceeding for the general administration of the partnership estate. *Greene* vs. *Breck*, 32 Barb., 73.

It is competent for more than one judgment creditor, to unite in the same proceeding, for the common assertion of their rights, and their bill will not be open to objection as multifarious. They cannot, however, take several common-law judgments; in that aspect, the proceeding would be bad for misjoinder. *Sage* vs. *Mosher*, 28 Barb., 287. See also *Conro* vs. *Port Henry Iron Company*, 12 Barb., 27.

It is competent for a party, standing in the position of a judgment-creditor, to sue, either in the ordinary form, for his own sole behalf, or for himself and his class, whichever he may elect to do. *Hammond* vs. *Hudson River Iron and Machine Company*, 20 Barb., 378; *Cox* vs. *Platt*, 32 Barb., 126; 19 How., 121.

A receiver, under supplementary proceedings, may institute a suit of this description. His authority is derived under a judgment, and he

stands in the place of, and represents, the judgment-creditors. *Porter* vs. *Williams*, 5 Seld., 142; 12 How., 107; *Chatauque County Bank* vs. *White*, 2 Seld., 236; *Seymour* vs. *Wilson*, 16 Barb., 294; 15 How., 355; *Shaver* vs. *Brainard*, 29 Barb., 25.

A general assignee does not, as has been decided, stand in this position, his standing in court being merely, as the nominee of the debtor, on the one hand, and a trustee for creditors at large, on the other, *Beekman* vs. *Kirk*, 15 How., 228; *Hammond* vs. *Hudson River Iron and Machine Company*, 20 Barb., 378. See also *Bank of British North America* vs. *Suydam*, 6 How., 379; 1 C. R. (N. S.), 325.

By the recent statute, however, chapter 314 of 1858, page 506, the powers of parties, standing in a representative capacity, are defined and extended, and a general authority is given to them to bring suits of this nature.

A suit of this description must stand alone. A claim for other and independent relief, cannot be joined in the same proceeding. *Dewey* vs. *Ward*, 12 How., 419. Nor can relief against several defendants, holding independent conveyances, be so asserted, without the risk of an objection for misjoinder. *Reed* vs. *Stryker*, 6 Abb., 109.

In a contest between conflicting suits, preference was given to one which contested, over one which assumed, the validity of an assignment alleged to be fraudulent. *Wheeler* vs. *Wheedon*, 9 How., 293.

The execution of a power has been held to be compellable for the benefit of creditors, in a proceeding of this description. *Tallmage* vs. *Sill*, 21 Barb., 34. But a trust, provided for the maintenance of the *cestui que trust*, cannot be reached, unless the existence of a surplus is made evident. *Bramhall* vs. *Ferris*, 4 Kern., 41.

The proceeding does not, however, extend to control the debtor in the management of a suit, instituted by him for an analogous purpose, or to restrain him from settling or compromising that suit, should he think fit. *Boughton* vs. *Smith*, 26 Barb., 635.

The filing of a complaint of this description was held, under the former practice, to effect, *per se*, a specific lien on the property sought to be reached, and the same seems still to be the case. To make that lien available against third persons, the precaution of filing a notice of *lis pendens* at the outset should, however, always be observed. *Wheeler* vs. *Wheedon*, 9 How., 293 (298); *Roberts* vs. *Albany and West Stockbridge Railroad Company*, 25 Barb., 662; *Voorhies* vs. *Seymour*, 26 Barb., 569; *Tallmage* vs. *Sill*, 21 Barb., 34 (55); *Gere* vs. *Dibble*, 17 How., 31.

Although a creditor, under supplementary proceedings, obtains an inchoate lien of a similar nature, which, on the appointment of a receiver, will become perfected, still, if he abandon those proceedings, and insti-

tute a creditor's suit, he cannot any longer claim the benefit of them. His only lien will then date from the commencement of the latter proceeding. *Edmonston* vs. *McLoud*, 16 N. Y., 543. In *Tripp* vs. *Childs*, 14 Barb., 85, it was held that this remedy was extendable over future earnings of the judgment-debtor, and with a view to avoid a fraudulent disposition of them. See, however, *Campbell* vs. *Foster*, 16 How., 275, holding the contrary, as to future revenue derivable under a trust fund.

In relation to the averments in a suit of this description, the following cases demand citation:

The old forms and the provisions of the former rules upon the subject are now swept away, and need no longer be observed. See *Quick* vs. *Keeler*, 2 Sandf., 231, before cited. But all that was made requisite by the Revised Statutes remains equally essential, and must still be stated. *Same case.* See also *Hammond* vs. *Hudson River Iron and Machine Company*, 20 Barb., 378 (386); and *Rogers* vs. *Hern*, 2 C. R., 79, also above cited.

Especially it is necessary, in order to sustain the ordinary proceeding, to aver, as under the old practice, the issuing and return of an execution unsatisfied. *Campbell* vs. *Foster*, 16 How., 275. See generally, as to averments, *Catlin* vs. *Doughty*, 12 How., 457.

In a suit to set aside an instrument on the ground of fraud, it is sufficient to charge the fraud relied on, in general terms, in connection with a full allegation of the provisions alleged to be void, or the other facts out of which that fraud arises. It is not necessary to enter into any detailed specification of the reasons for impeaching it, or to point out the peculiar objections taken. *Jessup* vs. *Hulse*, 29 Barb., 539; *Hastings* vs. *Thurston*, 18 How., 530; 10 Abb., 418.

In a suit to remove a fraudulent obstruction on real estate, the plaintiff must show in his complaint: 1. That there is such real estate. 2. That the judgment would have been a lien thereon, had not the fraudulent obstruction been interposed. 3. That, by reason of such interposition, his execution cannot reach it, and that therefore his remedy at law is not sufficient. If it fail in any of these respects, the suit will not be maintainable. *Wilson* vs. *Forsyth*, 24 Barb., 105.

In a general creditors' bill to reach and distribute the assets of a limited partnership, the allegations of the complaint, as to the claim of the plaintiffs, must be so definite and certain, as to inform the defendants when, in what manner, to what amount, and by what contracts it is claimed that they have become entitled. *Gray* vs. *Kendall*, 10 Abb., 66.

The principle of *secundum allegata*, applies equally to this as to other pleadings, and, unless the proofs given accord with the averments, the proceeding cannot stand. *Bailey* vs. *Ryder*, 6 Seld., 363.

(*b.*) Other Special Liens.

The following may be referred to, as a few of the many decisions in relation to the enforcement of equitable liens, generally considered, and applicable to the special circumstances of each individual case.

As to the lien of a vendor on property conveyed by him, in respect of an unpaid note given for purchase-money, and its availability, as against the holder of a mere voluntary conveyance, though taken under circumstances which would have discharged a *bonâ fide* purchaser, see *Burlingame* vs. *Robbins*, 21 Barb., 327; *Warren* vs. *Fenn*, 28 Barb., 333. See also, as to a similar lien, for reimbursement for instalments paid on account of a contract for purchase, incapable of being afterwards fulfilled, *Tompkins* vs. *Seeley*, 29 Barb., 212.

The equitable lien for unpaid purchase-money, is only raised by law, in the absence of express agreement between the parties. It will be waived by the taking of any security, other than the personal obligation of the vendee, or by the making of express provision for its payment. *Hare* vs. *Van Deusen*, 32 Barb., 92.

As to the charge effected upon an estate, by its devise, subject to the payment of debts, and the means of enforcement of that charge, by an action *in rem*, for the benefit of creditors of the testator, see *Wood* vs. *Wood*, 26 Barb., 356.

As to the mode of enforcement of debts, against real estate of a foreign intestate, having effects within this state, on which administration cannot be obtained, and the necessity of negativing the possibility of obtaining such administration, by special averment, on the face of the complaint for that purpose, see *Hollister* vs. *Hollister*, 10 How., 532.

An administrator, who voluntarily pays a debt of his intestate, cannot subsequently proceed to collect it out of the real estate. The statute gives that right to creditors, and to them only. Where, however, such a debt is caused by the application of moneys of the estate to the payment of debts due from the intestate in his lifetime, the administrator may be regarded as equitable assignee of such claims, and may in that character obtain his remedy. *Ball* vs. *Miller*, 17 How., 300.

As to the right of a doweress, in possession of part, to obtain contribution from heirs, of their proportion of taxes on the whole property of the deceased paid by her, see *Graham* vs. *Dunigan*, 2 Bosw., 516.

In relation to the marshalling of claims, as between two funds affected by the same lien, and the principles on which an apportionment of liability may be made, in a case calling for that mode of interposition, see *Ingalls* vs. *Morgan*, 6 Seld., 178; affirming *same case*, 12 Barb., 578.

An agreement to create a lien, affects a lien in equity, available against the claims of subsequent judgment-creditors. To have this effect, how-

ever, the agreement must be clear, and its object, and the property affected by it, definitely expressed. If it fall short of these conditions, the agreement will be regarded as merely executory. If it satisfies them, however, the lien so created will be valid and enforceable, even against future acquired property agreed to be charged, so soon as that property is acquired. *Seymour* vs. *Canandaigua and Niagara Falls Railroad Company*, 25 Barb., 284; 14 How., 531.

(*c.*) Lien upon Estate of Feme Covert.

The consideration of this subject has been in a great measure anticipated, and the decisions and statutes bearing upon it cited, under the head of *Parties*, in Book II., section 34.

The following decisions have reference to the law on this subject, as it stood prior to the last amendment, effected by chapter 172 of 1862, p. 343.

Where the separate estate of a married woman, which is sought to be charged, arises under a specific deed or instrument, such deed or instrument should, it would seem, be set forth, that the court may determine, whether its provisions are consistent with the defendant's attempt to charge that estate. *Yale* vs. *Dederer*, 18 N. Y., 265 (268); 17 How., 165.

In order to create a charge upon such separate estate, the intention to do so must be declared, in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself. *Yale* vs. *Dederer*, 22 N. Y., 450; 20 How., 242.; see also, *Taylor* vs. *Glenny*, 22 How., 240.

The complaint, therefore, of a party who seeks to enforce such a charge, must show that the consideration of the promise relied on, was some benefit to the separate estate, or that there was a distinct intention upon her part to charge it. If not, such complaint will be demurrable. *Palen* vs. *Lent*, 5 Bosw., 713.

In all cases, the averments should be full, and must show by unmistakable allegation the following facts:

That the defendant has property, describing it with sufficient certainty to enable its identification, and specific application to payment of the lien as claimed, and that she owned such property, at the time the debt was contracted, a bare allegation, without specification, will not avail; that such property is held by her to her separate use; and, if the general provisions of the statutes of 1848, 1849, 1860, and 1862, are relied on, as creating such separate property, the case must be brought within their scope by special averment, as, for instance, by an allegation that the defendant was married within this state, at a date subsequent to the passage of the first of those statutes.

The nature and consideration of the plaintiff's debt sought to be enforced, and that such debt was incurred, upon the express credit, or for the express benefit of the specific property sought to be charged, and that the defendant made, or intended to make, such debt a charge or lien upon her separate estate, at the time she contracted it.

And the demand for judgment should be, that such separate estate be charged with, and applied to the payment of the debt in question, and that a receiver be appointed to take charge of that estate, and dispose of it, or of so much as may be necessary for such payment. See *Cobine* vs. *St. John*, 12 How., 333; *Goodall* vs. *McAdam*, 14 How., 385; *Sexton* vs. *Fleet*, 2 Hilt., 477; 15 How., 106; 6 Abb., 8; *Bass* vs. *Bean*, 16 How., 93; *Arnold* vs. *Ringold*, 16 How., 158; *Dickerman* vs. *Abrahams*, 21 Barb., 551.

As to the covenant of a married woman being effective to bind separate property, of which she has power to dispose, under an ante-nuptial contract, see *Van Allen* vs. *Humphrey*, 15 Barb., 555.

But the recent amendment of the law seems to have swept away most, if not all, of these distinctions, and to enable a suit to be brought upon the contract of a *feme covert* in the ordinary form, the judgment, if obtained against her, being enforceable against her separate estate, in the same manner as if she were *sole*. See chapter 172 of 1862, p. 343, section 7. See also chapter 460 of 1862 (the amended Code), p. 846, section 12.

§ 154. *Foreclosure, or Redemption.*

(*a.*) Foreclosure of Mortgage.

The bill of complaint in this proceeding, was made the subject of special regulation, under the former practice, by section 1 of chapter 342 of 1840, making it the duty of the chancellor to frame a short and convenient form, containing so much only as was necessary to enable the court to frame a proper decree. This form was framed accordingly, and has come into general use; and although, in strictness, it stands formally abolished by the preamble, and by sections 69 and 140 of the Code, the use of it is, in substance, still continued.

The substance of that form may be shortly stated thus:

The making and terms of the bond and mortgage must be averred fully and specifically, the description of the property being given *in extenso;* especially is it material to set out fully the condition of the bond, and the power of sale in the mortgage.

The recording of the mortgage must be also specially shown; and if any assignments have been made, they must be averred on the same principles, so as to show actual title in the plaintiff.

The breach of the condition which gives the right to foreclose, and the existence and amount of the plaintiff's debt, must be alleged with the same particularity. As to the effect of an omission to make a sufficient averment in this respect, see *Second American Building Association* vs. *Platt*, 5 Duer, 675.

It should be stated that no other proceedings have been taken, for the recovery of the same amount.

And, if parties, other than those directly liable, are sought to be foreclosed upon, it must be alleged that they claim some lien or interest in the premises, subsequent to the plaintiff's mortgage.

The complaint winds up, by a prayer that the defendants be foreclosed; that the property be sold, and the proceeds brought into court; that the plaintiff be paid his debt, interest, and costs, out of such moneys; and that the mortgagor, or any other party liable to its payment, be adjudged to pay any deficiency, if any. As to the necessity of inserting a demand for this relief in all cases, see *Simonson* vs. *Blake*, 20 How., 484; 12 Abb., 331.

The question as to the parties necessary to be joined, has been already anticipated in book II., section 38, where it will be found fully discussed. The rule may be shortly stated thus: The mortgagor is, of course, a necessary party, where the property remains in him. He is also a proper party, even after alienation, as remaining still liable for any deficiency. His alienee, seized of the property, must, of course, be joined. Intermediate alienees, retaining no interest, need not be so. But any alienee, who has assumed payment of the mortgage, under his conveyance, or otherwise, may be brought in, and payment of any deficiency claimed as against him; and, where this is the case, and the plaintiff chooses to rely upon the solvency of such assuming alienee, it is no longer necessary for him, though admissible, to join the original mortgagor. See *Drury* vs. *Clark*, 16 How., 424. See, as to what will or will not be sufficient to constitute an assumption of this nature, *Stebbins* vs. *Hall*, 29 Barb., 524; *Trotter* vs. *Hughes*, 2 Kern., 74; *Belmont* vs. *Coleman*, 22 N. Y., 438. See likewise, as to the plaintiff being bound by equities in this respect, as between the parties, of which he has actual notice, *Flagg* vs. *Munger*, 5 Seld., 483.

Every wife or widow of a mortgagor, or of any subsequent grantee, or owner of the equity of redemption, must be joined, or the decree will be void, *pro tanto*. *Denton* vs. *Nanny*, 8 Barb., 618. Where, too, a widow had actually been made a party in another capacity, no issue being raised as to her right of dower, and, in that capacity, suffered judgment to be taken against her *pro confesso*, her right to dower was held not to be affected. Her claim, in that respect, was paramount to the mortgage, and therefore she had no right to suppose that that claim

would be called into question, whatever might be the case as regarded her subsequent interest. *Lewis* vs. *Smith*, 11 Barb., 152; 7 L. O., 292; affirmed, 5 Seld., 502; 12 L. O., 193; *Wheeler* vs. *Morris*, 2 Bosw., 524.

And, although the wife or widow of a mortgagor cannot, under the statute (1 R. S., 740, section 5), claim dower adversely to a mortgagee for unpaid purchase-money, it is, nevertheless, necessary to join her, in all cases, in respect of the interest which she retains in the surplus, if any. *Wheeler* vs. *Morris*, *supra*; *Mills* vs. *Van Voorhis*, 23 Barb., 125; *Same case*, 20 N. Y., 412; 10 Abb., 152 (the reversal not being in derogation, but in affirmance of this doctrine); *Blydenburgh* vs. *Northrop*, 13 How., 289. As to the validity of a mortgage of this description, even though it bears a date subsequent to that of the conveyance of the property, provided both are clearly parts of the same contract, see *South Baptist Society of Albany* vs. *Clapp*, 18 Barb., 35.

And, where subsequent encumbrances, whether by way of mortgage, judgment, or lien exist, such encumbrancers, and every other party subsequently interested, must be brought in, or the foreclosure will be defective, *pro tanto*, and any party omitted to be joined will retain a right of redemption. See *Brainard* vs. *Cooper*, 6 Seld., 356.

As to the effect of omitting to join a party standing in this position, and as to the power of such party to maintain foreclosure on his own behalf, and the position of mortgagee in possession in which the original first mortgagee will then stand, in a case where he has himself bought in the property, see *Walsh* vs. *Rutgers Fire Insurance Company*, 13 Abb., 33.

Where the rights of the parties so joined are of a general nature, as, for instance, in the case of judgment-creditors, the general allegation that they claim some lien or interest, will suffice, and it will not be necessary or proper to make a more specific averment. Nor can any equities between such defendants be brought in issue, for the purpose of delaying the plaintiff's remedy, or encumbering the proof or decision of his suit. The proper time for raising such questions, is on the coming in of claims to the surplus, if any. *Drury* vs. *Clark*, 16 How., 424.

Nor is a mortgagee bound to notice the equitable rights of subsequent grantees, as between themselves, unless specifically brought to his attention, by actual notice. But, where such notice is brought home to him, such equitable rights may be provided for. *Howard Insurance Company* vs. *Halsey*, 4 Seld., 271; affirming 4 Sandf., 565. See also, on the same subject, *Flagg* vs. *Munger*, 5 Seld., 483.

But, where the claim of an encumbrancer or party interested, is of a specific nature, or arises under a specific instrument, it should be averred accordingly, so as to make it clearly appear what is the interest sought to be foreclosed. See, as to a claim for dower, *Lewis*

vs. *Smith*, *supra*. And, where any party is interested in more than one capacity, care must be taken to frame the statements so comprehensively, as to include every possible interest which such party may possess.

Where infants are interested in the estate sought to be foreclosed, the nature of their interest, and whether it is paramount or subordinate to that of the plaintiff, must be shown by specific allegation. The ordinary allegation, that such infants claim some interest in the premises, is not sufficient, as the facts cannot be taken as admitted, as against them, and there must be some averment to sustain the requisite proof. *Aldrich* vs. *Lapham*, 6 How., 129; 1 C. R. (N. S.), 408.

Of course, too, any peculiar circumstances connected with the security, as, for instance, if the mortgagee have been in possession, must be distinctly averred; and, in the latter case, the results of any accounts between the parties, which will tend to show the exact sum then due in respect of the security, must be correctly stated; and it may be expedient to annex copies of the accounts themselves to the complaint, with a view to obtain an admission or non-denial of their correctness. The observation made in a previous chapter, with regard to fixing the venue in these cases, will have been noticed. It must be in the county, or one of the counties, where the premises are situate, irrespective of that in which the loan itself may have been actually transacted.

A prior encumbrancer need not, and ought not properly to be joined. He cannot be affected, or his rights reached by the decree. The same is the case as to any party claiming a right, prior or in hostility to the mortgage sought to be foreclosed. The question as to the rights of such party cannot be litigated in the suit, but must be made the subject of a separate proceeding. *Lewis* vs. *Smith*, *supra*; *Corning* vs. *Smith*, 2 Seld., 82. N. B.—Both these decisions were in cases arising prior to the amendments of 1852. It may now be questionable, whether causes of action of this description, may not be capable of joinder, in a complaint, properly framed under subdivision 1 of section 167, as added in that year. See also *Hancock* vs. *Hancock*, 22 N. Y., 568.

The decision in *Depeyster* vs. *Hasbrouck*, 1 Kern., 582, where a suit for the purpose of reforming a mortgage, so as to include premises omitted through fraud, and for foreclosure of it, when reformed, was held to be maintainable, would seem to tell in favor of the above conclusion.

Encumbrancers, junior to the plaintiff, cannot interfere with, or seek to control, the proceedings in his suit. See *Bedell* vs. *McClellan*, 11 How., 172.

If the plaintiff have actual notice of a prior encumbrance, even

though unrecorded, he will be bound by it, and the court will provide for securing its priority. *Haywood* vs. *Shaw*, 16 How., 119.

The usual mode of framing the complaint, is to state the condition of the mortgage, by reference to, and as being the same as that in the bond previously alleged. This mode is, however, subject to this inconvenience, that it leaves the defendant at liberty to raise the question, as to whether the conditions do or do not accord, for the purpose of delay. See *Dimon* vs. *Bridges*, 8 How., 16. A more specific allegation of the condition of the mortgage, according to its actual wording, would tend to obviate this difficulty.

The condition in the mortgage is, in fact, what really governs the proceeding, and a suit will still be maintainable, even under circumstances where one on the collateral instrument would be barred. *Pratt* vs. *Huggins*, 29 Barb., 277.

Foreclosure is maintainable on the mortgage alone, without any collateral instrument. Unless, however, such mortgage contain a positive covenant for payment of the sum secured, the plaintiff, in the absence of a collateral bond or note, will be confined to his remedy on the land, and cannot recover against the mortgagor for any deficiency. *Vide* 1 R. S., 738, section 138; *Vrooman* vs. *Dunlap*, 30 Barb., 202.

The terms of the security itself cannot, as a general rule, be varied by extraneous evidence, and it may be foreclosable, notwithstanding the tender of proof of a parol agreement for extension of the period of payment. *Hunt* vs. *Bloomer*, 5 Duer, 202.

A proceeding of this nature does not in any manner affect the independent rights of the parties. Any equities of those parties, as between themselves, remain unaffected, and may be raised in another proceeding. *Hoyt* vs. *Martense*, 16 N. Y., 231; reversing *same case*, 8 How., 196.

Nor is it necessary, upon the face of the complaint, to show the details of the interest of the plaintiffs, provided a *primâ facie* title is made apparent. See *Pinckney* vs. *Wallace*, 1 Abb., 82.

It seems, too, that a plaintiff is not required to allege, or to establish beforehand, and in the first instance, any claims he may have upon the mortgaged premises, independent of the mortgage he seeks to enforce. He has the same right as any other person, to present and establish a claim to the surplus moneys, after sale; and, if necessary, his complaint may then be amended, on an application made, after that surplus has been ascertained. *Field* vs. *Hawxhurst*, 9 How., 75.

A mortgage executed for an amount to be advanced, is foreclosable, but only to the extent of the advance actually made. *Dart* vs. *McAdam*, 27 Barb., 187; *Robinson* vs. *Williams*, 22 N. Y., 380.

In *Seymour* vs. *Canandaigua and Niagara Falls Railroad Company*,

25 Barb., 284; 14 How, 531, a mortgage, comprising in part property to be acquired in future, was held to be a lien in equity from the date of its original record, and to be foreclosable against such property, when acquired.

A mortgagee may maintain his suit, unaffected by any collateral claims of the defendants, and even although a collateral proceeding for the purpose of setting aside his security be actually pending. *Tarrant* vs. *Quackenbos*, 10 How., 244.

A strict foreclosure, according to the practice in England and several of the sister states, is, though unusual, maintainable in a proper case, as, for instance, for the removal of doubts as to the validity of a previous decree. See, as to this proceeding, and the proper form of decree in such a case, *Kendall* vs. *Treadwell*, 14 How., 165; 5 Abb., 16.

As to the right of a female mortgagee to maintain foreclosure, notwithstanding her subsequent marriage with the mortgagor, see *Power* vs. *Lester*, 17 How., 413; affirmed, 23 N. Y., 527.

Nor will a bequest of the mortagee's interest to the mortgagor, prevent the holder of an intermediate outstanding interest in the debt, from maintaining foreclosure. *Hancock* vs. *Hancock*, 22 N. Y., 568.

The comptroller of the state has the same rights as any other person, of foreclosing a mortgage, assigned to him as security, by a banking or other incorporation, pursuant to the statute. *Flagg* vs. *Munger*, 5 Seld., 483.

As to the right to maintain foreclosure, in respect of a mortgage wrongfully satisfied of record, and the effect of such wrongful satisfaction upon the rights of the different parties interested, see *Ely* vs. *Scofield*, 35 Barb., 330.

In the city of New York, a mortgagee acquires a right to redeem the premises, as soon as they are assessed for city purposes. By such payment he acquires a lien on the premises, which he may add to his mortgage debt, and collect by foreclosure. *Brevoort* vs. *Randolph*, 7 How., 398.

And, in the same city, the corporation acquires a lien upon the premises, in default of payment of such an assessment, which is enforceable by a proceeding in the nature of foreclosure. *Mayor of New York* vs. *Colgate*, 2 Kern., 140; affirming *same case*, 2 Duer, 1.

As to a mortgage to a building or other similar association, and the extent to which the lien upon it is, or is not enforceable, see *Hamilton Building Association* vs. *Reynolds*, 5 Duer, 671; *Second American Building Association* vs. *Platt*, 5 Duer, 675; *Citizens' Mutual Loan Association* vs. *Webster*, 25 Barb., 263.

As a general rule, the usual interest clause will receive a strict construction, and, if the mortgagor fail to make his payments regularly,

within the stipulated time, he cannot be relieved; and the rights of the mortgagee to foreclose will be absolute, notwithstanding a subsequent tender. *Ferris* vs. *Ferris*, 28 Barb., 29; 16 How., 102; *Hunt* vs. *Keech*, 3 Abb., 204. See also *Dwight* vs. *Webster*, 32 Barb., 47; 19 How., 349; 10 Abb., 128.

But where, under such circumstances, the conduct of the mortgagee has been either fraudulent or oppressive, the court has, in some instances, interfered to prevent his taking advantage of the forfeiture created by his own wrong. *Broderick* vs. *Smith*, 26 Barb., 539; 15 How, 434. See also, similar relief granted, on the ground of accident or mistake, *Lynch* vs. *Cunningham*, 6 Abb., 94.

So also, when a mortgagor had made a remittance to his mortgagee, in order to obtain an extension of time, the latter was held bound to grant the extension, or return the amount. *Grinnan* vs. *Platt*, 31 Barb., 328.

As to the mortgagor's right to stay proceedings, at any time before sale, on tender to the mortgagee of his principal, interest, and costs, though his law day for redemption be past; and that such a tender, when made, at once discharges the lien, see *Kortright* vs. *Cady*, 21 N. Y., 343; reversing *same case*, 23 Barb., 490; 5 Abb., 358; and also at special term, 12 How., 424. See also, as to a charge on personal property, *Pratt* vs. *Stiles*, 17 How., 211; 9 Abb., 150.

As to the necessity of such a tender being made in strict legal form, to be available for the purpose of discharging the lien, see *Harris* vs. *Mulock*, 9 How., 402.

After land, the subject of a mortgage, has been legally converted into money, payable to the mortgagee, proceedings by way of foreclosure will no longer lie. His remedy is by an application for the amount. *Shephard* vs. *Mayor of New York*, 13 How., 286.

To be enforceable in the hands of an assignee, the mortgage must be valid, and the assignment good in itself, and made in good faith, and without notice of any fraud or defect in the security. If deficient in any of these particulars, the plaintiff's right to sue will be gone. See *Dewitt* vs. *Brisbane*, 16 N. Y., 508; *Talmage* vs. *Pell*, 3 Seld., 328; *Leavitt* vs. *Palmer*, 3 Comst., 19; *Chamberlain* vs. *Barnes*, 26 Barb., 160. See also, as to the limitation of the claim of a plaintiff, under similar circumstances, *Wood* vs. *Chew*, 13 How., 86.

Although the power in a mortgage, authorize a private sale, a public sale must, under the statute, be had in a proceeding of this description, or the right of redemption will not be barred. *Lawrence* vs. *Farmers' Loan and Trust Company*, 3 Kern., 200.

As to a suit not being maintainable, for the purpose of recovering a deficiency, after foreclosure completed, in a case where a mortgage had been given alone, without any covenant for payment, or any collateral

bond; on the ground that the plaintiff's remedy in such a case is confined only to the land, under 1 R. S., 738, section 138, see *Vrooman* vs. *Dunlap*, 30 Barb., 202.

In relation to the mortgagee's right to intercept the rents and profits, after default and before sale, in certain cases, and when it will, or will not, be recognized and provided for by the court, see *Syracuse City Bank* vs. *Tallman*, 31 Barb., 201.

As to the plaintiff's measure of recovery, on an instrument providing for future advances of a specific nature, and as to the evidence necessary to support it, see *Walker* vs. *Paine*, 31 Barb., 213.

(*b.*) Foreclosure of Mechanics' Lien.

As before noticed in book III., section 61, it is not proposed to enter, in the present work, into the details of this remedy, in so far as it constitutes a special statutory proceeding. The mode in which such lien is acquired, its nature and extent when obtained, and its incidents, so far as regards the rights of the claimant, and the liability of the defendant, or rather of the defendant's property, will accordingly be passed over, referring the reader to the special treatises which have been published upon the subject.

But, inasmuch as the proceedings to enforce it, when acquired, partake closely of the characteristics of an ordinary suit for foreclosure, it will be convenient to notice, at this juncture, some of the principal decisions which bear upon the structure of the complaint, by which relief in respect of it is sought.

The present statutes applicable, and under which that relief is obtainable, are as follows:

As regards the city and county of New York. Chapter 513 of 1851, p. 953; amended by chapter 404 of 1855, p. 760

As regards the counties of Kings and Queens. Chapter 478 of 1862, p. 947.

As regards all the counties in the state, except those of New York, Kings, Queens, and Erie, chapter 402 of 1854, p. 1086; originally passed for a smaller district, but extended and made generally applicable as above, by chapter 204 of 1858, p. 324.

As regards the city of Buffalo, the old law, chapter 305 of 1844, still subsists, except in so far as it has been amended by chapter 517 of 1851, p. 960.

The statute of 1858, extending that of 1854, has an extensive repealing operation. It sweeps away and nullifies the following special laws, applicable to particular places:

The original law of 1844, except as regards the county of Erie: Chapter 184 of 1846; amended by chapter 160 of 1850, p. 326, relative

to the county of Richmond: Chapter 169 of 1851, p. 319, chapter 384 of 1852, p. 611, and chapter 413 of 1853, p. 809, as to Westchester and other neighboring counties: Chapter 663 of 1857, vol. 2, p. 477, as to Saratoga Springs.

Its apparent effect would also seem to have extended to a repeal of the special statute as to Kings county, chapter 335 of 1853, page 708. This conclusion is however denied, and that statute held to be still in force, in *Rafter* vs. *Sullivan*, 13 Abb., 262. The special statute of 1862, above cited, has however put an end to the question.

For the purpose of pleading, it is not necessary to notice the distinctions which exist in detail between the present subsisting statutes; all substantially provide for the acquisition of a lien, as against the owner, in favor of a party doing work or labor, or furnishing materials, towards the erection or repairing of any house or building, to be acquired by the filing of a notice in the county clerk's office, within a specified time, and to be enforced by means of a consequent notice to such owner, followed up by proceedings in the nature of a suit for foreclosure.

The New York statute is, however, imperative in requiring that for such purposes the claim should be for work, &c., done or furnished by virtue of a contract, either entered into directly with the owner or his agent, or done by the claimant for such a contractor, in pursuance of an agreement, and in conformity with the terms of his original contract with the owner. The general act is less stringent in its terms, and enables the acquisition of such a lien, in respect of any work done or performed as above, and likewise for any materials furnished by a resident of the counties enumerated.

The following decisions bear upon the structure of a complaint framed for assertion of the relief in question. They all bear, with little if any exception, upon the New York statute, that being the one chiefly drawn into controversy. They are however, as a general rule, equally applicable to the others, on the general principles established.

In any case, and under whatever description of contract the remedy in question is sought, the complaint must contain full and specific averments, showing the acquisition of the lien, by filing the requisite notice, and also that the claim, in respect of which the lien arises, is a claim within the terms of the statute invoked. The proceeding is *in rem*, not *in personam*, and every fact necessary to show a strict compliance with those terms, must be specifically averred. *Vide Cronkright* vs. *Thomson*, 1 E. D. Smith, 661; *Randolph* vs. *Leary*, 3 E. D. Smith, 637; 4 Abb., 205; *Quimby* vs. *Sloan*, 2 E. D. Smith, 594; 2 Abb., 93, and most of the other cases below cited.

In *Duffy* vs. *McManus*, 3 E. D. Smith, 657, reported as *Duffy* vs. *Brady*, 4 Abb., 432, a case under the New York statute, the principles

are laid down thus: A complaint, predicated solely on the notice, and its object and intent, without separate or independent averments of the facts alleged in the notice, was held bad on demurrer. It was held that such complaint must be subjected to the rules of law in other actions, and that it should aver, that notice was filed, that the defendant is the owner, that the work was done in pursuance of a contract, and in conformity therewith. The premises should be described with sufficient certainty, and both the street and number should be given, or the reason why the plaintiff cannot give the latter averred.

In every case, the complaint must be framed as for a foreclosure, and the mere ordinary averments of work and labor done, will be insufficient to support a claim. The plaintiff must show the peculiar nature of his claim, to lay ground for his application for this species of relief. *Foster* vs. *Poillon*, 2 E. D. Smith 556; 1 Abb., 321.

It must appear, in all cases, that the materials were furnished, and the labor performed, at or before the time that the notice was filed. *Jaques* vs. *Morris*, 2 E. D. Smith, 639.

Where the contractor is himself the plaintiff, under a contract made between him and the owner, he must show, on the face of his complaint, that the owner is indebted to him, and, before there can be an actual recovery of the money, it must appear that the debt has become payable. *Doughty* vs. *Devlin*, 1 E. D. Smith, 625. A lien is sustainable under these circumstances, in respect of work done under a general employment, with a specific agreement as to price, as to part, and for the residue on a *quantum meruit*. *Smith* vs. *Coe*, 2 Hilt., 365.

Where, in such a case, the contractor has given a specific credit to the owner, it does not interfere with the acquisition of his lien by the filing of notice, unless the credit be so long as to extend beyond the statutory period; but such lien cannot be enforced, till the money is payable. *Miller* vs. *Moore*, 1 E. D. Smith, 739; *Althause* vs. *Ludlum*, 2 E. D. Smith, 657.

In a complaint by a subcontractor, laborer, or material man, it is not necessary to aver, that a payment was due from the owner to the contractor at the time of filing the notice. To sustain a recovery, however, he must prove the fact that such a payment is then due, and the owner will be allowed for intermediate payments made in good faith, and cannot be compelled to pay more than the contract price due from him to the contractor. *Doughty* vs. *Devlin*, *supra*; *Cronk* vs. *Whittaker*, 1 E. D. Smith, 647; *Sullivan* vs. *Brewster*, 1 E. D. Smith, 681; 8 How., 209; *Pendleburg* vs. *Meade*, 1 E. D. Smith, 728; *Cannan* vs. *McInrow*, 3 Kern., 70.

The complaint in such a case must aver, however, in addition to the ordinary requisites above noticed, that the work, &c., was done or fur-

nished for the contractor for the building; that the defendant, or one of the defendants, is the owner, within the terms of the statute; that such work was so done, or materials furnished, in conformity with the terms of the contract between such contractor and the owner; and that the money claimed was, at the time of acquiring the lien, due from the contractor to the claimant. *Doughty* vs. *Devlin*, 1 E. D. Smith, 625; *Dixon* vs. *La Farge*, 1 E. D. Smith, 722; *Gay* vs. *Brown*, *ibid.*, 725; *Pendleburg* vs. *Meade*, *ibid.*, 728; *Broderick* vs. *Poillon*, 2 E. D. Smith, 554, reported as *Broderick* vs. *Doyle*, 1 Abb., 319; *Quinn* vs. *The Mayor of New York*, 2 E. D. Smith, 558, reported as *Quinn* vs. *McOleff*, 1 Abb., 322; *Grogan* vs. *The Mayor of New York*, 2 E. D. Smith, 693.

When the complaint is against a grantee or assignee of the original owner, under an instrument executed before notice filed, it should show that such grant or assignment of the property was made, subject to the lien of the claimant. *Jackson* vs. *Sloan*, 2 E. D. Smith, 616; *Quimby* vs. *The Same*, *ibid.*, 594; 2 Abb., 93. As a general rule, a lien can only be acquired against the party with whom, as owner legal or equitable, the contract was made, and an intermediate alienation may defeat the plaintiff's claim to this peculiar remedy. See *Sinclair* vs. *Fitch*, 3 E. D. Smith, 677, and several others of the cases above cited. In this as in other cases, evidence of work done on employment of the owner, is therefore inadmissible, under an averment of such work being done for the contractor. *Hauptman* vs. *Halsey*, 1 E. D. Smith, 668. See also, as to a recovery inconsistent with the original notice, *Hauptman* vs. *Catlin*, 1 E. D. Smith, 729. See, however, *same case*, 3 E. D. Smith, 666; 4 Abb., 472.

The same general principles as to averment will also be applied in these as in other cases. Where, therefore, several claims are asserted in one complaint, the allegation of each must be complete in itself, and the deficiencies in one cannot be supplied from others. A general averment, applicable to all in common, is, however, admissible *pro tanto*. *Sinclair* vs. *Fitch*, 3 E. D. Smith, 677.

One general lien is, however, enforceable, in respect of work done upon several buildings, standing upon contiguous lots, though the court, upon a sufficient equity being shown, and the proper parties all being brought before it, may apportion the burthen. *Paine* vs. *Bonney*, 4 E. D. Smith, 734.

If a contractor abandons his work under an entire contract, before completion, the rule being that he can maintain no action, no lien can be maintainable in such case, by his subcontractors. See *Tucker* vs. *Williams*, 2 Hilt., 562; *Randolph* vs. *Garvey*, 10 Abb., 179; *Smith* vs. *Brady*, 17 N. Y., 173.

(*c.*) Redemption.

The right of the owner of property affected by a charge, to redeem it at any time before his ownership is absolutely foreclosed upon, presents itself naturally, in connection with the subject of foreclosure.

Such right is exercisable of course, by the owner himself, or by any of the owners of the equity of redemption of the property affected by such charge, or their heirs or representatives respectively; likewise, by any junior encumbrancer, or any holder of a junior lien upon such property, whether specific or general. See *Jenkins* vs. *Continental Insurance Company*, 12 How., 66 (67).

And, even after actual foreclosure, such right may still be exercisable by a party standing in any of the above positions, who has been omitted to be joined as a party in the proceedings, by which such foreclosure was effected, whether by suit or by advertisement, or who has been imperfectly or inefficiently so joined, so that such foreclosure does not, in fact, effect a bar to the right in question. See *Bogert* vs. *Coburn*, 27 Barb., 230.

As to such right on the part of a doweress or inchoate doweress, omitted to be joined, or against whom the allegations of the complaint are insufficient to effect a bar of this particular interest, see *Lewis* vs. *Smith*; *Denton* vs. *Nanny*; and *Wheeler* vs. *Morris*, cited in the first division of the present section.

As to the similar right of the wife or widow of a mortgagor for unpaid purchase-money, in respect of her interest in the surplus fund, though barred by the statute from asserting her claim adversely to the immediate security of the mortgagee, see also *Wheeler* vs. *Morris*, *Mills* vs. *Van Voorhis*, and *Blydenburgh* vs. *Northrop*, there cited.

As to the similar right on the part of a junior encumbrancer, or judgment-creditor, omitted to be joined, see *Brainard* vs. *Cooper*, there noticed; *Wetmore* vs. *Roberts*, 10 How., 51; *Jenkins* vs. *Continental Insurance Company*, 12 How., 66.

And such right is exercisable by a tenant for years of the land charged, or by any other person, standing in the relation of surety for the debt, as charged upon land in which he has an interest, in order to the protection of that interest. *Averill* vs. *Taylor*, 4 Seld., 44.

A party standing in such a position, has a right of subrogation to the remedies of the encumbrancer redeemed by him, and to the performance of all acts necessary to a complete transfer of that encumbrance. *Same case.* In a bill for such purpose, however, the junior encumbrancer must show a present interest in himself, and a present necessity for subrogation in order to protect that interest, or he cannot compel it, whilst his interest remains unattacked. If sought to be fore-

closed upon, he might then invoke the powers of the court for that purpose. *Jenkins* vs. *Continental Insurance Company*, *supra*.

The owner, or his grantee, or any person standing in the relation of a principal debtor, cannot claim a subrogation, or any thing more than a satisfaction of the encumbrance; to this he is of course entitled. See two last cited cases.

A party still entitled to exercise this right, after foreclosure by the senior encumbrancer, must, nevertheless, pay to the latter his costs of such foreclosure, as well as the principal and interest due. *Gage* vs. *Brewster*, 30 Barb., 387. See also *Bogert* vs. *Coburn*, 27 Barb., 230.

An assignee of the mortgagor's interest, after the filing of notice of *lis pendens*, or a subsequent alienee, will be barred by a subsequent decree, and cannot afterwards claim to redeem. He should have come in, and asked to be made a party at the time. *Cleaveland* vs. *Boerum*, 23 Barb., 201; affirmed, 27 Barb., 252.

An invalid proceeding, such as a private sale under an express authority inserted in the mortgage, in disregard of the provisions of the statute that all sales on foreclosure shall be public, constitutes no bar to the right of redemption. *Lawrence* vs. *Farmers' Loan and Trust Company*, 3 Kern., 200.

The right of redemption does not extend as against the holder of a sheriff's deed, regularly obtained, under a sale on execution. *Buck* vs. *Fox*, 23 Barb., 259.

A mortgagee in possession may assert a claim to be compensated for improvements made by him, under circumstances raising an equity on his behalf, though in derogation from the general rule to the contrary, as against the right of the mortgagor to redeem. See *Micklas* vs. *Dillaye*, 17 N. Y., 80; *Wetmore* vs. *Roberts*, 10 How., 51. See, however, as to the application of the ordinary rule, *Bogert* vs. *Coburn*, 27 Barb., 230.

A suit of this description will not lie in respect of a mortgage to the United States Loan Commissioners. The statute prescribes a specific mode of redemption in such cases, and the general equitable powers of the court do not attach. *Pell* vs. *Ulmar*, 18 N. Y., 139.

The owner of an equity of redemption of a portion of property, subject to a general mortgage, must, unless the holder of that mortgage elect to waive his rights, redeem the whole encumbrance. *Bogert* vs. *Coburn*, 27 Barb., 230; *Averill* vs. *Taylor*, 4 Seld., 44 (54). See, however, as to the peculiar statute rights of a railroad corporation to effect a partial redemption, on payment of due compensation to a general mortgagee, *Dows* vs. *Congdon*, 16 How., 571.

The right of redemption exists, in personal property, at any time before absolute foreclosure and sale, under a chattel mortgage affecting

it. *Pratt* vs. *Stiles*, 9 Abb., 150; 17 How., 211. So also, as to a pledge, *vide Roberts* vs. *Sykes*, 30 Barb., 173; *Lewis* vs. *Graham*, 4 Abb., 106.

As to the right of the owner, or his alienee, to redeem, as against an equitable mortgagee, and to have an accounting for that purpose, if necessary, see *Chase* vs. *Peck*, 21 N. Y., 581.

A suit to cancel a mortgage, on the ground of usury, can only be brought by the mortgagor himself; but he will be in a position to maintain it, even after a general assignment by him in trust for creditors. *Strong* vs. *Strickland*, 32 Barb., 284.

§ 155. *Real Estate—Equitable Proceedings.*

(*a.*) General Remarks.

As before stated, in connection with the subject of ejectment, as considered in section 150, the provisions of the Revised Statutes, in relation to proceedings of this nature, so far as regards matters of substance, as distinguished from matters of form, are specially reserved by section 455 of the Code, passed in 1849.

Before the passage of that section, doubts had been entertained, as to whether this class of actions could be brought at all under the Code. See *Traver* vs. *Traver*, 3 How., 351; 1 C. R., 112. The contrary, however, had been settled by the following series of decisions: *Watson* vs. *Brigham*, 3 How., 290; 1 C. R., 67; *Backus* vs. *Stilwell*, 3 How., 318; 1 C. R., 70; *Myers* vs. *Rasback*, 4 How., 83; 2 C. R., 13; *Row* vs. *Row*, 4 How., 133; *Townsend* vs. *Townsend*, 2 Sandf., 711; *Reed* vs. *Child*, 4 How., 125; 2 C. R., 69; *Hammersley* vs. *Hammersley*, 7 L. O., 127; *Vanderwerker* vs. *Vanderwerker*, 7 Barb., 221. These authorities established beyond a doubt, that, in all cases where, under the old practice, a party was at liberty to proceed, either at equity, or by petition, or otherwise, under the special provisions of the Revised Statutes, he had still the same option; an action under the regular forms of the Code being substituted for the former bill in equity in such cases. Since the passage of section 455, there can be no doubt at all upon the subject. See *Althause* vs. *Radde*, 3 Bosw., 410.

The proceedings which present themselves for consideration upon the present occasion are two: 1. Partition. 2. Proceedings for admeasurement of dower. Both present the same general feature of having been, from the outset, obtainable through the medium of a suit in equity, or by special proceeding under the Revised Statutes, at the option of the applicant.

(*b.*) PARTITION.

Statutory and other Provisions.

In addition to the above, the Code contains a special reservation on this subject, as follows:

§ 448. The provisions of the Revised Statutes relating to the partition of lands, tenements, and hereditaments, held or possessed by joint-tenants or tenants in common, shall apply to actions for such partition brought under this act, so far as the same can be so applied to the substance and subject-matter of the action, without regard to its form.

Passed in 1849, and has come down unaltered.

The provisions thus saved will be found in title III., chapter V., part III., 2 R. S., 316 to 333; amended by chapter 430 of 1847. By chapter 679 of 1857, vol. II., p. 504, the facilities of amendment granted by section 173 of the Code, are specially extended to this class of proceedings. See also chapter 430 of 1847, section 3.

The following portion of those provisions presents itself for notice on the present occasion.

Section 1 of the title in question, prescribes the class of applicants by whom the remedy is obtainable:

§ 1. When several persons shall hold, and be in possession of any lands, tenements, or hereditaments, as joint-tenants, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or years, any one or more of such persons, being of full age, may apply by petition, &c., for a division or partition of such premises, according to the respective rights of the parties interested therein; and for a sale of such premises, if it shall appear that a partition thereof cannot be made, without great prejudice to the owners.

N. B.—By chapter 277 of 1852, p. 411, provisions are made, enabling the application to be made on behalf of an infant interested as above, on its being made apparent to the court that it is required for his interests. See, as to the proper form of report, on an application of this description, *In re Marsac*, 15 How., 383; also, as to the necessity of due diligence in a proceeding of this nature, when authorized, see *Lyle* vs. *Smyth*, 13 How., 104.

By section 5 of the title of the Revised Statutes now in question, provision is thus made as to the contents of the petition for such relief:

§ 5. The petition for the partition or sale of any such real estate, shall contain the following matters:

1. It shall particularly describe the premises sought to be divided or sold.

2. It shall set forth the rights or titles of all persons interested therein, so far as the same are known to the petitioner, including the interest of any

tenant for years, for life, by the courtesy, or in dower, and the persons entitled to the reversion, remainder, or inheritance, after the termination of any particular estate therein; and every person who, by any contingency contained in any devise, grant, or otherwise, may be, or become entitled to any beneficial interest in the premises; and,

3. It shall be verified by affidavit.

Section 7 prescribes that, in case the names or interests of any of the parties be unknown to the petitioner, or be uncertain or contingent, so that the parties cannot be named, it shall be set forth in the petition.

Sections 8 and 9 provided, that it shall not be necessary to make any creditors or lien-holders parties; but, by section 10, a power is given for that purpose, at the election of the parties, in which case the petition shall set forth the nature of such lien or encumbrance.

By section 79, and those which follow, special provision is made for the continuance of the former powers of the Court of Chancery, in like cases.

By chapter 430 of 1847, above noticed, powers are given to the court to enable the combination of partial or total partition, and of sale, as to different shares, by means of the same proceeding.

By chapter 238 of 1853, p. 526, special provision is made, enabling the combination of proceedings, by an heir disputing a devise in the will of his ancestor, and, whether in possession or not, with an application for partition of the subject-matter of such proceedings, if successful.

Judgment for a partition may also be obtainable, in connection with proceedings in respect of waste, as provided for by title V. of the same chapter of the Revised Statutes. See 2 R. S., 335, 336, sections 11 to 17.

By rule 77 (72), provision is made in restraint of the maintenance of separate suits, for partition of different portions of estates within this state, owned by the same persons in common. And it is expressly provided, that "when infants are interested, the petition shall state whether or not the parties own any other lands in common."

There can be no doubt, whatever, but that all the above statutory requisitions in relation to a petition, ought to be equally complied with in the framing of a complaint under the new practice, and that the practitioner who omits to take this necessary precaution, makes such omission at the peril of his pleading being impeached, or, at the least, impeachable in the course of the proceeding.

It may be convenient, before passing on to the subject in its more general aspect, to make a short summary of the requisites thus imposed.

1. It must appear upon the face of the complaint, that the plaintiff

belongs to the class of persons defined in section 1; and, unless in the excepted cases hereafter stated, that he is in possession.

2. It must appear that such plaintiff is of full age, unless the application be made in behalf of an infant, under the statute of 1852. If so, the fact that such application is made by leave of the court, should appear by specific allegation,

3. The rights of all parties interested in the inheritance, as defined by section 5, must be shown, by full and specific allegation, and all such parties must be joined. The better mode will be, where such rights depend upon the terms of any written instrument, and those terms are in any manner peculiar or doubtful, to allege such instrument, or the relevant portions of it, in the very words employed; and, as regards every instrument, or interest, the averment of it must be made with sufficient detail, to make its exact import or extent indisputably apparent.

4. A particular and specific description of the property must be given.

5. In case the names or interests of any of the parties be unknown, or such interests be contingent or uncertain, that fact must be specially averred. All that the plaintiff knows upon the subject should appear, and it should be shown why he cannot give a more certain specification.

6. If, by the election of the plaintiff, any creditors or lien-holders are made parties, with a view to the adjustment or apportionment of their charges, or otherwise, the nature of their liens or encumbrances should be specifically set forth. As to the expediency of obtaining the general consent of the parties interested, before introducing parties of this description, see *Hammersley* vs. *Hammersley*, 7 L. O., 127.

7. If the suit is brought by an heir, under the special statute of 1838, an allegation must be made that the apparent devise made by his ancestor, and impeached in the combined proceeding, is void.

8. Relief should be prayed for, to the effect defined in section 1; and,

9. The complaint had better in all cases be verified. The third subdivision of section 5, is in its terms imperative on the subject, and although a question might possibly be raised as to whether this is not a question of form, it will be far better not to omit the precaution.

(*c.*) Partition, Generally Considered.

The questions as to the necessary parties in a proceeding of this nature, have been already considered, and the decisions in point cited, in book II., section 38, to which the reader is accordingly referred.

Parties who have parted with their title before the action is commenced, need not, and cannot be properly joined. *Vanderwerker* vs. *Vanderwerker*, 7 Barb., 221.

Partition between tenants in common, is a matter of right by common law, as well as by statute, but the mode in which that right is to be carried out, rests in the discretion of the court. *Haywood* vs. *Judson*, 4 Barb., 228 But, to enable the court to act, jurisdiction over all the parties, must be fully and regularly acquired. See *Rogers* vs. *McLean*, 31 Barb., 304. But the right is not so far absolute, as to enable a suit to be carried on, to the prejudice of another, already commenced, involving the same object. See *Danvers* vs. *Dorrity*, 14 Abb., 206.

The powers of the court in this respect, do not affect the right of parties to make partition by deed, or even by agreement, without its interference, and, if such partition be actually made, and followed up by performance of such agreement and possession of the property in conformity, the courts will recognize and enforce the arrangement. *Mount* vs. *Morton*, 20 Barb., 123 ; *Bilsborow* vs. *Titus*, 15 How., 95.

And, after a lengthened acquiescence in a partition once made by a regular proceeding, the court refused to interfere, and order a repartition, even though the basis of the former proceeding was not strictly correct. *O'Donnell* vs. *Kelsey*, 6 Seld., 412.

The last decision recognizes a partition of lands formed by *alluvion ;* that of an interest under a grant of mining rights, is also carried out by *Canfield* vs. *Ford*, 28 Barb., 336 ; affirming *same case*, 16 How., 473. An interest in government lands, for the purpose of working salt springs, under 1. R. S., 267, section 93, is not however inheritable, or a subject of partition. *Newcomb* vs. *Newcomb*, 2 Kern., 603. A partition of personalty was held to be enforceable on equitable principles, in *Tinney* vs. *Stebbins*, 28 Barb., 290.

When the legal title to the premises is disputed or doubtful, the court, sitting in equity, will not interfere. It will, however, entertain and decide upon a collateral controversy, in relation to the equitable rights of the parties. *Hosford* vs. *Merwin*, 5 Barb., 51.

In *Bogardus* vs. *Parker*, 7 How., 305, it was also held, that a question as to the claim of a defendant to a specific lien on the estate itself, might properly be raised by the complaint in a suit of this nature, and an account prayed for and taken in respect of such claim.

But inconsistent or independent equitable claims, cannot be combined ; as for instance, a prayer for partition, in connection with an ordinary creditor's bill, against one of the parties interested. *Dewey* vs. *Ward*, 12 How., 419.

The plaintiff in this form of suit must be in actual or constructive possession of his undivided share ; and, therefore, when the complaint shows that the legal title is in a third person, as trustee, the defect will be fatal. *Stryker* vs. *Lynch*, 11 L. O., 116. In the same case it was held, that it is not sufficient, in this proceeding, to allege that a defend-

ant claims some adverse interest, and is therefore a proper party. The rule that adverse titles are not to be tried in partition is not changed by the Code, and the nature of every claim against the estate must, of necessity, be stated.

The statute of 1853, recognizes, however, a proceeding of this description, by a contesting heir, though the devisee's possession be adverse.

As regards unoccupied lands, an allegation or proof of possession is not indispensable, and the suit may be maintained without it. *Beebee* vs. *Griffing*, 4 Kern., 235.

Where suit had been brought by a tenant in common of a vested remainder, and had been prosecuted to judgment, all parties being joined, the court decided, on the objection of a purchaser, that, under its general jurisdiction, all parties were concluded, and a good title passed. *Blakely* vs. *Calder*, 15 N. Y., 617; affirming *same case*, 13 How., 476.

This decision, however, only goes to the point, that, under the circumstances, all parties were concluded, and the purchaser had no ground for refusing to complete. It is more than implied in the opinions, that, if taken by a party in the course of the suit, the objection would have been valid. *Vide* 15 N. Y., 622; and *Brewster* vs. *Striker*, 2 Comst., 19. See also *Fleet* vs. *Dorland*, 11 How., 489, deciding that partition cannot be granted at the suit of a mere reversioner; and that, where infants are interested, the court are bound to take notice of and give effect to the objection, whether taken or not by the parties.

Where all parties directly interested are before the court, and all existent interests are represented, the proceeding will be perfect, and all parties claiming derivatively will be barred, such as persons not in being, contingently interested, and *cestui que trusts*, under a legal trust, where the trustee is a party. *Mead* vs. *Mitchell*, 17 N. Y., 210; affirming *same case*, 5 Abb., 92.

Indebtedness, however great, on the part of one of the parties interested, will form no bar to the proceeding. *Waring* vs. *Waring*, 7 Abb., 472.

The proceeding being *in rem*, an erroneous inclusion of property will be fatal to it, not merely as to the erroneous portion, but as to the whole. A partition is an unity, and cannot be severed. The whole must stand or fall together. *Corwithe* vs. *Griffing*, 21 Barb., 9.

In *Croghan* vs. *Livingston*, 17 N. Y., 218; 6 Abb., 350; affirming *same case*, 25 Barb., 336, it was considered by Pratt, J. (17 N. Y., 225), that the proceeding by petition under the Revised Statutes, is repealed, and that a suit, conducted according to the forms of the Code, is now the only remedy. See also *Matter of Cavanagh*, 14 Abb., 258; 23

How., 358. In *Doubleday* vs. *Heath*, 16 N. Y., 80 (82, 83), the proceeding by petition appears to be recognized by the same court. This seems, however, to be *obiter dictum*, the suit having been actually brought under the forms of the Code, by summons and complaint (p. 80). There can be no question, but that a proceeding in the ordinary mode, is in all cases preferable, as being more elastic in its nature, and less embarrassed by statutory requisitions as to form.

(*d.*) Admeasurement of Dower.

This proceeding is of a nature analogous to that of partition, and has, in like manner, been made the subject of statutory regulation. See title VII., chapter VIII., part III. of the Revised Statutes; 2 R. S., 488 to 493.

By section 1, it is prescribed, that the petition of a party claiming this relief, should specify the lands in which she claims dower, but the form of the application is not otherwise prescribed. The remedy is given to her, in default of an assignment of such dower, within forty days after her husband's decease.

In default of her making such claim in due course, a counter-remedy is given to the heirs, or the owners of any lands subject to her claim, by petition, under section 7, for the purpose of compelling such admeasurement. Ninety days notice to her, given after the expiration of the forty days period above referred to, is a necessary preliminary, unless she has made default for one year after such decease. Her power to proceed by suit instead of petition, is acknowledged in the same section.

Relief of this nature was granted by the Superior Court, in *Townsend* vs. *Townsend*, 2 Sandf., 711, and, objections having been taken that the defendants were not then in actual possession of the lands there in question, and also that the action was brought within six months after the husband's death, those objections were overruled.

The widow's right to this peculiar remedy does not, however, preclude her from maintaining ejectment against a tenant, before her dower has been assigned or admeasured, though, in a judgment taken by her under such circumstances, provision will be made for the latter purpose. See *Ellicott* vs. *Mosier*, 3 Seld., 201; affirming *same case*, 11 Barb., 574.

The complaint in this case, should contain a full description of the land on which the dower attaches, with definite and positive averments of the husband's seizin and death, and of the widow's right to dower; and also, that such right has not been barred, either by express provision made for her, or release or consent on her part; or, if she have exercised her election between her dower and a provision made for her, that election should be specially pleaded.

Under section 307 of the Code, a previous demand and refusal is

made a necessary condition precedent to an action of this nature, as far as regards the recovery of costs, which cannot otherwise be claimed.

As to the power to join, with proceedings of this nature, a claim for damages for withholding, or for mesne profits, and as to the proper parties to the proceeding, see *Van Name* vs. *Van Name*, 23 How., 247.

§ 156. *Other Suits in Equity.*

It would, as before noticed, be beyond the limits, and inconsistent with the object of a work like the present, to proceed to the separate consideration of every class of controversies comprised within this general division. All fall substantially within the same general principles of averment. The cause of action must be made equally apparent as in a common-law proceeding, but, as a general rule, a somewhat greater latitude is admissible in the averment of details. The pleader is not so rigorously confined to the statement of facts bearing directly upon the right of action, strictly considered; those which bear or have a tendency to bear upon the nature or extent of the remedy sought to be invoked are, on the contrary, further admissible, and the prayer of the complaint is special and detailed, instead of merely claiming the recovery of a specific amount, or specific damages.

See general remarks on above subject, *ante*, section 123, under the head of *Adaptation of Averments to Case*, whether legal or equitable.

It may not be out of place, however, before quitting the subject, to notice shortly, some two or three of the more prominent descriptions of controversy which fall within this general classification.

(*a.*) Injunction.

This subject has been, in a great measure, anticipated in a former chapter, under the head of *Provisional Remedies*. The proceeding presents this peculiar feature that, in a large average of cases, the controversy is substantially decided, on the preliminary motions for the granting or dissolution of the provisional remedy, in anticipation of the ultimate judgment prayed for.

Where an injunction is asked for, by an individual, to restrain a public act, on the ground of special injury to himself, the nature and extent of the grievance complained of should be specified, and a mere general charge, without details, will be insufficient. *Wetmore* vs. *Story*, 22 Barb., 414; 3 Abb., 262.

That the provisions of the Code tend rather to the extension, than the limitation of the previous powers of the court, in relation to this remedy, is laid down in *Merritt* vs. *Thompson*, 3 E. D. Smith, 283.

The right of any party entitled to the benefit of an easement in property, arising out of an original covenant against nuisances, to maintain injunction in respect of a breach of that covenant, though remediless at law, for want of privity of estate, is recognized and protected in *Brouwer* vs. *Jones*, 23 Barb., 153. See also, as to an injunction for protection of a party entitled to the benefit of a covenant of this nature, *Schenck* vs. *Campbell*, 11 Abb., 292.

As to the qualified nature of a grant of right of burial, and the right to make such changes, as altered circumstances may require, without being restrained by the court, see *Richards* vs. *Northwest Protestant Dutch Church*, 32 Barb., 42; 20 How., 317; 11 Abb., 30.

In relation to the power of the court to grant, what substantially amounts to affirmative relief, by means of an injunction, restraining the discontinuance of an existent state of circumstances, see *The People* vs. *The Albany and Vermont Railroad Company*, 19 How., 523; 11 Abb., 136; *New York and New Haven Railroad Company* vs. *Pixley*, 23 Barb., 428.

(*b.*) INTERPLEADER.

This subject presents one point of analogy with that immediately preceding, *i. e.*, that the relief sought for is substantially obtainable, by means of a special remedy provided by the Code. There is, however, this material difference, that, in injunction, the special remedy is merely in aid of the proceeding in which it is granted. In interpleader, the remedy provided by section 122, is not in aid of, but in substitution for a suit for the same purpose.

Its exercise is, however, purely optional, and does not deprive the applicant of his power to institute a suit in equity, according to the former chancery practice. In many cases, his remedy can be only so obtained, the special proceeding being statutory, and therefore confined to the strict terms of the section; whereas, in a suit, the general jurisdiction of the court is invoked, and its general powers are exercisable. See *Winfield* vs. *Bacon*, 24 Barb., 154, below cited.

As to the power of the court to entertain such a suit, notwithstanding the provisions of section 122, which are merely concurrent, see *Beck* vs. *Stephani*, 9 How., 193; *Winfield* vs. *Bacon*, 24 Barb., 154; *Mayor of New York* vs. *Flagg*, 6 Abb., 296; *Willetts* vs. *Finlay*, 11 How., 468; *Leavitt* vs. *Fisher*, 4 Duer, 1.

The questions in relation to the right of interpleader in general, have been already partially considered, in connection with the subject of the special remedy by motion, under section 122, in book II., section 40.

The proper averments in a suit are referred to in *Beck* vs. *Stephani*, 9 How., 193, above cited. A person who owes a debt, or has incurred a liability, and is unable to determine, without serious risk, to which of

several adverse claimants it should be rendered, may maintain the proceeding, and a mere claim is ground for it. But the plaintiff must show he does not collude with any of the claimants; that the claims are what, under the old distinctions, would be denominated legal; that privity subsists between him and the defendants; that he is in possession, actually or constructively; that he does not claim any interest in the property in dispute; and that he can in no other way be protected from an oppressive or vexatious litigation, in which he has no personal interest. And, to maintain the proceeding, the amount of the fund should be ascertained, or ascertainable, with sufficient certainty to enable it to be brought into court. *Willetts* vs. *Finlay*, 11 How., 468, above cited.

To be tried in this form, whether by suit or motion, the question must be perfectly simple, and the party seeking to be discharged a mere stakeholder. If there be any other possible ground of claim against such holder by any of the parties, the ordinary course of procedure will not be interfered with. *Sherman* vs. *Partridge*, 4 Duer, 646; 11 How., 154; 1 Abb., 256. Nor can interpleader be maintainable, unless the plaintiff be ignorant as to the right balance between the contending claimants, or in a case, where there can be no doubt that the claim of one is untenable. See *Wilson* vs. *Duncan*, 11 Abb., 3 (7).

When the question raised, was merely as to the rights of two claimants to a municipal office, and to the salary attached to it, and the suit was not strictly in the form, though in the nature of interpleader, it was held unnecessary to have the fund brought into court. *Mayor of New York* vs. *Flagg*, 6 Abb., 296.

The proceeding not being one favored by the court (*vide Beck* vs. *Stephani*, *supra*), the averments should be full and specific, and show a clear case for its interference. The circumstances under which the fund is held should be set forth in full detail, and, where the controversy arises under a written instrument, its exact provisions should be given. The nature and extent of the demands of the contending claimants should also be set forth, with the utmost accuracy and precision of which the case is capable, and the other different conditions, above noticed, clearly fulfilled. The plaintiff's readiness to pay into court, or otherwise dispose of the fund, as the court may direct, should also appear.

As to a suit in the nature of interpleader, with respect to contending claims upon real estate, see *Woodgate* vs. *Fleet*, 9 Abb., 222.

(*c.*) Suit for an Accounting.

In an application of this description, the plaintiff should show clearly on the face of his complaint, the fact of the accountability of the defendant, the circumstances under which he became so, and the nature and extent of the fund, in respect of which an accounting is sought.

He should also aver that no accounting, or no complete accounting, has been had; that, on such an accounting, the defendant will be indebted, and that a request to account has been made and refused. The prayer should be for an accounting, under the direction of the court, and for the payment of the balance to be found due. Where the relation of partnership, trusteeship, or any other of an analogous nature, has subsisted between the parties, and the relief sought consists, not merely in the recovery of a money balance, but also in insuring the protection or administration of existent property in which the plaintiff is interested, a prayer for an injunction and receiver is usually, and will be properly, added.

A complaint of this nature, setting forth a partnership, a dissolution, the existence of unsettled accounts, and a balance in favor of the plaintiff is, *primâ facie*, good, as showing a sufficient cause of action. *Ludington* vs. *Taft*, 10 Barb., 447.

A general averment, showing the nature of the liability, in respect of which an accounting is sought, will be sufficient, without going into the circumstances in detail. See *Bates* vs. *Cobb*, 5 Bosw., 29.

Although, in a suit of this nature, items accruing subsequent to the commencement of the action, may be included, the plaintiff is not bound so to bring them in, but may, if he chooses, make them the subject of a new suit. *Tyler* vs. *Willis*, 35 Barb., 213; 13 Abb., 369.

As to a receivership in such cases, and as to the duties of the party appointed being merely to wind up, and not to carry on the business of a dissolved partnership, except under the special direction of the court; and as to the inability of a plaintiff, who has framed the prayer for the former only, to move for the latter description of relief in a suit for this purpose, when instituted, see *Jackson* vs. *De Forest*, 14 How., 81.

As to the right of one partner, to maintain a suit for an accounting and receivership, notwithstanding an assignment for creditors, executed by others without his consent, and in disaffirmance of that assignment, see *Wetter* vs. *Schlieper*, 4 E. D. Smith, 707; 15 How., 268; 6 Abb., 123.

In a suit by one partner against another, for an accounting, and relief for misconduct, a stranger, who has fraudulently obtained possession of partnership property, may be brought in, and relief obtained, as against the property in his hands. *Wade* vs. *Rusher*, 4 Bosw., 537.

A suit of this nature is maintainable in respect of a special partnership, as well after, as before the dissolution of that relation. *Hogg* vs. *Ellis*, 8 How., 473. See also the case next cited.

And such a partner, who has neglected to pay in his proper contribution, may be compelled to do so, even after dissolution, in a suit by a

trustee of the partnership assets for the benefit of creditors. *Robinson* vs. *McIntosh*, 3 E. D. Smith, 221.

As to the right of one partner, in case of breach by the other of a stipulation in the partnership articles against carrying on other business, either to sue in damages for that breach, or to assent to the act, and claim the proceeds on an accounting, see *Moritz* vs. *Peebles*, 4 E. D. Smith, 135.

As to a suit, originally brought for a balance of account stated, being convertible into one for an accounting, by amendment to conform to the facts proved, see *Emery* vs. *Pease*, 20 N. Y., 62.

A decree, upon a final accounting between partners, will not be opened in respect of matters subsequently accruing, by means of a fresh action for that purpose. The only remedy is by bill of review, or supplemental bill in the nature of a bill of review. See *Hays* vs. *Reese*, 34 Barb., 151.

(*d.*) Divorce.

Proceedings for this remedy are made the subject of special statutory regulation. The provisions on the subject will be found in articles II. to V. of title I. of chapter VIII., part III. of the Revised Statutes, 2 R. S., 142 to 149, inclusive. See also chapter 246 of 1862, p. 446, amending sections 31 and 38 of that title.

The remedy is obtainable under three different categories:

1. Nullity of the marriage. Article II.
2. Adultery. Article III.
3. Cruelty or abandonment. Article IV. of those above cited; article V. being of general application.

(*e.*) For Nullity.

Divorce, on the ground of nullity, may be granted for the following causes, existent at the time of the marriage sought to be dissolved.

1. That the parties, or one of them, had not attained the age of legal consent.
2. That the former husband or wife of one of the parties was living, and the marriage with such former husband or wife was then in force.
3. That one of the parties was an idiot or lunatic.
4. That the consent of one of the parties was obtained by force or fraud; or,
5. That one of the parties was physically incapable of entering into the marriage state. Article II., section 19. A suit for this purpose is only maintainable by the party injured against the other, whose incapacity is alleged. Section 33.

By section 20, chapter 257 of 1841, power is also given to declare a divorce, upon the application of the wife, when, at the time of the mar-

riage, such female was under fourteen, and such marriage was without the consent of her parent or guardian; was an offence on the part of the husband, punishable under the statute; was not followed up by consummation or cohabitation; and has not been ratified by mutual consent after the female had attained fourteen years.

The principles of averment in these cases are as follows:

The marriage must in the first instance be averred.

A sufficient allegation of facts must then be made, to bring the case clearly within one of the different categories above stated, such category being alleged in the exact words of the statute, in connection with the averment of the facts necessary to make it appear.

It must be specifically stated that the cause of dissolution was existent at the time of the marriage.

In a proceeding under subdivision 2 of section 19, brought by one of the parties, it should be shown that the other is living (§ 22), and, if such marriage was contracted in good faith, and there be issue, such facts, and the names of such issue should be stated. See section 23.

If the suit be brought under subdivision 3, the existence of the idiocy or lunacy complained of, at the time of the institution of the suit, and also, that, at least, one of the parties is living, must be averred. See sections 24, 25. If brought by a lunatic after restoration of reason, the complaint should negative cohabitation after such restoration. Section 27.

If the marriage be impeached for want of legal consent, voluntary cohabitation, after the legal consent, must also be specifically ignored (§ 21); and, in case of a suit by the party aggrieved, it must specifically appear, that such party was not of legal age at the time.

When the proceeding is by a female, under section 20, consummation, cohabitation, or ratification, by mutual consent, after such female has attained fourteen, must be all negatived; and the fact that such female was under fourteen at the time specifically stated.

So also, in the case of a marriage impeached on the ground of force, or *duress*, voluntary cohabitation at any time, and, where impeached on the ground of fraud, voluntary cohabitation, with full knowledge of the facts constituting the fraud, must be specifically ignored. See section 31, as amended by chapter 246 of 1862, p. 446, section 2.

And, where physical incapacity is the ground, the complaint should show upon its face, that the suit is brought within two years after the solemnization of the marriage. Section 33. It would be as well, also, to aver continuance, as well as existence, of such incapacity.

In relation to the annulment of the marriage of a minor, procured by fraud, on the application of a relative, see *Sloane* vs. *Kane*, 10 How., 66.

But, as to the inability of a party to maintain a suit of this description, after voluntary cohabitation, even although the existence of the fraud was not discovered till some time after the marriage, see *Glinsmann* vs. *Glinsmann*, 12 How., 32.

Where the husband had represented his former wife to be dead, whereas, in fact, he was divorced from her, and she was living, the representation, though false, was held insufficient as a cause of dissolution of the marriage. *Clark* vs. *Clark*, 11 Abb., 228. As to the power of interference of a relative in a case of physical incapacity on the part of an infant, and the extent to which such interference will, or will not, be practically recognized, see *E. B.* vs. *C. B.*, 28 Barb., 299; 8 Abb., 44.

(*f.*) For Adultery.

The following statutory requisitions are imposed with respect to this proceeding, by article III. of the title of the Revised Statutes in question.

Under section 38, a divorce is obtainable in the following cases:

1. Where both husband and wife were inhabitants of this state, at the time of the commission of the offence.

2. Where the marriage has been solemnized, or has taken place within this state, or where the injured party, at the time of the commission of the offence, and at the time of the exhibiting the bill of complaint, shall be an actual inhabitant of this state. See, as to what constitutes inhabitancy on the part of a female plaintiff, article V., section 57.

N. B.—Prior to the amendment of this section by chapter 246 of 1862, p. 446, section 1, both marriage and inhabitancy within the state were cumulatively necessary to the acquisition of jurisdiction, instead of the provision being framed, as at present, in the alternative.

3. Where the offence has been committed in this state, and the injured party, at the time of exhibiting the bill of complaint, is an actual inhabitant of this state.

Facts must be specifically averred, so as clearly to bring the case within one or other of the three jurisdictional categories above prescribed, in all the parts of that category, and the precise words of that portion of the statute which is invoked, should be inserted in the averment, in connection with the necessary statement of facts, the only exception being, that the terms, "time of commencement of this action," may now be substituted for the terms, "time of exhibiting the bill of complaint," employed in the section. As the defendant is excused from verifying the answer (section 39), there is no necessity for verification of the complaint in any case.

The date at which, or the period within which, the offence took place, the place where, and the person or persons with whom it was committed, must, in all cases, be specifically averred, with all practicable detail, and, where more than one offence is charged, each should form the subject of a separate statement. If practicable, the name of the party with whom such offence was committed should be given. If impracticable, the charge may be made of commission with a male or female (as the case may be), unknown to the plaintiff, and, whose name, after diligent inquiry, cannot be ascertained.

Where more than five years have elapsed since the act complained of, discovery of that act within five years must be specifically averred. Section 42, subdivision 3.

The complaint had better also be made to include the following negative allegations (see same section):

1. That the offence charged was not committed by the procurement, or with the connivance of the plaintiff.

2. That such offence has not been forgiven by the plaintiff, and that, since its commission, there has been no voluntary cohabitation on his or her part, with knowledge of the fact.

4. That the plaintiff has not, on his or her part, been guilty of adultery. (Number 3 has been before noticed.)

If there be children of the marriage, their names and the dates of their births should be averred. See sections 43 and 44. If the suit be that of the husband, and he wishes to question the legitimacy of any of such children, an allegation that they are, or that he believes them to be illegitimate, must also be distinctly made. See rule 90 (68).

And, if the wife have property, its nature, and her interest therein, should be stated, with a view to the proper decree upon the subject being pronounced. Sections 46, 47.

The amendment of section 114 of the Code in 1857, has now dispensed with the necessity, which before existed, of the wife being represented by a next friend in all cases. See, as to the antecedent practice, *Thomas* vs. *Thomas*, 18 Barb., 149; and, as to a wife defendant, *Meldora* vs. *Meldora*, 4 Sandf., 721.

Causes of action, for a total and for a limited divorce, are wholly incapable of joinder in the same proceeding. *McIntosh* vs. *McIntosh*, 12 How., 289. The same is also the case as regards defences, see *McNamara* vs. *McNamara*, 2 Hilt., 547. And, where the defendant does not answer, the relief obtainable by the plaintiff will be strictly limited to that prayed for, and cannot be granted on any other ground, though, if properly sought, the facts might warrant such a decree. *Walton* vs. *Walton*, 32 Barb., 203; 20 How., 347. Also, after the plaintiff has obtained a divorce on one ground, in the courts of another state, he or

she cannot bring a second suit in this, on the other, whilst such former decree remains unimpeached. *Coddington* vs. *Coddington*, 10 Abb., 450.

But a divorce, previously obtained in another state, by the adverse party, without notice to the applicant in this, is void, and is no bar to a suit by such applicant. *Visscher* vs. *Visscher*, 12 Barb., 640; *McGiffert* vs. *McGiffert*, 31 Barb., 69; 17 How., 18.

A complaint for divorce, on the ground of adultery, will be insufficient, where it contains no specification of the person with whom, or the place where the offence was committed. If the former be unknown, the latter should be specifically stated, *Heyde* vs. *Heyde*, 4 Sandf., 692. The same principle as to the necessity of giving a full and definite statement in relation to the acts complained of, is equally applicable to cases where separation only is sought; the elements of time, place, and circumstances, must be equally borne in mind, in framing allegations directed to the latter relief.

Allegations simply directed to the question of alimony are irrelevant, and, if objected to, are liable to be stricken out of the complaint. They form no part of the original issues between the parties. *Forrest* vs. *Forrest*, 3 Abb., 144 (156); 6 Duer, 102.

As to the positive necessity of the fullest proof being given, before the allowance of a divorce, especially when the plaintiff is himself not free from fault, see *Trust* vs. *Trust*, 11 How., 523.

With regard to the custody of children, and the obligations of the parties, in relation to their support, see *Burritt* vs. *Burritt*, 29 Barb., 124, and cases cited, *In re Holmes*, 19 How., 329; *People* vs. *Brooks*, 35 Barb., 85.

(*g.*) Separation.

The provisions of the statute, in relation to limited divorces, as contained in article IV., are as follows:

Under section 51, a separation from bed and board forever, or for a limited time, may be decreed, on the complaint of a married woman in the following cases:

1. Between any husband and wife, inhabitants of this state.

2. Where the marriage shall have been solemnized, or shall have taken place, within this state, and the wife shall be an actual resident, at the time of exhibiting her complaint.

3. Where the marriage shall have taken place out of this state, and the parties have become and remained inhabitants of this state, at least one year, and the wife shall be an actual inhabitant, at the time of exhibiting her complaint.

As to the force of the term inhabitant, see article V., section 57.

Section 52 thus provides:

Such separation may be decreed for the following causes:

1. The cruel and inhuman treatment by the husband of his wife.

2. Such conduct on the part of the husband toward his wife, as may render it unsafe and improper for her to cohabit with him.

3. The abandonment of the wife by the husband, and his refusal, or neglect, to provide for her.

And, by section 52, the following special provisions are made on the subject of averment.

The bill of the complainant, in every such case, shall specify particularly, the nature and circumstances of the complaint on which she relies, and shall set forth times and places with reasonable certainty.

The same remedy is obtainable by a husband for misconduct on the part of his wife, under section 12, chapter 205 of the laws of 1824. See *Perry* vs. *Perry*, 2 Paige, 506; *McNamara* vs. *McNamara*, 2 Hilt., 547.

Misconduct of the adverse party is a defence (see section 53), and such defence may be made the subject of affirmative relief. The misconduct must, however, be within the limits of the present article. Adultery cannot be so pleaded or proved. See *McNamara* vs. *McNamara*, 2 Hilt., 547.

Under section 52, the principles of averment, under this, are even more strict than in the case of the major divorce. Substantially, however, they are the same. The case must be clearly brought within the purview of one of the subdivisions of section 50, as to the jurisdiction, and of section 51, as to the remedy. Every fact necessary for those purposes must be distinctly and specifically averred, and the precise wording of the statute, so far as it is applicable, inserted in the substance of the averment so made. See last subdivision of the present section, and decisions there referred to. The existence and ages of the children, if any, should also be specifically stated, to lay ground for the exercise of the powers of the court, under sections 54 and 55. As to a complaint, deficient in the above particulars, being demurrable, see *Anonymous*, 11 Abb., 231.

If a separation only be prayed for, relief on any other ground cannot be granted, where the defendant does not answer; though, if originally prayed for, the facts found might warrant such relief. *Walton* vs. *Walton*, 32 Barb., 203; 20 How., 347.

§ 157. *Prayer for Relief.*

Having considered the different modes of averment applicable to different classes of action, it remains to notice, in the last place, the demand of, or prayer for relief, the main object, in short, of the action,

and to the establishment of which all the preliminary statements are directed.

When the action is one for the recovery of money only, under a common-law contract, or liability, no difficulty can arise; the demand will simply be for the sums ought to be recovered, interest, and costs, in conformity with the summons.

In actions, in which pecuniary damages alone are sought, the formula is even simpler, judgment being merely demanded for damages and costs.

In real estate and equitable actions, however, the considerations which present themselves are more numerous and important. They have been, in a great measure, anticipated, in the different subdivisions of this chapter, devoted to particular forms of action; but there remain a few general considerations, which may be adverted to before quitting the subject.

It is this class of actions which demand the special attention of the pleader in this respect. Every possible remedy which the court may have in its power to grant, under the peculiar circumstances, should, therefore, be carefully pondered over, and every one of those remedies should be distinctly and in terms asked for; unless, under the circumstances of the case, it be thought better to waive them in any respect. Injunction, in particular, cannot be granted at all, in respect of facts existent at the date of the complaint, unless that remedy be specially prayed for; and, where the appointment of a receiver is part of the relief sought, before or as part of the judgment, a demand to that effect must also be inserted. In actions for the recovery of real or specific personal property, it must not be forgotten, that a claim for damages for withholding, and also, in the former case, a claim for mesne profits is, in all cases, compatible with a claim for the recovery of the property itself; and a prayer to this effect should always, as a general rule, be subjoined to the main relief demanded. In cases of waste and nuisance, special relief is obtainable, in connection with an action for damages, under the provisions of the statute on those subjects. And after asking all the different forms of relief, which may be obtainable, particular care should be taken, in the whole class of equitable actions, never, on any account, to omit the usual concluding clause, praying for such further and other relief as may be just, and as the court may direct. As to the importance and extent of this clause, see *Grafton* vs. *Remsen*, 16 How., 32; also, *Marquat* vs. *Marquat*, 2 Kern., 336; reversing *same case*, 7 How., 417.

The powers of the court in respect to granting relief of this kind, are in fact of the widest nature, in cases where the controversy is litigated, as appears by section 275, providing, that

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but, in any other case, the court may grant him any relief, consistent within the case made by the complaint, and embraced within the issue." See *Cheeseborough* vs. *House*, 5 Duer, 125; *Bidwell* vs. *Astor Mutual Insurance Company*, 16 N. Y., 263; *Anon.*, 11 Abb., 231; *Jones* vs. *Butler*, 30 Barb., 641; 20 How., 189.

But this latitude is only exercisable, where ground is legitimately laid for it, and where a trial is had. It furnishes no legitimate reason for dispensing with the exercise of caution and forethought at the outset of the suit, and it may be remarked, in addition, that being confined to contested cases, it furnishes no help where the defendant demurs instead of answering, or where, designedly or otherwise, he allows judgment to go by default. In such a case, relief omitted to be asked for cannot be granted, or, if granted, cannot be sustained. See *Simonson* vs. *Blake*, 20 How., 484; 12 Abb., 331; *Walton* vs. *Walton*, 32 Barb., 203; 20 How., 347.

Besides this, the powers of the court in this respect, are confined to cases where an actual trial has been had, on answer. The section does not reach the case of demurrer, or motion on the ground of non-conformity with the summons; and, in those stages of the proceeding, an insufficient or improper demand of relief may lay ground for serious objection.

The relief demanded, determines the nature of the complaint, and may be conclusive, as far as regards questions in relation to misjoinder, or discrepancy between the summons and complaint. See also generally, *Pollock* vs. *The National Bank*, 3 Seld., 274.

Alternative relief may be prayed, in respect to matters legitimately within the issue between the parties, and such relief may be legal or equitable, or both. *Getty* vs. *Hudson River Railroad Company*, 6 How., 269; 10 L. O., 85; *Linden* vs. *Hepburn*, 3 Sandf., 668; 5 How., 188; 9 L. O., 80; 3 C. R., 65; *Redmond* vs. *Dana*, 3 Bosw., 615; *Cahoon* vs. *The Bank of Utica*, 3 Seld., 486; *Young* vs. *Edwards*, 11 How., 201; *Corning* vs. *Troy Iron and Nail Factory*, 34 Barb., 485; 22 How., 217; *Relyea* vs. *Beaver*, 34 Barb., 547; *Van Rensselaer* vs. *Layman*, 10 How., 505. A demand for judgment, alternative as to parties plaintiff, may, however, be bad. *Warwick* vs. *Mayor of New York*, 28 Barb., 210; 16 How., 357; 7 Abb., 265.

Relief cannot, however, be asked purely upon hypothesis, without some ground being laid for the demand. *Lamoreux* vs. *Atlantic Mutual Insurance Company*, 3 Duer, 680; *Durant* vs. *Gardner*, 19 How., 94; 10 Abb., 445.

Nor can grossly inconsistent demands be made, as for instance, a

prayer for equitable relief, in connection with a claim for a forfeiture. *Linden* vs. *Hepburn*, *supra*; *Lamport* vs. *Abbott*, 12 How., 340; *Durant* vs. *Gardiner*, *supra*.

Within the above limits, almost any description of relief may be asked; nor will even a superfluous demand afford ground for demurrer. See *Moses* vs. *Walker*, 2 Hilt., 536; *Andrews* vs. *Schaffer*, 12 How., 441; *People* vs. *The Mayor of New York*, 28 Barb., 240; 17 How., 56; 8 Abb., 7 (15); *Beale* vs. *Hayes*, 5 Sandf., 640; 10 L. O., 246. Nor will the mere demand of multiplicity of relief, of itself render the complaint liable to the objection of multifariousness. *Geery* vs. *New York and Liverpool Steamship Company*, 12 Abb., 268.

But, of course, this observation is not to be taken as an encouragement to laxity or irrelevancy, as, although no ground for demurrer, a case of gross mispleader in this respect, may be reached by a motion to strike out or elect.

§ 158. *Service and Other Formalities.*

It will not be necessary to go over in detail, the proceedings necessary to be taken with respect to the complaint, when prepared, as the same subjects have been already treated of in a general point of view in preceding chapters. A mere general notice of them will be sufficient.

It must be fairly and legibly copied out, the folios being marked in the margin of the original, and of every copy required for service.

Where it contains more than one cause of action, each must be separately stated and plainly numbered. The insertion in the title of the name of the court, and the venue, if in the Supreme Court, are indispensable.

If verified, and, as a general rule, it should be verified, the verification must be added, and properly sworn to, and every copy made to conform to the original as completed.

If served with the summons, which is usually advisable, a copy must be annexed to each copy of the summons served, except in those cases where a notice of object of action is admissible.

If served after the summons, on demand of the party or his attorney, the copy is served in the same manner as an ordinary paper, and no summons need be annexed.

If demanded, that copy must be served within due time after demand, *i. e.*, within twenty days, or the defendant's attorney will not be bound to accept it, and may move to dismiss. *Baker* vs. *Curtis*, 7 How., 478; *Mandeville* vs. *Winne*, 5 How., 461; 1 C. R. (N. S.), 161. If there be any difficulty, an extension of time must be obtained.

Where service by mail is admissible the complaint may be so served. It should be mailed, however, within twenty days unless the demand for it be served in that manner. But, as a general rule, this mode of service, or delay in mailing it, will be equally unadvisable, as the effect of either is necessarily to extend the defendant's time to answer.

In *Travis* vs. *Tobias*, 7 How., 90, it was considered that, in actions founded on contract, though several defendants be named in the summons, the plaintiff, on demand by one of them, may deliver to the latter a copy, with his name only inserted as defendant, omitting the others. This view seems very questionable, and the case is certainly one that ought not to be followed as a precedent, when a few additional words will remove all question on the subject.

(*b.*) Filing.

As before noticed, the filing of the complaint is, at one time or other, essential. In strictness, it ought, in all cases, to be filed within ten days after service (Code, section 416); and this was held to be obligatory in *Tuomey* vs. *Shields*, 9 L. O., 66. In practice, however, the complaint is seldom, if ever, filed before the entry of judgment; nor does it seem necessary to do so, unless upon order obtained by the adverse parties, under the same section (416). The terms of the section itself clearly show that an omission to file the complaint before the service of such an order, will not be a serious, or even an impeachable irregularity. Such an order once obtained, however, the filing then becomes imperative, and an omission to comply with the direction will, as a general rule, be fatal; although, where the omission is unintentional and explained, the court may allow it to be rectified. See *Short* vs. *May*, 2 Sandf., 639. The mere filing will be a sufficient compliance with the order, and it will not be necessary to serve the opposite parties with notice of that compliance. *Douoy* vs. *Hoyt*, 1 C. R. (N. S.), 286. In practice, however, this is generally done, and ought to be, as a matter of fairness and courtesy.

Where service takes place by publication, it is, however, necessary that the complaint should be filed at once, and before the issuing of the summons, or the proceeding will be irregular. In real actions, also, it is now necessary, under the recent amendment of section 132, that the complaint should be filed at the outset of the suit, inasmuch as, until that is the case, the notice of pendency of action cannot be placed on record. Under the Code of 1849, this was otherwise, and it was there provided that the notice in question might be given at "the time of commencing the action," without reference to the complaint being or not being previously filed.

The collateral proceedings of filing notice of *lis pendens*, and serving notice of object of action, where applicable, have been noticed at an earlier stage of the work.

(*c.*) Concluding Observations.

Stamping, as it does, its distinctive character upon all the subsequent proceedings in the suit, the complaint is a pleading of peculiar importance, and the recent decisions bearing upon the subject of its preparation are so numerous, that the necessary consideration of them has swelled the present chapter to an unusual bulk. This circumstance has compelled the author to abandon his original intention of including in his first volume, all proceedings down to the final joinder of the issues to be tried between the parties; reserving for the second, those connected with such trial, the immediate preparations for it, and its ulterior results. Between two alternatives, he has chosen that of sacrificing, to some extent, the technical symmetry, in preference to curtailing an essential portion of his work.

As regards one subject treated in the next general division, an anticipatory observation may not be misplaced, *i. e.*, the subject of *Counter-claim*. Though technically responsive, so much of an answer as sets up a counter-claim, is, in fact, *pro tanto*, an affirmative pleading, presenting all the essential features of a counter-complaint. Being, in effect, a cross-suit, the same statement of facts will be requisite to demonstrate the existence of a cause of action, as when that cause of action is separately asserted; the same precision and sufficiency will be indispensable in framing the allegations by which that cause of action is sustained; and the same necessity of framing a proper demand for the relief or judgment sought to be obtained, will be imposed upon the pleader.

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